1912. Sept. — Khushal vs. Kalayan.

has in effect been done, and, therefore, I think he is the duly registered proprietor of the business. That being so, it seems to me clear that the summons is correct, and that, therefore, the objection that the names of the defendant's partners had not been given is not a tenable one. The appeal must be upheld with costs, including the wasted costs in the Court below, and the case sent back to the magistrate for further hearing.

MASON, J.: I concur.

[Appellant's Attorneys, FINDLAY, MACROBERT & NIEMEYER.
Respondent's Attorneys, CLARK & PRICE.]

[Reported by GEY VAN PITTIUS, Esq., Advocate.]

WESSELS & MASON, JJ. September 23rd, 1912.

DE KORTE vs. NTLEBI.

Husband and Wife.—Matrimonial Suit.—Wife's Costs.—Attorney and Client.—Husband's Liability.—Necessaries.

To enable an attorney, who acted for a wife in a matrimonial suit, to recover from the husband the amount of his attorney and client bill of costs, he must allege and prove that such costs were necessaries.

1912. Sept. 23. — De Korte vs. Ntlebi.

Appeal from a decision of the Civil Magistrate, Johannesburg.

Appellant, an attorney—plaintiff in the Court below—alleged in his summons that the defendant was indebted to him in the sum of £18 7s. 6d., being the amount of the taxed fees and disbursements as between attorney and client, incurred by the plaintiff during the period from February 15th to March 25th, 1912, for and on behalf of defendant's wife, to whom the defendant was married in community of property, the said taxed costs arising out of an action instituted by the defendant in the Transvaal Provincial Division against his wife for divorce; that the defendant was unsuccessful in his action for divorce

against his wife, and was accordingly liable for the said taxed fees and disbursements, and that he refused to pay same.

Defendant denied his indebtedness, and stated that on March 5th, 1912, his wife applied to the Court for an order to compel him to pay her £20 to defend the action which application was refused; that judgment was given in favour of his wife with costs, and that the defendant had paid the said costs of the action; that the defendant did not authorise his wife to incur the costs now claimed, and he denied liability for same.

The magistrate granted absolution from the instance with costs on the grounds (1) that the action was really an attempt to vary the judgment in the divorce action by substituting attorney and client costs for party and party costs, and (2) that even assuming that the wife could be awarded her attorney and client costs out of the common estate in the absence of such an order in the divorce action, that it was not alleged or proved that there was any common estate, and that there was no authority for holding a husband personally liable in such a case.

W. Pittman for the appellant: The husband is liable for these costs.

[WESSELS, J.: There is no allegation in the summons that these costs are necessaries?]

A husband is liable even if the costs are not necessaries. The husband is liable (1) because he has given implied authority to his wife to incur these costs and (2) because apart from such authority, the wife is in circumstances like the present an agent of necessity of the husband to incur such costs. See *Peters* vs. *Peters* (1907, T.S. 13); *Coetzee* vs. *Higgins* (5 E.D.C. 352); *Donovan* vs. *Tabb* (1909, T.S. 1,112; 1909, L.L.R. 351); *Harrower* vs. *Harrower* (1909, L.L.R. 257); *Hutton and Meyer* vs. *Epstein* (1906, T.H. 207); *Hablutzel* vs. *Hablutzel* (1 M. 276); *Maasdorp, Institutes of Cape Law*, vol. I., p. 30; *Eastland* vs. *Burchell* (3 Q.B.D. 432); *Wilson* vs. *Glossop* (20 Q.B.D. 354); *Ash* vs. *Ash* (62 L.J. Prob. 97). See also *Voet* 5, 1, 18 as to *venia agendi* of the wife.

B. de Korte for the respondent was not called upon

1912. Sept. 23.

De Korte vs. Ntlebi.

WESSELS, J.: The facts in this case are briefly as follows. The appellant's attorney and client bill of costs on behalf of the respondent's wife in an unsuccessful divorce action instituted against her by the respondent, was taxed at £18 7s. 6d. The respondent and his wife were married in community of property, and the appellant's bill has not been paid by his client, the respondent's wife. It appears that in his capacity as attorney for the wife the appellant did certain work for her in the divorce action, which he was authorised by her to do. After the decision in the divorce action the bill of costs as between party and party was taxed, and also the bill as between attorney and client. No question arises in the present case in regard to the party and party bill; what we have to decide is whether the appellant is entitled to claim from the respondent payment of the amount of the taxed attorney and client bill. The question is, therefore, this: Where an attorney is engaged by a wife to defend her in a divorce suit, is the attorney entitled to recover from the husband the amount of a bill of costs taxed between the attorney and his client (the wife), where the husband and wife have been married in community? This involves, first, the question, is the wife entitled to obtain party and party costs from her husband if she is successful in the action? This question was raised in *Donovan* vs. *Tabb* (1909, T.S. 1112), but was not decided. Assume, however, that she is. Is she also entitled to obtain her costs incurred as between attorney and client? Now if a wife married in community can obtain taxed party and party costs, on what principle can she claim them? The only principle that I can see is, that in divorce proceedings the wife can sue and be sued *in propria persona* without the assistance of her husband. In such a case she has a *persona standi in judicio*. It follows, therefore, that she can bind the joint estate in all such costs as are absolutely necessary to make her defence effective. It may be that this is not true where her defence is *mala fide*, though personally I do not wish to express an opinion on the point. If she is successful she certainly is entitled, in my view, to bind her husband for such costs as were necessary for her defence; but no fur-

ther. *Prima facie* the taxed party and party costs are the necessary costs, the *necessariæ et utiles impensæ*, and costs not so taxed are *prima facie* such as are not necessary. This was the view which was held by my brother BRISTOWE in *Hutton & Meyer* vs. *Epstein* (1906, T.H. 207). If we return to the summons in the present case, we find that all that the plaintiff relies on is that the defendant is endebted to him in the sum of £18 7s. 6d., "being the amount of the taxed fees and disbursements as between attorney and client incurred by the plaintiff during the period from the 15th February to the 25th March, 1912, for and on behalf of the defendant's wife." There is no allegation that they were necessary costs, and that the wife could not have properly defended herself unless they were incurred. Under these circumstances it appears to me clear that the plaintiff cannot succeed. The appeal must therefore be dismissed with costs.

MASON, J.: I concur. I do not wish to express any opinion as to the exact position of a wife with reference to her attorney's costs—namely, whether she has implied authority to bind her husband to any extent with reference to necessary costs, or whether her right remedy is an application to the Court; because assuming the law to be as contended by Mr. *Pittman*, that she has implied authority to incur necessary costs, it appears to me that in this particular case there is neither any allegation in the summons, nor in the evidence, that these costs were necessary; and I agree with my brother WESSELS in thinking that, *prima facie*, in this case the attorney and client costs are not necessary costs.

[Appellant's Attorney, C. M. DE KORTE.
Respondent's Attorney, A. MANGENA.]

[Reported by GEY VAN PITTIUS, Esq., Advocate.]