C3.3

The Recognition of Native Law since Union

The recognition of Native Law became general in 1927 when a uniform policy was laid down in the Native Administration Act 38 of 1927. Section 11 of the Native Administration Act lays down the conditions under which the courts of native commissioners established under section 10 of the Act may recognise and apply Native Law in the following terms:—

(1) "Notwithstanding the provisions of any other law, it shall be in the discretion of courts of native commissioners in all suits or proceedings between natives involving questions of customs followed by Natives to decide such questions according to the native law applying to such customs except in so far as it shall have been repealed or modified: Provided that such native law shall not be opposed to the principles of public policy or natural justice: Provided further that it shall not be lawful for any court to declare that the custom of lobola or bogadi or other similar custom is repugnant to such principles."

The following points must be noted in this sub-section:—

① The application of Native Law in a particular case is left in the discretion of the court of the native commissioner. In other words the parties to a suit cannot claim as of right that their suit should be settled according to native law. It is for the court to decide whether the case in question is a proper or appropriate one for the application of Native Law or alternatively European law.

Several questions arise in connection with the exercise of this discretion by the court of native commissioners.

(a) Thus it may be asked whether in exercising this discretion the native commissioner should give preference to Native Law or European Law. The Cape and O.F.S. division of the Native Appeal Court has held that the given discretion given by section 11 to a court of native commissioner is not an unqualified or absolute discretion and that a true construction of the section is that Roman-Dutch law (i.e. European Law) must be primarily applied in any particular case and that Native Law should only be invoked in matters peculiar to native custom falling outside the principles of Roman-Dutch Law (Nganoyi vs Mangoloti Njonebeni 1930 N.A.C. (C&O). The discretion must be exercised judicially i.e. fairly and reasonably and not arbitrarily or capriciously (Samuel Mkujidela vs Mitikitiwe Sawintshi 1943 N.A.C. (C&O).

On the other hand the Natal and Transvaal Division of the Native Appeal Court has held that it is desirable "to avoid as far as possible getting away from a system of law that whatever its shortcomings may be from our standpoint, is more in harmony with native conceptions of equity & justice" (Jacob Monaheng vs Rebecca Konupi 1930 N.A.C. (N & T)).

In other words in the view of the Natal or Transvaal Division of the Native Appeal Court "in all suits or proceedings between Natives" Native law should be primarily applied and European law only ~~departed from~~ resorted to where such a course is dictated by considerations of public policy or natural justice. The same court put the matter differently in Caluza Kambule vs Alfred Kunene, 1932 N.A.C. (N.O.T.) in which it was held that Native law should be invoked when it provides a remedy and the Common law i.e. Roman-Dutch law should only be resorted to when no remedy can be obtained under the former (i.e. Native law). In other words in making up his mind as to whether to try a case by Native law or by Roman-Dutch law, the Native Commissioner must apply the law which provides the aggrieved party with a remedy. If he has no remedy under European law Native law must be applied or vice versa (see also Charles Mngunboya vs William Ncutato, 1929 N.A.C. (N.O.T.); Jacob Ntsabelle vs Jeremiah Poole, 1930 N.A.C. (N.O.T.)).

As was pointed out in Moeina vs Motladi, 1937 N.A.C. (N.O.T.) ~~1937~~ where the cause of action is known only to Roman-Dutch law or only to Native law the Court has no discretion, but must apply the law which provides the remedy. But where the cause of action is known to both systems of law, each providing its own remedy, he (the Native Commissioner) has the choice of applying judicially one of the two systems.

Assuming that the Native Commissioner has to choose between the two systems the question arises as to when he should use one system and when the other system of law. In Ndlongo vs Ndlongo 1937 N.A.C. (N.O.T.) it was indicated that certain tests should be applied. The President of the Court, McLoughlin, J said "It is the intention of the legislature that native law is to have full force and should be applied in all cases where the parties clearly had it in mind when contracting with each other... In order to give effect to the intention of the parties the Native Commissioner is bound to ascertain the nature of the contract concluded by them ... the nature of the transaction should be the test". This statement of the position was quoted with approval in Magedela's case (supra) in which it was indicated that to hold otherwise would be to violate the most elementary principles of the interpretation of contracts. The Court in Magedela's case went on to indicate that where an action is based on delict it might perhaps be necessary to apply other tests ... but "when the action is based on contract" (as it was in the case in question) "it is the Court's duty to ascertain and give effect to the intention of the parties.

In the light of these decisions it would appear as if the position as regards the discretion given to courts of native commissioners may be summarised as follows:—

"(I) The true meaning of section 11, sub-section 1, is that the common law is primarily to be applied and that native law is to be applied only where the nature of the case is peculiar to native laws.

(II) Where the cause of action is known only to one system of law and not the other, that system should be applied which provides a remedy

(III) Where the action is brought in a form known to one system of law or indicating by summons or otherwise that it falls under one system rather than another, the system indicated is normally applied. ~~The effect of~~

(IV) Where the plaintiff has given no such indication as to the system of law under which he is proceeding, then the nature of the transaction is the test provided that where in doubt the Court, following (I) above, will apply the common law.

In Natal it would appear that the position of native law is even stronger, its application being dependent upon section 50 of the Natal Courts Act of 1898 which provides that

"All civil cases between natives shall be tried according to native laws, customs and usages, save so far as may be otherwise provided by law or as may be of a nature to work some manifest injustice or be repugnant to the settled principles and policy of natural equity" from the application of native law

This section which goes on to exclude trade transactions of a nature unknown to native law, and provides specifically that prescription in native law as recognised in Natal, was not repealed by the Native Administration Act 38 of 1927 as amended from time to time.

(6) A further question may be asked as to the stage at which the Native Commissioner ought to indicate his decision to apply one or other system of law in a particular case. It has been held that although this would naturally depend upon the circumstances of the case, it is advisable as far as possible that the parties should know at the beginning of the case what line the Native Commissioner intends to follow. Obviously it is necessary that the Native Commissioner must avoid a confusion of the two systems of law. He must not try a case partly by Native Law & partly by European law (Jakot Ntsabelle vs Jeremiah Poole, 1930 N.A.C. (N&T); Mkosini Qwabe vs Andries Sebende 1930 N.A.C. (N&T)

2. The sub-section further indicates that courts of native commissioners have the discretion to apply Native Law "in suits or proceedings between Natives". Obviously this discretion does not apply in cases (i) between a Native & a Non-Native or (ii) between a Native exempted from the operation of Native Law (eg. under Natal Law 28 of 1865) and one not so exempted.

Thus if one of the parties is a European and the other a Native to whom Native Law would otherwise be applicable, European law must be applied. (See United Building Society vs W. Matiwane, E.D.L. 1933; Nyasane vs Blackbeard, 1921 E.D.L. 228).

Similarly if one of the parties is a European and the other a Native exempted from the operation of Native Law under Natal Law 28 of 1865, the Common Law i.e. European Law must be applied.

On the other hand if one of the parties is a Native exempted from the operation of Native Law and the other is not, presumably Native Law would not be applied and the common law must be applied.

The sentence in Natal of Natives who have been relieved from the operation of Native Law has given rise to the question as to whether such exempted Natives are subject to the jurisdiction of the courts of native commissioners. It has been held, however by the Native Appeal Court (Natal & Transvaal Division) that all Natives, exempted under Law 28 of 1865 or any other law, and unexempted alike, are subject to the jurisdiction of courts of Native Commissioners in all civil cases between Native & Native. This means that the jurisdiction of Magistrates' Courts is ousted by that of the Native Commissioners even in respect of exempted Natives (Florence Mdlalose vs Benjamin Mabaso, 1931 N.A.C. (N&T)

In dealing with a case in which an exempted Native is involved the Court of Native Commissioner would presumably have to apply the Common Law as such a Native is not subject to the operation of Native Law, but ~~that does~~ the latter fact does not deprive the court of Native Commissioner of its jurisdiction over such exempted Natives as the Native

Commissioner's Court is competent to apply both the common law and Native Law.

3. The application of Native Law is only permitted in "questions of customs followed by Natives". In the first place this means that the Native Commissioner need not concern himself with obsolete customs or customs which have been abrogated by desuie or fallen into desuetude. Only customs actually followed by Natives i.e. observed by Natives are accorded recognition under this section (see Pole vs Costa N.P.C. (C&O) 1931).

This raises the question as to whether Native Law requires to be proved in every case before a Native Commissioner to decide whether whether the point at issue involves questions of custom followed by Natives or whether the Native Commissioner can rely on his own knowledge of Native Law to settle that question. ~~In order~~ As regards the former alternative it has been held that in order to answer correctly the question as to whether the said involves questions of customs followed by Natives it will often be necessary to hear evidence in order to determine the nature of the transaction. If the transaction is one peculiar to native custom only, that law should be applied. If the contract is known only to both systems of law, then it is necessary to determine which system the parties had in mind or more correctly, which system the parties must be deemed to have had in mind when they entered into the contract. If the parties clearly contracted according to Native Law, that law must be applied, but if after hearing evidence this still doubtful which system the parties had in mind common law principles must be applied because if he (i.e. the Native Commissioner) is unable to decide whether or not the parties intended to contract according to Native Custom it is impossible to say that any question of customs followed by Natives is involved; consequently section 11(1) cannot apply and the Native Commissioner has no discretion but must apply the common law.

In order to decide the question as to whether a particular custom is ~~still~~ as a matter of fact followed by Natives the Native Commissioner may call this assistance Native Assessors, a procedure for which provision is made in section 19 ~~(1)~~ of the Native Administration Act 38 of 1927 which provides:

(1) In any case in which a Native Appeal Court or native commissioner's court deems it desirable it shall be at liberty to call to its assistance, in an advisory capacity, such native assessors as the court may deem necessary

(2) The opinion of such ~~native~~ assessors shall be recorded and form part of the record

On the other hand it has been held that the law presupposes that the presiding officer in the court of native commissioner is versed in Native law and he can therefore rely on his own knowledge of native law to decide ~~the question~~ as to whether any particular the point at issue is one involving questions of customs followed by natives or what the native law applicable in the circumstances may be. Naturally if he is in doubt as to what the native law applicable to a particular point may be, he should either get the parties to lead evidence or he should call to his assistance expert assessors. This very point was decided in Mosake vs Sabeduke 1928 T.P.D. 633 in which it was clearly stated that where the native Commissioner has no doubt in the matter, he is competent to decide a civil dispute between natives involving native law + custom, although no evidence of such law + custom has been placed before him. (See also Rowe vs Assistant Magistrate Pretoria & another 1925 T.P.D. 361; Msomi vs Singindawo 1927 A.D. 255; Ngcobo vs Ngcobo 1929 A.D. 233; Mokgatle vs Bogopane 1926 T.P.D. 348; Kula Mazimbuko vs Dlozi Mazimbuko 1930 2 N.A.C. (N&T) 143; Mnguloya vs Mutetu, 1929 N.A.C. (N&T); Isha Maguze vs Isa Zondi 1931 N.A.C. (N&T)

b. Customs followed by Natives are either general customs or local customs. The question may arise as to whether in a particular case the general custom or a local custom should be followed by the Court. In Kula Mazibuko vs Dlozi Mazibuko 1930 N.A.C. (N&T) it was held that the court will refuse to recognise a local custom which is contrary to universally recognised custom. Thus the law of primogeniture is universally recognised among Natives and a local custom in conflict with it would not be recognised.

Where, however, a local custom is not in conflict or inconsistent with general custom, the Court will not necessarily refuse to accord it recognition. Where a local custom is pleaded in a suit it must be conclusively proved before it will be recognised (Magokuwa vs Madida N.H.C. 1911) It must be noted that it is not permissible to prove general custom and expert evidence is only permissible in the description of a tribal or local custom (Kadeuma vs Beere, N.H.C. 1905 Judicial notice is taken of general native custom and as already indicated (supra) it is only where there is some doubt about a particular point of general native law that evidence may be taken or expert assessors called in to assist in settling the case.

4. (a) Questions of customs followed by Natives are to be settled according to native law only in so far as such native law has not been repealed or modified. Native law may be repealed or modified by statute or by proclamation by the Governor-General under the powers vested in him as Supreme Chief of the Natives in the Provinces of the Transvaal, Natal and Orange Free State or in his capacity as Governor-General as far as the native territories of the Cape such as the Transkei are concerned or by judicial decision or by abrogation by desuse or by the growing up of a different custom. If any point of native law has been modified or repealed in one of the ways indicated above then it will not be applied by the Court of Natives

(b) Secondly the application of native law is subject to the condition that such native law is "not opposed to the principles of public policy or natural justice". It is impossible to define in specific terms what type of case will or what particular custom will be regarded as opposed to the principles of public policy or natural justice. Much depends upon the particular circumstances of the case in question. But as was pointed out in Rodisane vs Mokgotho 1928 T.P.D. "a native custom will is not in conflict with the general principles of civilisation merely because it does not tally with the procedure of ordinary courts such as are established by peoples in a more advanced state of civilisation". This was a case in which the point at issue was the native custom of imposing a levy upon members of the tribe for the benefit of the chief this Mokgotho was most inconsistent with the principles of civilisation. The native method of ~~enforcing~~ a levy imposed by a Chief to raise money for legitimate tribal purposes by the confiscation of the property of the defaulters ~~is however held~~ without due regard to the property seized was, however, in Mokuri vs Matlabes 1920 T.P.D. 389, held to be contrary to "public policy or natural justice". The collection of tribal levy is now regulated by Government Notice 349 of 1927.

There are other examples of customs or practices which have been held by the Court to be contrary to public policy or natural justice.

1 Thus in Lizzie Magcoba vs Alex Magcoba, 1928 N.A.C (Transkei) the Court held that it was not prepared to recognise

as native practice which would encourage the widow of a Christian marriage, for the sake of bearing an heir to her deceased husband, to indulge in illicit intercourse under circumstances repugnant to the principles of a Christian marriage, and which would perpetuate in certain respects the consequences of a contract which had been absolutely and completely dissolved by her husband's death. The custom of ukungena under which a widow may be taken as wife by a relative of her husband deceased husband in order bear children for he deceased husband is well established under among certain Native tribes and is recognised by the law in the case of parties to a customary union under native law & custom known as a customary union, but in the case of the widow of a Christian marriage such an ukungena union is regarded as contrary to public policy & natural justice

2. A polygamous marriage i.e. the marriage of one man to more than one woman has been regarded as inconsistent with the principles of civilisation recognised in the civilised world (Rex vs Nalana, 1907 T.S. 407). The reference here is to marriage by Christian or civil rites. The position is different where a customary union — a marital union contracted in accordance with native custom — is concerned. In the case of customary union it is permissible for a man to be united to more than one woman at the same time such a union, or unions, would not be regarded as opposed to public policy or natural justice, in view of section 11(1) of Act 38 of 1927

The subsequent entry into a customary union by a man who already has legally married i.e. by Christian or civil rites has been held to be an irregular & immoral contract inconsistent with the general principles of civilisation, section 11(1) of Act 38 of 1927 notwithstanding. In other words a man cannot be married to one woman by Christian or civil rites and united to another woman by customary union at one and the same time. (See Emma Nkosiyana & Enock Nkosiyana vs Johannes Twala, 1929 N.P.D. (N.S.T.)

This also follows from the definition of a customary union which is "the association of a man and a woman in a conjugal relationship according to native law & custom, where neither the man nor the woman is a party to a subsisting marriage"

In fact in Natal in terms of sections 14 and 15 of Act 46 of 1887 not only was it illegal for a man to be united at one and the same time to two women one by Christian rites and the other by customary union, but the ~~native~~ law further and that once an individual had been married by Christian rites he could not ~~thereafter~~

thereafter enter into a customary union were after the termination of the Christian marriage, nor could any of the children of a Christian marriage enter into such a customary union at any time. Otherwise they were liable to be punished by a fine not exceeding £25 or by imprisonment with hard labour for a period not exceeding one year. Both sections 14 & 15 of Act 46 of 1887 were repealed by the Native Administration (Amendment) Act 21 of 1943, so that the position in Natal will now similar to that in the other provinces, namely, that a Native once married by Christian or civil rites need not always follow that system of marriage but may enter into a customary union, nor need the need the children of a Christian marriage follow their parents in the matter of marriage.

6. Section 11(1) provides that it shall not be competent for any court to declare that the custom of lobola or bogadi or any similar custom is repugnant to the principles of public policy or natural justice. Prior to 1927 the different S. A. Courts had taken different views of this custom, Natal being the only Province in which the lobola custom was fully recognised, but the enactment of section 11(1) has now done away with "these invidious distinctions in the judicial recognition of this ancient and honourable custom".

Under the original Act 38 of 1927 Section 11 had a second subsection 11(2) which read as follows:-

"Where the parties to a suit reside in areas where different native laws are in operation, the native law, if any, to be applied by the court shall be that prevailing in the place of residence of the defendant"

This was an attempt to provide for the conflict of laws which would arise where the parties belonged to different areas and were therefore subject to different systems of native law. In deciding upon what law to apply in such circumstances the native commissioner was directed to take the law prevailing in the place of residence of the defendant. This subsection was repealed by Act 21 of 1943 and replaced by another which reads as follows:-

"In any suit or proceedings between Natives who do not belong to the same tribe the court shall not, in the absence of any agreement between them with regard to the particular system of native law to be applied in such suit or proceedings, apply any system of native law other than that which is in operation at the place where the defendant or respondent resides or carries on business or is employed, or if two or more different systems are in operation at that place, not being within a tribal area, the court shall not apply any such system unless it is the law of the tribe, if any, to which the defendant or respondent belongs."

The effect of this new sub-section which has not yet been interpreted by the Native Appeal Court would appear to be as follows:—
In any suit or proceedings between Natives where the parties belong to different tribes, (not necessarily different areas as in the old section) the Native Law to be applied shall be determined thus

(1) If the parties had entered into an agreement as to the system of native law to be applied, the system agreed upon shall be applied

(2) If no such agreement had been made between the parties, then the native law to be applied shall be that in operation where the defendant or respondent resides or carries on business or is employed. In other words ~~in addition~~ to the test of residence which was contained in the original sub-section, there has been added the tests of place of business & place of employment. This is more in keeping with the actual conditions of modern native life which are not as static as was implied in the ~~any~~ subsection as originally enacted.

(3) If the defendant or respondent resides or carries on business or is employed in an area where different native laws are in operation, and that place is not within a tribal area, the court shall ~~do either~~ follow one or other of two courses, either not apply any native law at all or apply the native law of the tribe to which the defendant or respondent belongs. This sub-section recognises the fact that under modern conditions Natives may reside or carry on business or be employed in an industrial centre where no native law is in operation or where ~~there~~ there is such a mixture of native laws that it would be impossible to apply any of them to a particular suit or proceeding between Natives. In such a case the native commissioner is empowered to disregard native law and to apply the common law. On the other hand the circumstances may be such that the particular natives concerned in a suit or proceeding, though residing or carrying on business or employed in such an industrial Centre, still adhere to their customs & usages. In such a case in the event of a conflict of laws the native commissioner is empowered to apply the law of the tribe to which the defendant or respondent belongs.

A new subsection 3 has also been added to section 11 dealing with the legal capacity of a Native who is a party to a suit or proceeding between Natives. The sub-section reads as follows:—

(3) The capacity of a Native to enter into any transaction or to enforce or defend his rights in any court of law shall, subject to any statutory ~~proceeding~~ provision affecting any such capacity of a Native, be determined as if he were a European: Provided that

(i) if the existence or extent of any right held or alleged to be held by a Native or any obligation resting or alleged to be resting upon a Native depends upon or is governed by any Native law (whether codified or uncodified) the capacity of the Native concerned in relation to any matter affecting that right or obligation shall be determined according to the said Native law;

(ii) a native woman who is a partner in a customary union and who is living with her husband shall be deemed to be a minor and her husband shall be deemed to be her guardian.

The legal capacity of an individual includes (i) his right to sue or be sued in a court of law, (ii) his right to enter into contracts or to incur obligations, (iii) his right to own property. This subsection deals more particularly with a Native's capacity "to his right enter into transactions i.e. to make contracts & (ii) to enforce or defend his rights in a court of law i.e. his right to sue or be sued in a court of law.

According to this subsection in every case a native is capacity to contract (his contractual capacity) and his capacity to sue or be sued (his locus standi in judicio) shall be determined as if he were a European i.e. the common law principles shall be applied in dealing with these elements in the legal status of a Native. There are, however, certain exceptions to this, namely

(1) where there is a statutory provision affecting to the contrary affecting the contractual capacity or locus standi of Natives

(2) where in the matter in question the legal capacity of the native concerned depends upon or is governed by native law; in that event native law shall be applied

(3) in the case of a woman who is a partner to a customary union and who is actually living with her husband, she shall be deemed to be a minor and her husband shall be deemed to be her guardian. In other words such a woman must always sue or be sued or contract assisted by her husband just a minor must always sue or be sued or contract assisted by his guardian.

This sub-section is an attempt to meet the difficulties created by the increasing mobility of the native population. Under original native law only one person in every ~~family~~ household had full legal capacity, namely the head of the household. Nowadays natives are frequently away from the control of their kraalhead and it is becoming increasingly unpracticable to insist upon every individual being always by his kraalhead in his or her contracts or in his or her appearance in court. Except in the above mentioned instances the individual Native is to have the same freedom to contract or to sue or be sued as a European.