

The Rights of Illegitimate Children to Inherit

In the case of Mtsholwa Mbulawa vs Maxesibo Mongwa, (N.A.C. (S.O), 1936), it was held that according to Pondo custom an adulterine child of a married woman can never in any circumstances inherit the property of her husband. Even if the child has been brought up at the husband's kraal and dowry paid for him from that kraal he cannot become heir. If the child is the illegitimate issue of the husband, even if fetched from elsewhere, he can inherit in the absence of legitimate male children.

In the case of Mzandama Gebuza vs Matana Gebuza, (N.A.C. (S.O) 1938) the position in Tumbuland was discussed and the Court stated that the decided cases in Tumbuland clearly show that an adulterine son of a married woman cannot succeed to his mother's husband's estate where there is legitimate male issue of the marriage between his mother and the deceased.

In the case of Sidubulekama vs Fuba, (1 N.A.C. 449), the Native Appellate Court went even further, and held that an adulterine son could not succeed to the exclusion of legitimate issue in ~~the~~ any of the houses of his mother's husband.

Also in Bantye vs Mtuyedwa, (1 N.A.C. 110) it was decided that according to native custom such a child (i.e. an adulterine son of a married woman) cannot inherit where there is legitimate male issue of the marriage between her mother and her husband.

In the case of Ludidi vs Mshelwa, (5 N.A.C. 28) it was held that an adulterine son (of a married woman) could succeed to the estate of his mother's husband in default of legitimate issue. This case was apparently ~~decided~~ decided according to the laws & customs of the Pondomosi among whom <sup>with</sup> adulterine sons are apparently allowed to succeed to the exclusion of collaterals. But this is not so according to Pondo <sup>or Tumbuland</sup> custom.

The Court went on to say: "These principles of native custom have been affirmed in a long series of cases before the Native Appeal Court which has emphasised that a widow is only entitled to maintenance while she is living at the kraal of her late husband or some other kraal approved of or established for her by her late husband's heir. Other cases dealing with this point include

- Nohafisi vs Yekeni Juli, 1 N.A.C. 174
- Mapoloba vs Mapoloba, 2 N.A.C. 186
- Tsetwa vs John Mkatshane 3 N.A.C. ~~187~~ 298
- Naiyana vs Mardulini 4 N.A.C. 159.
- Rashula vs Masixandu, 5 N.A.C. 202
- Katsira Mloda vs Jacob Toseni, 6 N.A.C. 40
- Nosamae vs Qinisile, 1929 N.A.C. (Cso) 1
- Masocukwe Sidubulekana vs Suweine Singilo, 1931 N.A.C. (Cso) 12
- Nonajiti Mergwa vs Koni Ggati, 1934 N.A.C. (Cso) 83
- H. Sibanda vs S. Dlokwani, 1936 N.A.C. (Cso) 61
- N. Ntshani vs M. Ntshani 1936 N.A.C. (Cso) 128.
- Ntshani vs M. Ntshani & Mobjembe 1936 N.A.C. (Cso).

Another instructive case in this connection is that of Nkunkumeni Mdyongolo & others vs Nomauntana Mdyongolo, 1943, N.A.C. (Cso) in which the heir to the Great House sought to exercise control over the crops from the land of the widow of the right hand house after he had "drove away" the widow from the kraal by calling upon her to fend for herself. In dealing with this question the Court said: -

"Upon the death of her husband a widow falls under the guardianship of her husband's heir. It is his duty to maintain and support her out of the resources of her husband's estate and out of his own resources, if any. If he tells her to fend for herself, that is an admission of his inability to discharge his obligations towards her and her family. It would be tantamount to driving her away from her husband's kraal."

Right to claim illegitimate child

In the case of George Paul Mpongwana vs Sijah Mgoji, (16 N.A.C. (Coo) 1938) that it was decided that a man married according to Christian rites has no claim to the child born of his adulterous intercourse with ~~another~~ a woman other than his wife; his relations with the latter was a breach of the solemn marriage contract and native custom could not be applied in the circumstances. Among some tribes according to native custom a man who has seduced ~~and~~ rendered pregnant a woman other than his wife is permitted to claim the child born as a result <sup>provided</sup> if he has paid full damages for the seduction and pregnancy. The above-mentioned case is authority for the proposition that this principle of native custom will not apply where the man concerned was a party to a Christian marriage at the time of the seduction. (See also Maintshona vs Nygizidi, (N.A.C.S.))

In the case of Mwankumbi Gabuzana vs Vorizana Qolo, (14 N.A.C. (Coo) 1938) it was pointed out that according to Pond's custom the natural father of a child is entitled to it after he has paid full damages (i.e. five head of cattle) but until then the guardian of the seduced girl is entitled to its custody. But under Sotho custom an illegitimate child is the property of his maternal grandfather and the payment of a fine by the seducer gives him no right to the child (See Mothiri vs N. Khehlem & ano. N.A.C. (Coo))

Definition of Illegitimate Son/Child

In Native Law an illegitimate child is defined as a child born out of lawful wedlock. Where a child is born in lawful wedlock the presumption is that he is legitimate and the onus is on anyone who alleges the contrary to prove his allegation (Jako Ntliziyombi vs Dokolwana Ntliziyombi, N.A.C. (Coo) 1937).

In the case of Kobo Xundu vs Charlie Xundu, N.A.C. (Coo) 1936 it was decided that a son born after the dissolution of the customary union to which his mother was a party is regarded as an illegitimate son and therefore cannot become heir of the man who divorced his mother, unless the latter was pregnant with him at the time of the dissolution.

In the case of Bransfeth Kalisa vs Thomas Kalisa, 1943 N.A.C. (C.S.O) following the case of Percy Mponde vs Barnett Mdingi, 1929, N.A.C. (C.S.O) it was held that any children born of "customary subsisting with at the same time with a (Christian) marriage to which the husband is a party are adulterous and illegitimate, the mother of such children being regarded as an unmarried woman. In the same case it was pointed out that 'in native law the illegitimate children of an unmarried woman belong to the house of which she is a daughter, and on the death of her father, the guardianship vests in his heirs. The fact that dower or a fine was paid for the mother of such children cannot have the effect of legitimising them. They were born of intercourse whilst a lawful barrier existed which prevented any act on the part of their parents conferring on them the status of children born in lawful wedlock.

Reference was also made to Ndema vs Ndema, 1936 N.A.C. (C.S.O) in which it was stated that an illegitimate son cannot inherit estate property through his mother. Property acquired as dower for her daughters would be such estate property and would devolve on some male in accordance with native custom. The Native Appeal Court in Kalisa vs Kalisa (supra) declined to follow the decision of the Transvaal Native Appeal Court given in 1924 in the case of Dana vs Pambariso S.N.A.C. 94 in which an illegitimate son was allowed to claim the lobola of his sister.

Bransfeth Kalisa vs Thomas Kalisa was a case in which the facts were as follows: - He was married by Christian rites to W. During the subsistence of this marriage He entered into a customary union with K. W gave birth to a son Y & a daughter; K gave birth to a son X and two daughters. After the death of H, X claimed the lobola of his sisters on the ground that he was heir to H in K's house. Y disputed this on the ground that K was an illegitimate son & therefore could not inherit from H.

## Illegitimate Child born of a widow

In the case of Nganeyake Hlangabeza <sup>and</sup> Zakelele Dingiso vs Nobeyose Mgubhwa, 1943, N.A.C. (C20) the question was discussed as to the rights of an illegitimate child born after the death of his putative father. The Court referred with approval to the case of Soxos vs Fredi Njiva, 1 N.A.C. 188 in which the status of illegitimate children born to a widow after her husband's death was considered. The Native Assessors stated the Pondo custom as follows:—

1. "If she, the widow, remains at her father's kraal and illegitimate children be born to her (1) the children belong to their putative father, if he pay cattle for them; (2) if he pay no cattle for them, then they belong to the woman's late husband's heirs, the latter pay cattle for them; (3) should no cattle be paid by either, <sup>then</sup> the children are the property of the woman's father; (4) should a fine be paid by the putative father, such fine belongs to the woman's father". The Appeal Court accepted this statement of the law applicable and this decision was followed in Mpeti vs Nkumarda, 2 N.A.C. 43. It is clear then that a putative father can, according to Pondo law, acquire his illegitimate child born to a widow at his people's kraal by paying the usual fine and pondlo, but the question still remains, can such a child succeed to his putative father's estate in the absence of any legitimate issue? This question was answered in the affirmative in Atijelwa Mbulawa vs Maseibe Muziva, 1936 N.A.C. (C20).

The Tembu law on the question of the succession of a child born to a widow has been enunciated in a number of decisions of the Native Appeal Court and is that a son born to a widow away from her late husband's kraal cannot succeed (see Noseji vs Gobozena (1 N.A.C. 214); Mponya vs Mlungu (5 N.A.C. 166)). It is true that in

case of Xelitole vs Xelitole (4 N.A.C. 147) the native assessors were divided in their opinion, three of them stating that a son born to a widow while she was away from her late husband's kraal could not succeed, while two stated that he could succeed but his case would have been strengthened had he and his mother returned to the kraal of the her late husband before setting a claim. The Native Appal. Court accepted the opinion of the majority as a correct statement of Native Law on the subject.

Onus of Proof in Presumption of Legitimacy

A legitimate child is said to be legitimate if it is born <sup>+ every child born in lawful wedlock is presumed to be legitimate</sup> in lawful wedlock. In Sikali Mkataga Mkwambisi vs Mkwambisi Mggobzi, 1941 N.A.C. (C40) it was held that where a child is born during the subsistence of his mother's marriage to her husband, <sup>the child</sup> it is presumed to be legitimate and the onus of rebutting that presumption is upon the person disputing it (See also E. N. Ngrekama vs A. N. Ngrekama, 1935 N.A.C. (C40)).

Under native custom it is the duty of the widow's guardian to maintain her during the minority of her heirs. This is done by ploughing her land and attending to her krosal affairs. Should the crop on her land fail it is the guardian's duty to maintain her from other sources. It follows that where he has ploughed, sown and cultivated her land for her support he has an interest in the crops and she is not entitled to misuse the crops to the prejudice of her children and her guardian. To this extent her control of the crops is fettered.

(Contd)

With the introduction of individual tenure (in the Transkei) in 1898 this restriction on the control of the crops of a widow where she was the registered owner was, by implication, swept away, but as was shown in Irvine Dyasi v Fanny Dyasi, 1935 N.A.C. (C 20) the tendency of the Regulation amending Proclamation 227 of 1898 was to restore native custom to what it was before survey and it may be the position in surveyed districts today that a guardian who has ploughed and cultivated a widow's land for the support of her herself and her children may have the right to restrain the widow from squandering the crops if he can show that as a result of her prodigality he will have to support her children out of his own resources. One must not forget that during the minority of her heirs she and her children are under his guardianship and he has the management and supervision of her affairs including her land although it is registered in her name, but he must act reasonably. If he tells her to shift for herself, she can regard herself as having been driven away from her husband's krosal: she can find a place to live for herself and her children and can make her own arrangements for the cultivation of her land. In other words he (the guardian) has in effect renounced his right to the control of the crops from her land whether such land was held under certificate of occupation (unsurveyed district) or under registered title (surveyed district).

## Rights of Widow in her deceased husband's Estate

In the case of Nodwesini Mbekebe vs Qomora Dumiso, 1941, N.A.S. (Cso) a widow claimed maintenance and support from the estate of her husband, although she was living away from her deceased husband's kraal contrary to the wishes of his son and heir. The law on the point at issue was stated as follows by the Court: "The rights of a Native widow of a Native customary union were clearly set out by Col. Sir Walter Stanford in giving evidence in the case of Sekeleini vs Sekeleini (21 S.C. 118) where he said: "In the case of a Native dying and leaving a widow or widows, such widow or widows would not under Native custom inherit any of the deceased's property. A widow would with her children come under the guardianship of her eldest son, if such son were of age. She would live with him, or at such place as he desired, and during the time that she recognised his authority, it would be his place to provide her and her children with necessary maintenance in keeping with her position, lands to cultivate and to lend her cattle with which to plough. She and her children would have to render him in return such services as are usually rendered by a wife to her husband and by children to a father. The failure on the part of the woman to recognise the eldest son's authority would have the effect of depriving her or them of any claim to maintenance and support. But as long as they render him such services and behave dutifully towards him, they are entitled to maintenance out of the estate of the deceased, and if the eldest son neglect to make sufficient provision for them or otherwise ill-treats them, an independent Chief, upon sufficient grounds being shown, might have allowed the mother to establish a separate kraal, with stock taken from the estate for her maintenance and under the guardianship of another guardian, usually a son or relative. The woman would, however, only have the use of the stock, the ownership still being vested in the son (i.e. her deceased husband's heir.)"



### Control of Estate Stock by Widow

1. The fact that a widow alleges that she has maintained and supported the heir and is therefore entitled to retain the estate and lobolo stock is not in accordance with native law. "There is no such a thing in Native Law & Custom as women being entitled to declare to whom their dowry cattle must revert. "It is also wrong to say that she, the widow, is entitled to the control and possession of the estate stock until her death. All that she is entitled to is to have the stock placed at the kraal at which she is living, if approved by the heir, and to be consulted in regard to its disposal, but the control remains in the heir and he cannot be prevented by her from dealing with it provided she is maintained in a suitable manner. She herself has no right to dispose of the property belonging to the estate of her late husband. [See *Ngwenya vs Mondulini*, 4 NAC 159; *Keshula vs Mosekorden* 5 NAC 202; *S. Kulu vs M. Mhlobo*, 1938 NAC. (C+O) 41.