What Law to Apply in Case of Doubt

Anderson v. Thomas Ntaka (1944, NAC (Civ) 2.

"The leading cases on the question of which law to apply are Atienza vs. Atienza's case, 1937 NAC (T.D.) 101 where the history of legal development in the former is set out briefly and the trend of recent changes indicated; and A. Mkhlongo v. Mkhlongo 1937 NAC (No. 7) 124 where two conflicting systems of law were indicated and applied. Coupled with these cases are those of Mgogo Mkhlongo v. and Philip Sekela 1937 NAC (No. 7) 32, Pith Mkhlongo v. Richard Mkhlongo 1937 NAC (No. 7) 87, Mkhlongo v. John Mhlongo case, 1938 NAC (No. 7) 68, which case deals with the position in Nata of a Native enfranchised from native law yet brought back into it for the purpose of civil case "enforcing rights under Native law to which he's a party") and K. Wesselin v. Potent 1942 NAC (Civ) 55 which considered and applied the ruling in Mhlongo's case.

In the former case the Appeal Court held that "when a transaction is unknown both to the common law and to Native law the native commissioner had discretion in applying either law, but that discretion was a judicial discretion and could not be exercised arbitrarily. Commissioner in this ruling in Mthlongo's case at Court said:"

"the exercise of the judicial discretion the native commissioner is
required by the rules of procedure to apply "the manner and manner
law, rather than the wider more strict." Holland, panchetita, p. 400, 1948.

The Court went further, it set out more fully the rule, laid
down by Van der Kruell in his "Jespent Thesis" (No 6 to 25) for
dealing with conflicting systems of laws in his day (15800 AD)
by Mhlongo at Dutch law, and went on to show how
they might be applied, mutatis mutandis to the case
of conflict between Native law and Common Dutch law (see Mkhlongo's
Case)."
The Application of Nature Law

[Merina vs. Matladi reno. 1937 N.A.C. (Not) p. 42.]

History of Application of Nature Law in Cape Colony

"With minor exceptions, the Cape Justice of the Peace was not recognized at all. Certain favour’d natives in what was known as British Kaffraria were ‘exempted’ from the application of the Common Law; otherwise the same law was applied to natives as to Europeans.

In the Transkei territory, however, nature law was applied almost exclusively from the earliest times, and it was expressly provided in the annexation proclamations — Section 23 of Proclamation 110 of 1879 and parallel sections in proclamations 112 of 1879 and 140 of 1885 that

"All such (civil) suits and proceedings shall be dealt with according to the law in force at the time in the Colony of the Cape of Good Hope except where all the parties to the suit are what are commonly called natives in which case it may be dealt with according to the Nature Law’.

Some of the Cape Natives (born in the Transkei) was more advanced than others. To meet their case a tendency becomes noticeable in the decisions to emphasize the word ‘shall be dealt with according to the Common Law’ as contrasted with ‘may be dealt with according to Nature Law’.

See Kuku, Willie Ngcuka v. Dominica Ntshebe, 3 N.A.C. 252; Edmund Tsholo v. Simon Letsoloko 4 N.A.C. 44; and other cases reported in the Transkei Natives.

Paragraph 233 of the Report of the South African Native Affairs Commission 1903-5 indicates the position clearly:

"The object of improvement and, so far as may be, assimilation of (Nature Law) with the ordinary Colonial Law should be kept in view as an ultimate goal.

In 1923, in adapting the Union Magistrates’ Court Act 1917 to the Transkei, the step was taken of erecting the enabling section in the annexation proclamations — Section 104 (1) of proclamation 145 of 1923 reads:

"Notwithstanding the provisions of the Annexation Act, it shall be in the discretion of the Court in civil suits or proceedings between natives involving questions of customs followed by Nature, to decide..."
such questions according to the native law applying to such estates, except as so far as it shall have been repealed or modified by Act of Parliament or Governor or Governor-General’s proclamation.”

It was said by the President in Nkomotela v Mlindi, S.M.R. 30 that this change entirely altered the basis of the application of Native law and restricted it to questions of Native law. He illustrated by that case the result obtained that the plaintiff by marrying by Christian rites had ceased to follow Native custom and that his action for adultery had to be dealt with by Common law.

Mr. Justice M popularised the dictum that “ordinarily” the Courts apply Common Law (i.e., South African Native law) which comes strongly after the quotation from Bell’s jurisdiction that “the heavier and narrower law will be applied rather than the wider and more remote.”

It must be emphasised, as Nkomotela’s case shows, that the decision was not a movement away from the body of Native law but it was an endeavour to take the enriched advanced Native out of the operation of Native law once they indicated by the adoption of enriched custom that they explicitly abandoned native practices. They never to be excluded from the flesh pots of heathendom.

This is, in fact, a contemporary movement in the other direction in favour of encompassing the heathens from the ill-effects of common

Dutch law as the report of the Cape Native Affairs Commission of 1910 (Case paragraphs 132 to 142) and Legislation ensuring the Enrolment (42 of 1910, Cpa) indicate.

Be that as it may, the question arises whether the Cape highest was carried over into the Union and endorsed by Act 35 of 1927, despite the adoption of the Trun帷ajaran provision in section 11? Definitely not.

In (Act 35 of 1927) set up a system of Native Land Acts specifically to deal with Native cases and by section 11 it imposed the application of Native law subject to certain provisos and it deliberately entrenched the custom of lobola or bridewealth, a custom which forms the basis of the Native social structure as the Justice Bloom has correctly pointed out in Mepoandile Case, Mepoandile v Lebel (1915 P.D. 357)
Not content with this, the legislature has modified Roman-Dutch law to meet the special conditions of Native, and to preserve their institutions, which strict application of Roman-Dutch law destroyed. (See particularly § 10 in regard to marriage and succession. (See Chapter 1 of Act 35 of 1897.)

Having done this, it proceeded to put its seal on the Native Native Code, an enactment designed specifically to preserve and perpetuate Native law. Nathan, in Nathan, has been guiding principle of the administration from the very infancy of that province.

In the Transvaal Law 46 of 1885 was intended to be an extension of the Native system, or rather, shows in his work on Native law in South Africa. That law was annulled by a series of decisions of the Transvaal Provincial Division, which destroyed all but a vestige of Native law in the application of the principles of civilization as adapted to isolated communities, in other words, the substitution of Roman-Dutch law for Native law. It cannot be submitted to the judge of the Transvaal Court that they were deliberately endeavoring to "civilize" Native law by subverting it to Roman-Dutch law.

On the contrary, the remarks of the learned judge, in the cases, are indicate the very opposite.

Nevertheless, this trend of judicial opinion and its contents was completely reversed by the legislature in 1927 by the preservation of Lobolo. In the Transvaal especially, it can be said that the policy of the legislature has been clearly that Native law must be preserved.
The Interpretation of Section 11 of Act 58 of 1927

E. Momi, Mwana Njoro, and N. Mwana Njoro, vs N. Mwana Njoro. (1972) NAC (N.T.) 444.

Provision to interprete section 11 of Act 58 of 1927 in the light of the foregoing

reasons, we must formulate the following:

The Native Commissioner is empowered to apply any system of law. —

1. In some cases which came before the Native Commissioner for decision, the cause of action was known to both systems of law, Roman Dutch and Native.

2. In some cases, the cause of action is known only to Roman Dutch Law and to Native Law.

3. In regard to 1, the Native Commissioner is required by the decision of Charles Anguaboga vs William Mantle (1929) NAC (N.T.) 73 to apply that system of law which provides a remedy.

4. In regard to 2, a discretion is vested in the Native Commissioner by section 11.

Now, a discretion implies a choice of action. When the increased prejudice and act repugnantly, but it can be required that the Native Commissioner be preserved.

What is the choice given to the Native Commissioner? It is not a discretion whether or not to apply Native Law or is it a choice between one or other system of law, either of which affords a remedy? To this must it is unanswerable that the legislature intended the choice to be the first, i.e., whether to apply Native Law or to reject it and refuse to hear the case. As indicated in the foregoing answers, on policy, this choice was not the intention of the legislature. If then, the Native Commissioner is given a discretion and he exercises that discretion judicially, this Court is not entitled to deprive him of that discretion by directing that he must apply the Roman law to the exclusion of Native Law. If anything, the rule announced by Holland would give preference to Native law as indeed Native Practice has established.

In these cases, this Court cannot endorse the decision of the Cape and Grey, Free State in the case of Ngwaza vs Mongboloo (1930) NAC (C.S.) 13, that Roman Dutch Law must primarily be applied, and I must hold that in the absence of prejudice, that the Native Commissioner, has not exercised a judicial discretion in the present case, his ruling that he will apply Native Law cannot be disturbed, for the cause of action is one common both to Native Laws and to Roman Dutch Law.
It follows also that the contention that a defendant can fetter the
discretion of the court to apply one or other system is untenable. He has
discretion and can exercise it. Actually the court is not able to read into the judgment the
description for the prosecution any
such interpretation. (James, John v. James Jackson, 1932 NCC(IV) 58.)
Principles of Natural Justice

"...and with the ground of the appeal that it is contrary to the principles of natural justice to reject a plea of prescription, we must avoid the pitfall of applying principles of justice of one community to another and especially avoid following reasoning from one system of jurisprudence to another. The law of nature i.e. natural justice, is ignorant of statutes of limitation of action. It knows only that a debt has been incurred and that it must be repaid. In this respect then, Native law is nearer nature and must be held to be in accord with natural justice. Public policy in regard to prescription in Native law is indicated in the new Code promulgated under the enabling provision of Act 38 of 1927. Section 152(2) indicates that prescription is unknown to Native law. The suggestion by Council that this Court should resort in the name of public policy to natural justice as well as established Native custom does not accord itself to the Court. It cannot usurp the functions of the legislature.

The above remarks in the case of Dumalatkhao vs Naiji, 1937 MAC 336 are directly in point here. Until the proper authorities are satisfied and are convinced that the time has arrived when various widely recognized customs, which are practiced daily by the Native tribes (e.g. polygamy, nkutuwxala, ukungena, etc.) which admittedly fall short of civilized standards, should be abrogated, the Court is of opinion that it should not interfere in matters of broad policy, which is the prerogative of the Executive, and that it would not, therefore, be justified in setting aside a custom which has long since become crystallized into law (by native usage)."

[Morna vs Mattadi and ano. 1937 MAC (N.T.) p. 45]
The Native Commissioner's Decision

The decisions in the cases in which the Native Commissioner ruled that "the case must be decided in accordance with the custom and be upheld a plea of acquittal or remission on the ground that a money lending does not involve a Native law custom for money is unknown to the Native laws" especially as interest can be claimed on such transactions and interest is unknown to the Native laws, were distinguished from the decision in that case. These reasons held that where a transaction was known to both the common law and to the Native laws, the Native Commissioner had discretion in applying either law, but that discretion was judicial discretion and could not be exercised arbitrarily. In exercising that judicial discretion, theNative Commissioner is guided by the rules of procedure to apply the more and narrower law rather than the wider and more remote law. (7)

The reasons are set out more fully in Van der Beek, "Some Recent Cases," No. 6 to 25 in dealing with conflicting systems of law in this day viz. Roman, Dutch and English laws. These rearneved are:

(1) On every province, both in or native that law should before all others be executed to which is proper 6 that it is the law and has been expressly promulgated or formally for it by the legislature.

(2) The special customs 6 which have been adopted in any place or any right be executed there.

(3) On the facts of Roman law which have been expressly adopted and Dutch laws which have been more recently at once to Roman law.

(4) When a custom comes in to the interpretation of any Rules of Dutch laws, especially some and extensive or restricted interpretation in such law rights to be explained from its original source.

(5) If the principle of the Roman law and those of the laws of Holland have been introduced in any statute, such a mixed law shall be interpreted each part from its own purpose. — Werk van de Lieden, 1844.

These rules were formed to resolve the difficulty arising from conflict between two systems of law, viz. Dutch and Roman, the latter being subsidiary, but the principles involved are directly in point in
Dealing with the analogous practice caused by parallel systems of law in this country, i.e. Native law & custom law. It is true that the adoption of
subsidium is not attached to us as the other, if those regulations and the analogy
may not be complete. Nevertheless it is the purpose intention of the
legislature that Native law is to have full force and that should be afforded in
all cases where the parties clearly had it in mind when entering into
such cases.

"In order to give effect to the intention of the parties the Native Commissioner
is bound to explain the nature of the transaction conducted by them. He
cannot, as in the present case, arbitrarily rule that he supposes a
money transaction is involving someone else to them. The reasoning is illogical
since money is in itself only a token and among Natives the articles
referred to tokens before contract was made with Sifiso or, any other
money, etc.

It has already been indicated that the environment of the
parties is not the criterion in ascertaining the law applicable
(See Ntombela v. Charles Ntombela 1972 NATC (Nov) 32)

The nature of the transaction should be the test. If for instance a
transaction is said to be a money or a frequent done anywhere, the
transaction remains a contract in Native law and enforceable as
such. Obviously the plea of prescription cannot be held good in such a
case.

Now the contact of law in which the Native law practised from
time immemorial - it includes the well known custom of "Dwe",
otherwise known as "Ngoma" or "Ngopa", and a loan of a beast or the
equivalent for cattle is also well known and frequent practised. Yet
should happen that under the custom one man advances another a
sum of money to another to cause him to complete a loan by paying in
money it is difficult to contend that the transaction has thereby lost its
original nature via a loan under indigenous. On the other hand it is
known that Natives practice advance and engage in transactions in contracts
which are purely everyday custom law, etc. Such a doctrine would
fall under the statutory rules of prescription. It is in ascertaining those
highlighting that the Native Commissioner must use his discretion and base it
judiciously.
The Application of Native Law in the Transvaal

Ruth Watling vs. Nicholas Bellomioni 1937 KLR (N.T.) 89.

The attitude of the legislature towards Native law in the Transvaal is clearly shown by the survey of the history of legislation on the subject since the early Republican days. The two races were placed in a category separate from the whites and they were permitted no equality either in the system of law applicable to them nor in regard to the courts to which they were accorded access in civil matters.

Article 7 of the Grand Welie of 1913 specifically excluded adjudication between the races in Church and State and although the instructions to Field Courts approved by Warden Beaconsfield on 11th September, 1883 provided in section 47 that the Native chief, when subject were subjected to the laws of the Chief, this must be read as referring to local laws only for this section was repealed by law 4 of 1885 drawing a sharp distinction between civil cases between European and native, where European law was to be applied, and those between native native where native law was applied. This distinction was emphasized by excluding access to the High Court of the land by natives in cases between themselves. It is the absolute assumption of legal segregation successfully adopted in Natal and imported into the Transvaal in emanuation in 1877.

A proclamation dated 10th May, 1877, established the High Court excluding jurisdiction in native civil cases. Law 11 introduced the new legislation regulating such cases in special courts. It was superseded in 1883 by Law 4 which law continued in full force until repealed. It was replaced by Act 38 of 1927, the only change being in 1927 when the Supreme Court was first given jurisdiction to hear cases on appeal.

As indicated in the judgment in Magogo Veloba's case (supra) the slide age law of 38 of 1927 is the preservation of the native system of law and social organization for that Act, not only entrenches the system of lobola, but reverses the incursions made by the application of common law rules on succession and marriage, but above all gives frank recognition to native law in areas like the Cape Province places where it had never been recognized.

Any doubt as to the law applicable to native is removed by law 4 of 1885 section 2 where it states clearly that "no law having civil effect is to be observed among the natives shall continue to remain in force in this Republic as long as they have not appeared to be inconsistent with the general principles of civilization recognized in the civilized world." By section 4 it is provided that "all disputes of a civil nature between natives shall
he dealt with according to the provisions of this law and in accordance with native law as present in use and for the time being in force, so far as the same shall not occasion injustice or be in conflict with the accepted principles of justice.

The law in force at the time of the war was confirmed by Ordinance 3 of 1902 section 2 enjoining no compensations and sub-compensations of native law in favor conferred and the duties imposed on them by law 4 of 1855.

Native law was recognized and applied. A modification was provided by Section 58 of Proclamation 21 of 1902, the Magistrates' Court Proclamation which in setting up a special native court for the Wanderer and district of Lansdowne, directs that "all civil suit or proceedings to which the parties are natives may be dealt with according to native law, and in case of any conflict of law or custom by reason of the parties being natives subject to different laws and customs, the suit or proceeding shall be dealt with according to the laws and customs applicable to the respective parties." This provision foresees that the claims brought before the inferior courts be dealt with in accordance with the laws and customs applicable to the defendant. Thus, provisions for handling the claims brought before the Court of 1927, but written in such a way that the provisions can be accepted as overriding the rule of native law that a female cannot sue a married. There is no indication in any other law that this was the intention of the legislation.
Interpretation of Section 11

Ketum Wezzi v. Makhuze Qetsane, 1942 N.C. (C. 02) 55

"Section 11(1) of Act 25 of 1897 provides that it shall be in the discretion of the court, after considering the whole case and the evidence given in the action, involving the laws of customs observed by the Natives, to decide such questions according to the nature of the action or custom except in so far as it shall have been declared or modified.

In his reasons for judgment, the additional native commissioner said,

"In deciding whether the case should be tried under the Native custom or common law, the court was guided by the judgment given in the case of aliens, to which reference was made in the present case, in the case of a man who had been held by the court to be under the statutory rules of presumption. In the present case the alleged loan was made for the purpose of paying a debt due to a foreigner, and in view of the nature of the custom, as in the reasons it was held that the case must be tried under common law.

The case cited by the additional native commissioner, is on all fours with the present case, for it was a claim for money, which was the case before the court. It was held that the witness, for example, in the payment of a debt, is the agent of the owner of the goods. In the present case, the court has held that the custom of the chief, as it was known to the judge, was that the loan of a loan was considered to be under the statutory rules of presumption. The court has held that the loan of a loan was considered to be under the statutory rules of presumption. The court has held that the loan of a loan was considered to be under the statutory rules of presumption.

The court has held that the loan of a loan was considered to be under the statutory rules of presumption. The court has held that the loan of a loan was considered to be under the statutory rules of presumption."
The Cape 1076, Division of the Court in the case of Nganyi v Khaphat

Nganyi, (1920 NAD (AT) 13) laid down that in situations common to
both Roman-Dutch law and Native custom, the Roman-Dutch (common) law
should be primarily applied and Native custom should only be applied
where Native custom falls outside the principles of Roman-Dutch law. In the case of Khanka v Khathe (1937 NAD (AT) 40) the
Transvaal Native Division of the Court was very careful not to
misapply any system of law which was applied or agreed with the decision in
Nganyi case (supra). The court decided, with respect, to agree with the decision of the Native Division in Khanka's case for the reasons
given therein.

In the present case, the court is of opinion that in the exercise of his
discretion, the Native Commissioner should have applied Native law and
custom and dismissed the claim for damages. The plaintiff was himself, however, taken to use out of Native law and custom, and by
claiming interest at 6% per annum which is quite foreign to
Native custom. In these circumstances, the court cannot say that had
the administrator of a system of law which he has himself
involved.