C3.13

What Law to Apply in case of doubt

Anderson Ngila vs Thomas Ntloko 1944, NAC(C&O) 2.

"The leading cases on the problem of which law to apply are Nkosana vs Mathladi & ano. 1937 N.A.C. (T&N) 46 where the history of legal development in the Transkei is set out briefly and the trend of recent changes indicated; and W. Mhlongo vs J. Mhlongo 1937 NAC(N&T) 124 where the rules for solution of conflict of two systems of law were indicated and applied. Coupled with these cases are those of Magesi Mhlongo & ano vs Philip Sebeko 1937 N.A.C(N&T) 32, Ruth Matsheng vs Nicholas Phlamini & ano 1937 NAC(N&T) 89, Dikweza Kaula vs John Mtimkulu & ano., 1938 N.A.C.(N&T) 68 (which case deals with the position in Natal of a Native exempted from Native Law yet brought back into it for the purpose of a civil case "involving rights under Native Law to which he is a party") and K. Wenosi vs Sotemba 1942 N.A.C. (C&O) 55 which considered and applied the rulings in Nkosana's case.

In Nkosana's case the Appeal Court held that "where a transaction is known both to the Common Law & to Native Law, the Native Commissioner had a discretion in applying either law, but that discretion was a judicial ~~no~~ discretion, and could not be exercised arbitrarily. Commenting in this ruling in Mhlongo's case the Court said:—

"In exercising that judicial discretion the Native Commissioner is required by the rules of procedure to apply "the nearer and narrower law rather than the wider & more remote"—Holland, Jurisprudence, p. 400, 12th ed.

The Court went further & set out more fully the rules laid down by Van der Keessel in his "Select Theses" (Nos 6 to 25) for dealing with conflicting systems of law in his day (up to 1800 A.D) viz Roman & Roman-Dutch Law, and went on to show how they might be applied, mutatis mutandis, to the case of conflict between Native Law & Roman Dutch Law (See Mhlongo's Case).

The Application of Native Law

[Mokuna vs Matlabe & ano. 1937 N.A.C.(N&T) p. 42.

History of Application of Native Law in Cape Province

"With minor exceptions, in the Cape proper Native Law was not recognised at all. Certain favoured 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 Transkeian Native territories, however, native law was applied almost exclusively from the earliest times, and it was expressly provided in the annexation proclamations — section 23 of Proclamation 110 of 1877 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 Native Laws".

Some of the Cape Natives (even in the Transkei) were more advanced than others. To meet their case a tendency becomes noticeable in the decisions to emphasise the word "shall be dealt with according to the (common) law" in contrast ~~to~~ with "may be dealt with according to Native Law" See herein Willie Nguma vs Lenina Koni, 3 N.A.C. 252; Edward Tsipo vs Simon Letsobela, 4 N.A.C. 4; and other cases reported in the Transkeian Reports.

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

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

In 1923, on adapting the Union Magistrates' Courts Act of 1917 to the Transkei, the step was taken of recasting the enabling section in the annexation proclamations. Section 104 (1) of Proclamation 145 of 1923 reads:—

"Notwithstanding the provisions of the Annexation Acts, it shall be in the discretion of the Court in civil 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 by Act of Parliament or Governor's or Governor-General's proclamation".

It was said by the President in Nkomentaba vs Ntinde, S.N.R. 130 that this change entirely altered the basis of the application of Native Law and restricted it to questions of Native law. He illustrates by that case the result attained 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.

This doubtless explains Whitfield's dictum that "ordinarily, then, the Courts apply Common Law" (i.e. "South African Native Law") which comes strangely after his quotation from Holland's "Jurisprudence" that "the newer and narrower law will be applied rather than the wider and more remote".

It must be emphasised, as Nkomentaba's case shows, that the tendency was not a movement away from the body of Native Law but it was an endeavour to take the ~~civilised~~ advanced Natives out of the operation of Native Law once they indicated by the adoption of civilised custom that they impliedly abandoned native practices. They were to be precluded from the flesh pots of heathendom.

There is, in fact, a contemporaneous movement in the other direction in favour of emancipating the heathens from the ill-effects of Roman-Dutch Law as the Report of the Cape Native Affairs Commission of 1910 (see paragraphs 132 to 142) and legislation ensuing thereon (Proclamation 142 of 1910, Cape) indicate.

Be that as it may, the question arises whether the Cape tendency was carried over into the Union and endorsed by Act 38 of 1927, despite the adoption of the Transkeian version in section 11? Definitely not.

Section 11 of Act 38 of 1927

It (Act 38 of 1927) set up a system of Native Commissioners' Courts specially to deal with Native cases, and by section 11 it enjoined the application of Native Law subject to certain provisos and it deliberately entrenched the custom of lobola or bogadi, a custom which forms the basis of the native social structure as Mr Justice Mason has correctly pointed out in Mesadoosa's Case. (Mesadoosa vs Londo, 1915 T.P.D. 357)

Not content with this the Legislature has modified Roman-Dutch Law to meet the special conditions of Natives and to preserve their institutions, which strict application of Roman-Dutch Law destroyed. This is particularly so as regard to marriage and succession. (See Chapter V of Act 38 of 1927.)

Having done this it proceeded to set its seal on the Natal Native Code, an enactment designed especially to preserve and perpetuate Native Law & Custom which, in Natal, has been a guiding principle of the administration from the very infancy of that province.

In the Transvaal Law 4 of 1885 was intended to be an extension of the Natal system, as Dr Brookes shows in his work on Native Policy in South Africa. That law was emasculated 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 civilisation as adopted in civilised communities, in other words, in the substitution of Roman-Dutch Law for Native Law. It cannot be imputed to the judges of the Transvaal Court that they were deliberately endeavouring to "civilise" Native Law by subverting it to Roman-Dutch Law. On the contrary, the remarks of the learned Judge in Mesdames case indicate the very opposite.

Nevertheless this trend of judicial opinion and its outcome was completely reversed by the Legislature in 1927 by the preservation of Lobolo. In the Transvaal especially, then it can be said that the policy of the Legislature has been clearly that Native Law must be restored.

Re interpretation of section 11 of Act 38 of 1927

[Mokoena vs Matladi & ano. 1937 NAC(N&T) p. 44.

Proceeding to interpret section 11 of Act 38 of 1927 in the light of the foregoing remarks, we must formulate the jurisdiction as follows:-

The Native Commissioner is empowered to apply two systems of law: -
(namely the Common Law (Roman Dutch Law) or Native Law

1. In some cases which comes before a Native Commissioner for decision the cause of action is one known to both systems of law, Roman-Dutch & Native.
2. In some cases the cause of action is known only to Roman Dutch Law or only to Native Law
3. In regard to 2, the Native Commissioner is required by the decision in Charles Mngubayo vs William Mantalo 1929 NAC.(C&N) p. 73 to apply that system of law which provides a remedy.
4. In regard to 1, a discretion is vested in the Native Commissioner by section 11. Now a discretion implies a choice of action. It is to be exercised judicially and not capriciously, but it can be exercised (Jacob Mbobela vs Jeremiah Poolo 1930 NAC (N&T) 13.

Now what is the choice given the Native Commissioner? Is it 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 court it is unconceivable that the Legislature intended the choice to be the former, viz whether to apply Native Law or to reject it and refuse to hear the case. As indicated in the foregoing comments on policy, this clearly 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 Common Law to the exclusion of Native Law. If anything, the rule announced by Holland would give preference to Native Law as indeed Natal practice has established. For these reasons this Court cannot endorse the decision of the Cape and Orange Free State Division in the case of Ngangezi vs Mangobeta 1930 NAC(C&O), p. 13. that Roman-Dutch Law must primarily be applied, and it must hold that in the absence of proof 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 Law & to Roman-Dutch Law.

It follows also that the contention that a defendant can refer the Native Commissioner by plea to apply one or other system is untenable. He has a discretion and can exercise it. Actually this Court is not able to read into the judgment relied upon for this proposition any such interpretation (James Roba vs Jones Mtwalo 1932 NRC(N&T) 58.

Principles of Natural Justice

Morma vs Matladi and ano. 1937 N.A.C. (N&T) p. 45.

"Dealing with the ground 4 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 ethics of one community to another and especially avoid fallacious 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 Counsel that this Court should reverse in the name of public policy or natural justice a well established Native custom does not commend itself to the Court. It cannot usurp the functions of the legislature.

The apposite remarks in the case of Dunaletshona vs Mraji, 5 N.A.C. 166 are directly in point here "Until the proper authorities are satisfied are cannot that the time has arrived when various widely recognised customs, which are practised daily by the Native tribes (eg. polygamy, ukuthwala, ukungena, etc.) which admittedly fall short of civilised standards, should be abrogated, this 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 crystallised into law (by native usage)"

[Morma vs Matladi and ano. 1937 N.A.C. (N&T) p. 45]

The Native Commissioner's Discretion

Mhlongo vs Mhlongo, 1937 N.A.C. (N & T) 124 —

re Money Loan the Native Commissioner ruled that "the case must be decided under common law" and he upheld a plea of prescription on the ground that "a money lending does not involve Native law & custom for money is unknown to Natives especially as interest can be claimed on such transactions and interest is unknown to Native Law & Custom". His attention was drawn to the decision of this court in Nkomo vs Mafukeda but he distinguished the present case from the decision in that case. There it was held that where a transaction was known to both the common law and to Native law the Native Commissioner had a discretion in applying either law, but that discretion was a judicial discretion and could not be exercised arbitrarily. In exercising that judicial discretion the Native Commissioner is required by the rules of procedure to apply "the more and narrower law rather than the wider and more remote" — Holland, "Jurisprudence", p. 400 10th Edition.

The rules are set out more fully in Van der Keesel, "Select Theses Nos. 6 to 25 in dealing with conflicting systems of law in his day viz Roman-Dutch and Dutch Law. There enumerated are:—

(a) In every province, town or district that law should before all others be resorted to which is proper to that place and has been expressly promulgated or formed for it by the legislature.

(b) The special customs also which have been adopted in any place or city ought to be observed there.

(c) On those points of Roman Law which have been expressly adopted into Dutch law we should have recourse at once to Roman Law.

(d) When a question arises as to the interpretation of any Rule of Dutch Law, especially concerning an extensive or restricted interpretation every such law ought to be explained from its original source.

(e) If the principles of the Roman Law and those of the Law of Holland have been intermixed in any statute, such a mixed law should be interpreted each part from its own proper source. — See van der Linden, 1.1.4

These rules were framed to solve 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 positions caused by parallel systems of law in this country i.e. Native law & Common law. It is true that the conception of subdivision is not attached to one or the other of these systems and the analogy may not be complete. Nevertheless it is the manifest 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 transaction conducted by them. He cannot, as in the present case, arbitrarily rule that ex facie the remains a money transaction as obviously unknown to them. This reasoning is illogical since money is in itself only a token and among Natives other articles served as tokens before contact was made with Europeans e.g. ivory, brass rings, hoes etc.

It has already been ~~described~~ indicated that the environment of the parties is not the criterion in ascertaining the law applicable (See Rex N'kunalo vs Charles Ngubane 1932 NAC(N+L) 32)

The nature of the transaction should be the test. If for instance a lobolo is paid in money as is frequently done nowadays, the transaction remains a contract in Native law and enforceable as such. Objection to a plea of prescription cannot hold good in such a case.

Now the contract of loan is one which the Natives have practised from time immemorial — it includes the well known custom of "sesa", otherwise known as "ngoma" or "khopsa", and a loan of a beast or the equivalent for lobolo is as well known and frequently practised. If it should happen that under this custom one man advances another a sum of money to another to enable him to complete a lobola being paid in money it is difficult to contend that the transaction has thereby lost its original nature viz a loan under native custom. On the other hand it is known that Natives practise commerce and engage in transactions in contracts which are purely everyday Common law dealings. Such undoubtedly would fall under the statutory rules of prescription. It is in ascertaining these distinctions that the Native Commissioner must use his discretion and use it judicially.

The Application of Native Law in the Transvaal

Ruth Matsheng vs Nicholas Dhlamini and 1937 N.A.C.(N&T) 89.

"The attitude of the legislature towards Natives & 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 natives were placed in a category separate from the Europeans and they were permitted no equality either in the system of law applied to them nor in regard to the courts to which they were accorded access in civil matters.

Article 9 of the Grond Wet of 1858 specifically excluded equalisation between the races in Church and State and although the instructions to Field Cornets approved by Volksraad Resolut on 17th September 1858 provided in section 49 that the Native Chiefs & their subjects were subjected to the laws of the land, this must be read as referring to penal 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 enforced. This distinction was emphasised by excluding access to the High Court of the land by natives in cases between themselves. It is the Shepstonian conception of legal segregation successfully adopted in Natal and imported into the Transvaal in annexation in 1877.

A proclamation dated 18th May, 877, 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 1885 by Law 4 which law continued in full force until repealed it was repealed by Act 38 of 1927, the only change being in 1907 when the Supreme Court was first given jurisdiction to hear such cases on appeal.

As indicated in the judgment in Magato Kilborgo's case (supra) the whole object of Act 38 of 1927 is the preservation of the native system of law and social organisation for that Act, not only entrenches the system of lobolo, but reverses the inroads made by the application of common law rules in succession and marriage, but above all gives frank recognition to native law in areas like the Cape Province proper where it had never been recognised.

Any doubt as to the law applicable to Natives is removed by Law 4 of 1885 section 2 whereof ~~states~~ directs that "The laws habits and customs hitherto 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 civilisation recognised in the civilized world." By section 4 it is provided that "all disputes of a civil nature between natives shall

be dealt with according to the provisions of this law and not otherwise and in accordance with native laws at present in use and for the time being in force, in 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 conferring on commissioners and sub-commissioners of natives "the powers conferred and the duties imposed on them by Law 4 of 1885.

Native Law was recognised 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 Witwatersrand district at Johannesburg, directs that "any 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 proceedings shall be dealt with according to the laws & customs applicable to the defendant." This provision forestalled the change brought about by Act 38 of 1927 but neither that Act nor this provision can be accepted as amending the rule of native law that a female cannot sue unaided. There is no indication in any other law that this was the intention of the legislature.

Interpretation of Section 11

Kelane Warozi vs Mabhulo Zotimba, 1942 NAC (COO) 55

"Section eleven(1) of Act 38 of 1927 provides that it shall be in the discretion of Courts of Native Commissioners in civil 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.

In his reasons for judgment the additional Native Commissioner states "In deciding whether the case should be tried under Native custom or common law, the Court was guided by the judgment given in the case of Nelson Mkhonto vs Jeremiah Mkhonto 1937 NAC (N&T) 124. In that case it was stated (p. 126) 'On the other hand it is known that Natives practice commerce and engage in transactions in contract which are purely every day common law dealings. Such undoubtedly would fall under the statutory rules of prescription. In the present case the alleged loan was made for the purpose of paying a debt due to a European store not connected in any way with a transaction under native law custom. In these 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 recovery of money loaned. The report does not indicate for what purpose the money was borrowed so that it cannot be assumed that it was, for example, for the payment of dowry. In the paragraph immediately preceding that quoted by the Additional Native Commissioner the Court stated:— "Now the contract of loan is one which the Natives have practised from time immemorial — it includes the well known custom of "xoa", otherwise known as "ngoma" or "mopisa", and the loan of a beast or the equivalent for lobolo is also well known and frequently practised. If it should happen that under this custom one man advances a sum of money to another to enable him to complete a lobolo already paid in money it is difficult to contend that the transaction has thereby lost its original nature, viz a loan under native custom". The Court, of course, did not pretend to give an exhaustive list of the purposes for which loans were made between natives. They used to borrow from one man in order to pay a debt to another. It cannot, I think, be seriously contended that if defendant had incurred a debt to another native & borrowed cattle to pay it that the claim for the

repayment of that loan would have to be heard under common law and that prescription would run. The fact that the loan was of money instead of cattle would not affect the position, for, as was said in Mbilongo's case (supra) money is in itself only a token. Nor would the fact that in the present instance the debt was due to a European have the effect of removing the transaction as between the parties out of native custom. It was said in Mbilongo's case the nature of the transaction should be the test. If, for instance, the money had been borrowed for the purpose of setting up a commercial business, then it would clearly not be one made under native custom and common law would apply.

The Cape & O.T.S. Division of this Court in this case of Nganonyi vs Mangoloti Nyakatini, (1930 N.A.C. (C&O) 13 laid down that in transactions common to both Roman-Dutch law & Native custom, the Roman-Dutch (common) Law should be primarily applied and native custom resorted only in matters peculiar to Native custom falling outside the principles of Roman-Dutch law. In the case of Nomina No. vs Matladi (1937 N.A.C. (N&T) 40 the Transvaal & Natal Division of this Court went very fully into the question as to what system of law should be applied & disagreed with the decision in Nganonyi's case (supra). The Court decides, with respect, to intimate its agreement with the decision of its sister Division in Nomina's case for the reasons given therein.

If the present case had been one merely for recovery of the amount originally lent this Court is of opinion that in the exercise of this discretion the Native Commissioner should have applied native law and custom and dismissed the special plea of prescription. The plaintiff has herself, however, taken the case out of native law & custom: ~~and by~~ by claiming interest at 6% per annum which is quite foreign to native custom. In these circumstances he cannot complain if defendant takes advantage of a system of law which he has himself invoked.