TRADITIONAL AND MODERN LAW OF PROCEDURE AND EVIDENCE IN THE CHIEF'S COURTS OF THE CISKEI

A DISSERTATION SUBMITTED TO RHODES UNIVERSITY

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LIST OF ABBREVIATIONS USED IN REFERENCE

ACCC :

Appeal Court for Commissioner's Courts Reports. The first Native Appeal Court was established in the Transkei and the reports of its decisions from 1894 to 1928 are in six volumes. These decisions are quoted as follows : Tafeni v Booi (1917) 3 NAC 41.

After the establishment of the special courts for Blacks in South Africa in 1927 two divisions of the Native Appeal Court were created in 1929; one with the jurisdiction in the Cape Province and the Orange Free State and the other with jurisdiction in the Transvaal and Natal. References to these divisions are indicated as follows : Dyasi v Dyasi 1935 NAC (C & O) 9; Mokgatle v Mokgatle 1946 NAC (T & N) 82.

A further change occurred in 1948 when three divisions, e.g. a Southern Division, Central Division and North Eastern Division were created. The reports of each division were published in separate volumes. With the exception of Central Division in each case one volume covered the period 1948-1951 e.g. Sibiya v Sibiya (1949) 1 NAC (NE) 61, Ntsimango v Ntsimango (1949) 1 NAC (S) 143; Tzanibe v Tzanibe 1950 NAC (C) 34.

In 1952 the reports of all Native Appeal Court were consolidated and each volume contains the decisions for a year e.g. Ngxolo v Samuel 1954 NAC (S) 40; Zulu v Zulu 1957 NAC (NE) 6.

A change of nomenclature of the Native Appeal Court occurred since mid-year 1962 and the new designation for these courts was Bantu Appeal Court. In 1978 the name Bantu Appeal Court was changed to Appeal Court for Commissioner's Courts in terms of the Second Black Laws Amendment Act No.102 of 1978.

ALLOTT :	Anthony Allott M.A., Ph.D, Professor of African Law, School of Oriental and African Studies, University of London.
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..... 1970 (1)	New Essays in African Law Butterworths, London, 1970.
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A.Y.B :	Archives Year Book.
BEKKER AND COERTZE :	Bekker and Coertze : Seymour's Customary Law in Southern Africa by J C Bekker, B.A., LLD., formerly Professor of Law and Director of the Institute for Public Service and Vocational Training, University of Zululand and J J J Coertze, Senior Law Examination, Juta and Co., 4th ed 1982.
BEKKER:	J C Bekker B.A., LLD., formerly Professor of Law and Director of the Institute for Public Service and Vocational Training, University of Zululand.
..... 1981	"The future of Indigenous Courts in Southern Africa" in A.G.M. Sanders (ed) Southern Africa in need of Law Reform. Butterworths, 1981.
BENNETT:	T.W. Bennett, B.A., LLB., (Rhodes) Ph.D., (Cape Town)
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BROWNLEE : Honourable Charles Brownlee, Gaika Commissioner, Reminiscences of Kaffir Life and History. Lovedale Mission, 1896.

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BURMAN : Sandra Burman Chiefdom Politics and Alien Law : Basutoland under Cape Rule 1871 - 1884 Macmillen Press Ltd., 1981.

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CHIMANGO : L J Chimango.
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CILSA: Comparative and International Law Journal of Southern Africa, University of South Africa, Pretoria.

COMMISSIONS : The reports of the Commissions are divided into sections. The pages of the Reports, minutes and of the Appendices are numbered separately and will be quoted as follows : "1883 Comm., Section 108 p.40 is a reference to section 108 of the Commission's Report found on page 40 of the report. "1883 Comm., 6560 p.368" is a reference to Question No.6560 and it's answer, Minutes of Evidence of the 1883 Commission to be found at page 368 and "1883 Comm., App. C. p.59, A3 is a reference to the answer to No.3 found on page 59 of the Appendices to the 1883 Commission Report. In the text the following Commission Reports are dealt with :

1883 Comm : Report and Proceedings, with Appendices of the Government Commission in Native law and Customs 1883 (Cape) G.4 of 1883 and 1903-5 Comm : Report of the South African Native Affairs Commission 1903-1905, with Minutes of evidence and Appendices.

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KOTZE : — J J Kotze.
Marital privile ge and the competence and compellability of Customary Law spouses as witnesses against each other (1983) 7 SACC 162.

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..... 1981	Internal Conflicts (1981) 98 SALJ 232
SOGA	Rev John Henderson Soga. The Ama Xhosa : Life and Customs. University of Witwatersrand University, Press, 1931.
SOGA	T B Soga Intlalo ka Xhosa. Lovedale Press, 1974.
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SALJ	South African Law Journal. Juta and Co. Cape Town.
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GLOSSARY OF XHOSA WORDS AND PHRASES

Amawele	-	twins
Amatyala	-	cases
Amatyala esizi	-	criminal cases
Amatyala embambano	-	civil cases
Amathole Ogaga	-	Most Senior Councillors of the royal family
Amaphakathi	-	Chief's Councillors
Isigqeba Samaphakathi	-	A Council of Councillors
Icongwane	-	A portion of beef taken from the hind leg
Ikhazi	-	dowry cattle
Intlonze	-	something taken from the wrongdoer to be used as evidence in court e.g. an article of clothing from the fleeing adulterer.
Ukuthuka	-	to insult
Isiko	-	Custom
Impuku	-	mouse
Umncwini	-	interrogator or person who leads the evidence of the parties at a tribal hearing. Sometimes he is called Umtshutshisi meaning a prosecutor.
Ukuncwina	-	examine closely
Inkundla	-	Court
Umsila wenkundla	-	Messenger of the Court
Ukudela inkundla	-	Contempt of Court
Inkundla yewilowo/ inkundla yamakhaya	-	Family Court or family Council
Ingqithi	-	tip of a finger
Ukwananisa	-	to give in exchange

INTRODUCTION

In this thesis it is intended to show, among other things, the evolution of the Ciskeian traditional African Court practice and procedure from the time of the advent of white rule up to the present day. In chapter two we show the manner in which the various Cape Governors tried to suppress the traditional court system and law by superimposing western type law and norms (repugnancy clause) on the unwilling African population.

The case law discussed in chapter 3 clearly shows the problems that arose and which to a large extent, still arise in the application of the Chiefs' Civil Courts Rules. Non-compliance with these rules reveals the need both for the training of the personnel of these courts and reform of the rules governing the Chief's courts. The areas that need urgent attention have been identified and the necessary recommendations have been made.

In the opinion of the present writer a matter that causes concern is the non-access of the Chiefs and their Councillors to the legal sources pertaining to their courts, for example, text books and relevant legislation. This is evident from the manner in which the Chiefs disregard the law governing both the civil and criminal jurisdiction of their courts. The relevant legal sources are discussed in Chapter one. Here the present writer shows the relevance of these sources to the Chief's Courts of Ciskei.

In Chapter four the problem of the legal nature of banishment orders is considered with a view to highlighting the need for the reform of the law relating to the banishment of the individuals from tribal areas.

In Chapter five the controversial question of the legal status of customary criminal law is raised and discussed.

The case study in Annexure A shows beyond doubt that there is a great deal of activity in the Chief's Courts and that, these courts still have a role to play. It is also the present writer's considered opinion that, any evaluation of the usefulness of the tribal courts should take into account the cultural differences between the western type law received in the Ciskei and the indigenous customary law bearing in mind that indigenous African courts are not manned by trained jurists. Any criticisms levelled at these courts should be seen in this light. *

In chapter 6 the indigenous court structure in the Ciskei is compared with the position in other independent Black states in Southern Africa.

Finally the problem of internal conflicts is considered in the light of the decided cases and the views of academic writers.

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* See in this connection Wood 17 at 21 and Sutner 1968 : 435 - 452. Contrast with comments by Sutner 1974 : 268.

RESEARCH METHOD

This study is based on the research work the writer conducted in the Republic of Ciskei which consisted in court visits to some tribal authorities where the writer observed the cases tried by the chief's courts. The writer also had interviews with the leading traditional leaders who are conversant with the traditional court system. An opportune moment presented itself when the writer conducted some short courses for Chiefs and Headmen at Zwelitsha Community Hall during March 1984. After lectures interviews were held with the Chairmen of the tribal Authorities and some of their councillors on some aspects of the research work.

The writer also visited the various Magistrate's offices of the Ciskei to see the cases registered in the Chiefs' Civil Record Books. The clerks of court in charge of the respective Record Books were very co-operative.

The research programme started in 1980 when the writer received a grant from the Research Division of the department of Co-operation and Development.

CHAPTER 1

SOURCES OF THE TRADITIONAL LAW OF PROCEDURE AND EVIDENCE OF THE CHIEFS' COURTS IN THE CISKEI

In this chapter an attempt is made to show the relevance of and extent to which the legal sources can be of use to the Chiefs' courts in the Ciskei. If courts of law are to function properly and with confidence it is necessary that provision should be made for authoritative source material which will serve as a guide to them. The discussion that follows is made with that objective in mind.

During the Tribal Court visits in some areas of the Republic of Ciskei the present writer explained to the Chiefs and their Councillors that the ultimate purpose of the research was to produce an authoritative source of reference which could be of use to the Chiefs and their tribunals. The writer was thrilled at the response of the Chiefs : most Chiefs interviewed held the view that there was an urgent need for that kind of source material to serve as a guide to the Chiefs' Courts. One Chief went further and pointed out numerous problems they encounter as a result of non-access to authoritative reference sources - He also pointed out that the Chiefs and their Councillors would greatly welcome any kind of reference source which should preferably be in Xhosa language.

At present the Chiefs do not make use of legal sources when hearing cases brought to them. However, the present writer established, during the course of the Court visits, that some enlightened Chiefs do make use of the textbooks on African customary law, albeit privately. It is hoped that in the future Chiefs will be in a position to openly use legal sources in their courts. The University of Fort Hare law school, at the request of the Ciskei Department of Justice, is presently conducting short courses for Chiefs and Headmen on some aspects of African customary law. These courses are conducted in Xhosa. In these courses we also cover the need to consult the relevant legal sources which are at the disposal of the Chiefs such as legislation which is also written in the Xhosa language.

The following are the important sources of indigenous law of procedure and evidence : Custom, precedent, legislation, Commission Reports and works of textwrites. These sources will be fully considered below :

(a) Custom

Both the Black Administration Act No 38 of 1927 as amended and the rules governing the Courts of Chiefs and Headmen enjoin the Tribal Courts to proceed in accordance with the laws and customs followed by their respective tribes when hearing cases brought to them. [1] This constitutes the statutory sanction of the so-called chief-in-council procedure, the customary law right of the members of the audience to participate in tribal litigation, the free system of evidence etc. A litigant's failure to comply with the recognised customary procedure renders his evidence suspect. [2] There is much to be said for the recognition of the customary law system of procedure as it is a form of procedure the Chiefs and their Councillors are well acquainted with. This commendable approach also takes account of the fact that custom is the main source of indigenous law as it was an unwritten law.

Thus Mr Justice N A Ollennu, the former judge of Appeal Court in Ghana says that it is a well established principle that customary law, being of an unwritten source, resides in the breasts of the traditional elders of the locality whose law it is. Therefore a declaration of that law made by a local court constituted by traditional elders is an authoritative pronouncement binding even on the superior courts, unless disqualified under the principle of repugnancy or where a superior court has previously made a pronouncement on the issue after a proper inquiry into the nature and content of that customary law. [3] In South Africa and the independent National states courts of law are reluctant to interfere with the procedure followed in the Chiefs' Courts. [4] It is only when it is

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1) See S S 12 and 20 of the Act read with rule I of the rules of Chiefs' and Headmen's Civil Courts. See also S 40 (3) of the Ciskeian Administrative Authorities Act No 37 of 1984 as well as S 10 of the Regional Authority Courts Act No 13 of 1982 (Transkei).

2) Bilitani v Kwini 1962 NAC (S) 8 at 9; See also Mapikata v Mpelisa and Mgwebi 1940 NAC (C & O) 160 where the court found that the evidence of the plaintiff showed a complete departure from the Native custom.

3) (1967) II JAL 73; See also Allott 1968 : 30

4) See Makapan v Khope 1923 AD 551 at 561-562

clear that the court has flouted the traditional court procedure that the proceedings of the Tribal Court will be set aside. [5]

Before a custom [6] can enjoy legal recognition it should satisfy the following tests :

(i) It must not conflict with the fundamental principle of the Common law. In this sense Common law should be understood to mean "the non-statutory law of whatever system is in question". [7]

For instance we distinguish between general custom which can be regarded as the common law of the tribe in question and particular or special customs [8]

The above distinction has received judicial sanction. [9]

(ii) It must have existed from time immemorial. Palmer and Poulter are of the view that there is no necessity for the requirement that a custom should be long established or that it should have existed from time immemorial since this would have the effect of refusing to recognise the progressive development of customary law. [10]

(iii) It must be certain;

(iv) It must be reasonable. [11]

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5) See Masenya v Seleka Tribal Authority And Another 1981 (I) S A 522 (T). This case is noted by Professor A J Kerr in (1981) 98 SAL J 320.

6) As to the meaning of a custom as distinguished from a mere social habit see Kerr 1976 : 17-18.

7) See Kerr 1958 : 86

8) See Kerr 1976 : 18-19.

9) See Sikwikwikwi v Ntakumba (1948) 1 NAC 23. This case is noted by Kerr 1976 : 19; 1958 : 95.

10) Palmer and Poulter 1972 : 120.

11) See also Kerr 1976 : 19-21

(b) Judicial precedent

The notion of precedent refers to the practice whereby courts of law take cognizance of previous decisions based on facts which are similar to the facts of the case under consideration. It is often said that the system of precedent presupposes the grading of courts according to certain levels of authority and works well in a court system where the records of the judicial proceedings are kept. [12] The keeping of case records serves to ensure the reliability of precedent. The absence of writing in pre-colonial Africa meant that the traditional African courts were not courts of record. This again meant that precedents of long ago are likely to be forgotten or that there may be conflicting assertions about what a previous case really decided. However, precedent is one of the important sources of customary law. According to Soga [13] in the olden days precedent was resorted to in intricate cases on some obscure point.

The rationale is to avoid hasty judgement lest wrong decision should unfavourably affect the prestige of the law. This practice is clearly illustrated in the well known case of twins in Mqhayi's Ityala lamawele. [14]

This case involved a dispute over seniority between the twin brothers and the youngest twin sought to succeed to both status and property of their deceased father over his elder twin brother. The claim was based on a number of grounds : He stated, inter alia, that he ought to be the heir to his father's kraal because his twin brother had surrendered his position when he exchanged it for a bird which he (the younger twin brother) had killed sometime previously when the two brothers were both tending livestock in the veld.

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12) Hosten et al 1980 : 225.

13) Soga 1932 : 41; see also the 1883 Commission, Section 8 p.14

14) This case is well known to the Xhosa-speaking people and was decided at Butterworth during the reign of King Hintsa. It is said that it was presided over by King Hintsa himself. See Mqhayi 1914 : vii.

He also alleged that he had received his home ritual (ISIKO LAKOWABO) of cutting the tip of a finger first (ingqithi). He also claimed that he was circumcised first at their circumcision ceremony. On the evidence before court it appeared that the birth of these twins was rather unusual in that one of the twins had his hand protruding instead of the normal birth of head first. It seems that when the hand made its appearance one of the mid-wives cut the tip of one of the fingers and it immediately retracted and that was how the youngest twin brother came to be the first to observe the custom of cutting the finger. This is a well known practice among the Xhosa tribes. When the case was dismissed by the court of the Headman which sat as a court of the first instance, an appeal was noted to the court of King Hintsa who, after a brief hearing adjourned the case to enable the court to look for precedent on the matter. To this end the King sent men to fetch a well-known sage Khulile Majeke at Nqabara Location in Willowvale district. When the hearing resumed Majeke was called to give evidence after having been briefed on the matter. He quoted a similar case in the Xhosa legal history which also involved a dispute between twin brothers. In that case Nkosiyamntu, the youngest twin had also claimed seniority over his elder twin brother called Liwana. He also alleged that he had "bought" the right from his twin brother who had also surrendered it in exchange for a piece of meat called icongwane in Xhosa. Majeke testified that the tribal elders who considered the matter decided the issue in favour of the youngest twin as the other twin had relinquished his position by means of exchange. In their own words the elder brother had sold his seniority (ubukhulu bakhe ubananisile). Despite the expert witness's expression of opinion that seniority does not always depend on priority of birth but on the person's deeds or actions pointing to his maturity the court did not feel persuaded to alter the decision of the court a quo: which was a judgement of absolution from the instance because the court said that the plaintiff had brought a frivolous action and was wasting time; instead the twin brothers were advised to co-operate with each other on all kraal matters.

The above case shows that although precedent was known in Xhosa law it was not rigidly applied.

In the present writer's opinion precedent should by and large be followed but courts should be on the lookout as to the changes in the law. For example if it appears that an old rule has changed, the court should apply the new rule if on its investigation it is satisfied that such a change has in fact occurred. In Sikwikwikwi's[15] case Sleigh (P) stated the position as follows : "If a variation of the custom is suggested this Court must be satisfied that this variation has been freely, frequently and consistently observed over a long period, and is just and reasonable".

As litigation in the independent National States will undoubtedly grow it will be extremely necessary, both for the benefit of lawyers dealing with appeals from these courts either to the magistrates' courts or Supreme Court and also for the benefit of these courts themselves, to keep a complete record of the proceedings of tribal courts. Already in the Republic of Transkei the newly created Regional Authority Courts are said to be courts of record.[16] Even a Chief's court is enjoined to maintain "a register in which shall be recorded particulars of all civil claims heard by him".[17] Proper keeping of complete records of judicial proceedings in the Chief's Courts would enable each independent National State to produce its own volumes of African law reports which could be helpful to researchers on indigenous law. It is noted with interest that at an early stage of colonial rule, the British Government sponsored the individual series of reports for many of the African territories.[18]

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15) Sikwikwikwi v Ntakumba (1948) 1 NAC 23 at 24

16) See rule 4 of the Regional Authority Courts Rules promulgated in Government Notice No.224 of 22 November 1982.

17) Rule 2 of Proclamation No.11 of 21 September 1984. Rule 9 of the said Proclamation requires a chief to maintain a register of criminal trials.

18) See further Milner 1967 : 151

(c) Legislation

Legislation is one of the important sources of customary law. Unlike in Botswana where there is a great deal of tribal legislation [19] instances of tribal legislation among the Xhosa-speaking people are few and far apart. Professor Kerr mentions the example of Kreli (Sarili)'s legislation which directed that on the death of a spouse no cattle should be recoverable. [20] Hammond-Tooke [21] says that among the Mpondomise of Tsolo district in the Transkei his informants found it difficult to cite cases of true law making from the past.

However it seems that in the future legislation may become a very important source of customary law particuarly if the Chiefs and their Councillors are given the necessary training. During the short courses for Chiefs and Headmen the present writer established that some Chiefs are not aware that tribal authorities have a law making function. In the Ciskei the law-making power of the tribal authorities is governed by the Administrative Authorities Act No. 37 of 1984 which provides as follows :

"Subject to the provisions of Section 19, a tribal authority may make bye-laws -

(i) for regulating the procedure and preserving order at meetings of the authority or of any Committee thereof, including any bye-law providing for the exclusion of any councillor or other person from any meeting on the grounds of disorderly conduct;

(ii) prescribing fees for any service rendered by the authority or rates payable by any class of persons in respect of services made available by the authority; and

(iii) generally in regard to any matter failling within its competence under sub section (1).

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19) See Schapera 1943 : 26-100; Hammond-Tooke 1975 : 67

20) Kerr 1976 : 16

21) Hammond-Tooke 1975 : 66

A bye-law may prescribe a penalty for any contravention thereof or or failure to comply therewith not exceeding a fine of fifty rand". S 4(2)(a).

Subsection 4(1) refers to a long list of matters dealing with tribal administration. It is important that there be a quorum before an important business can be transacted or decision can be taken. In terms of S 5(4) the nearest whole number exceeding one third of the total number of councillors of the authority shall form a quorum. Another important procedural requirement is that the chairman of the tribal authority should give notice to every councillor and to the magistrate -

"(a) of the place, day and hour appointed for ordinary meetings, and every councillor shall be obliged to attend such ordinary meetings without further notice; and

(b) of the place, day and hour of any special meeting and shall specify the purpose thereof ..." S 5(6).

The present writer agrees with Professor Allott that legislation is going to be a very important agent of change in Africa if the efforts by the African Governments to improve theirlegal systems continue unabated. [22] There is, for example, in the words of Mr Justice Ollennu, the big question of law reform which may take the form of codification, revision of old statutes and the enactment of new statutes either to replace old ones or to meet new situations created by the social, economic, political and cultural revolution in progress all over Africa. [23]

The most important piece of legislation in so far as Chiefs' Courts are concerned is the Administrative Authorities Act No.37 of 1984 as it repeals most legislation pertaining to Chiefs and

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22) See Allott 1968 : 3-4

23) See Ollennu 1967 : 74

Headmen in the Ciskei, namely the Black Administration Act No.38 of 1927 as amended especially "sections 5(1) (b), 12, 20, 21, 21A, 35, Second Schedule and Third Schedule", Ciskeian Authorities, Chiefs and Headmen Act No.4 of 1978; Authorities, Chiefs and Headmen Amendment Act No.31 of 1983 and the following Proclamation :

(i) Proclamation R 45 of 1961
(ii) Proclamation R191 of 1968
(iii) Proclamation R 197 of 1971
(iv) Proclamation R110 of 1972

Another important enactment which has been retained is Proclamation No.188 of 1969 which still regulates land tenure in the country. As this piece of legislation deals among other things, with the occupation of land in rural areas it is very important to Chiefs as the allocation of tribal land for residential and other purposes is the responsibility of the tribal authorities. [24]

Proclamation No.188 of 1969 is fully discussed by Professor Kerr. [25]

It is interesting to note that the Native Appeal Court in the past did not hesitate to take cognizance of changes made to customary law by the Chief-in-Council. [26]

(d) Commission Reports

The most important Reports are those of the 1883 Commission as well as the 1903 - 5 South African Native Affairs Commission. These reports contain useful information on the law relating to procedure in the Chief's Courts as well as the jurisdiction of the Chief's Courts especially as regards the legal position during Sir George Grey's period of administration.

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24) S 4(1) (a) of Act 37 of 1984.

25) See Kerr 1976 chapter X.

26) See Nzakana v Dingindawo 1943 NAC (C&O) 12, Sigcau v Sigcau 1944 AD 67. Both cases are noted by Kerr 1976 : 27 - 28.

Extracts from these reports are dealt with in chapter two below.

(e) Legal Writing

Under this heading one can include such diverse sources as the anthropological works on customary law, articles and notes in the law journals as well as the legal textbooks dealing with the subject. The full particulars of the author of a textbook have been omitted here as they have been given in the list of abreviations used in Reference at page I.

In the 1958 issue of Journal of African Law a mention is made of the fact that in 1958 the study of African law in Africa had reached its centenary as it began with the publication of a Compendium of Kafir laws and customs compiled by the direction of Colonel Maclean in 1858. Maclean's Compendium, which was originally intended for use by the magistrates in British Kaffraria, deals with the Xhosa law of the Ciskei. Other important works include in so far as the Ciskei is concerned the following :

The Customary law of Immovable Property and of Succession 2nd ed. by Professor A J Kerr.

This is a combination of two previous publications by the same writer : The Native Common law of Immovable Property in South Africa published in 1953 and The Native Law of Succession in South Africa published in 1961.

Professor Kerr's book covers most of the topics dealt with in this thesis, for example, Chapter III on "Types and Sources of Customary law" chapter VI on the legal position of the Chief over land.

Nowadays the allocation of tribal land is done by Chiefs and Headmen on behalf of the tribal authority and cases dealing with tribal land are taken to the tribal Authorities. The book also covers such interesting topics as ukubhuqisa, imilimandlela and stratas which are frequent cause of friction

especially during the ploughing seasons. The Chiefs and the magistrates might find the book a very useful source in dealing with land disputes.

Customary law in a Changing Society
by Professor Digby Siqhelo Koyana

Professor Koyana's book provides another important source material - of importance to the thesis are the following chapters : Chapter 6 dealing with the process of changing the law particularly the role of Chiefs and Headmen and the people and chapter 7 on courts and the Court structure and Chapter 8 on the law relating to land. It seems that the writer has first hand information on most issues he raises in the book.

The Civil Practice of All Courts for Blacks in Southern Africa 3rd edition by J A M Khumalo is the first book on African law to the writer's knowledge to be published by a Black lawyer. Professor Koyana in a Preface to his book says that Khumalo's book inspired him to produce his own book. As the title of the book indicates, Khumalo deals mostly with the law as applied in the Chief's Courts as well as the Special Customary Civil Courts in South Africa. The chapter on the Chief's Courts rules is very informative.

Die Privaatreg Van Die Suid Afrikaanse Bantoetaalsprekendes 2nd edition by N J J Olivier, N J J Olivier (Jnr) and W.H Olivier appeared in 1981. The first edition was published in 1969. The book covers most aspects of customary law of the Nguni tribes. It also deals with the Chief's Courts. It is one of the leading works in customary law.

Seymour's Customary Law in Southern Africa

4th edition by Professor J C Bekker and J J J Coertze (1982). This book is regarded as a standard work on customary law of the Cape Nguni and has been frequently quoted in the reports of the Appeal Court for Commissioners' Courts. As the authors indicate in the "Preface to the Fourth Edition" Seymour's book went through three editions.

On Xhosa law of procedure the following are other important sources :

Intlalo Ka Xhosa by T B Soga;

ltyala lamawele by S E K Mqhayi and the Ama-Xhosa; Life and Customs, by the Rev John Henderson Soga. These works have been referred to in this thesis.

Recommendations

With regard to this chapter it is recommended that an effort be made by the relevant Government Department to familiarise the Chiefs and their Councillors with the relevant legal sources pertaining to their courts. These sources can be made easily accessible to the Chief's Courts through translation into vernacular language. The Faculty of Law of the University of Fort Hare can play a useful role here through, inter alia, holding short courses for Chiefs and Headmen on the relevant aspects of Customary law. Already during March 1984 a short course for Chiefs and Headmen was organised by the Department of Justice and was succesfully conducted the Faculty of Law.

CHAPTER 2

HISTORY OF THE JURISDICTION AND THE LAW OF PROCEDURE AND EVIDENCE IN THE CHIEFS' AND HEADMEN'S COURTS IN THE REPUBLIC OF CISKEI

This chapter will be divided into four parts. Part A is an exposition of the traditional customary court structure and jurisdiction of the various tribal courts before the advent of the White rule. It also covers the customary court practice.

Part B deals with the effect of the White rule on the customary court system and the law from 1806 to 1927.

Part C deals with the period 1927 to the date when the territory became independent. Part D deals with the independence period to the present day.

A THE PERIOD BEFORE THE ADVENT OF THE WHITE RULE

I Jurisdiction and composition of the courts

(a) Inkundla yemilowo (family court)

(b) Inkundla yesibonda somsenge (Sub-headman's court)

(c) Inkundla kasibonda (Headman's court)

(d) Inkundla yenkosi (Chief's court)

(e) Inkundla kaKumkani (Paramount chief's court)

II Court fees and fines

III Procedure

(a) Main features of the law of procedure

(b) Organisation of the courts

(c) Initiation of legal proceedings

(i) Method of informing the accused or defendant about the date of trial

(d) Conduct of trial

(e) Execution of judgement

IV Evidence

Distinguishing features of the traditional African law of evidence

(a) Oral evidence
(b) Taking of oath
(c) Exclusionary rules
(d) Opinion evidence
(e) Real evidence
(f) Circumstantial evidence

B FROM 1806 - 1927

I The period from 1806 - 1833
II Sir Benjamin D'Urban and Stockenstrom treaty system
III Maitland and Pottinger proposals
IV The governorship of Sir Harry Smith
V Sir George Grey's system of administration
VI The Union of South Africa and the passing of the Black Administration Act No 38 of 1927.

C THE PERIOD FROM 1927 TO 3RD DECEMBER 1981

I Establishment of tribal authorities, community councils and Regional authorities.
II Creation of Ciskeian Territorial Authority
III The enactment of the Ciskeian Authorities, Chiefs and Headmens' Act No 4 of 1978

D THE PERIOD FROM 4TH DECEMBER 1981 TO THE PRESENT DAY

I Recognition of Chiefs and Headmen
II Existing Court structure
III Criminal and Civil jurisdiction of Chiefs' and Headman's Courts

THE PERIOD BEFORE THE ADVENT OF WHITE RULE

Describing the laws and customs of the Xhosa-speaking tribes or section of tribes inhabiting the Eastern and Frontier districts and of the Territories situated between the Great Kei River and the boundary of Natal the 1883 Commission Report states : "Among them a system of law has for generations past been uniformly recognised and administered. Although an 'unwritten law' its principles and practice were widely understood, being mainly founded upon customary precedents, embodying the decisions of chiefs and councils of byegone days, handed down by oral tradition and treasured in the memories of the people. This law took cognizance of certain crimes and offences; it enforced certain civil rights and obligations; it provided for the validity of polygamic marriages; and secured succession to property and inheritance, according to simple and well defined rules". [27] The rights and obligations referred to above were given effect to within the framework of a hierachical traditional court system. The administration of justice was in the hands of the people themselves. The traditional court structure can be illustrated by means of the following diagram. :

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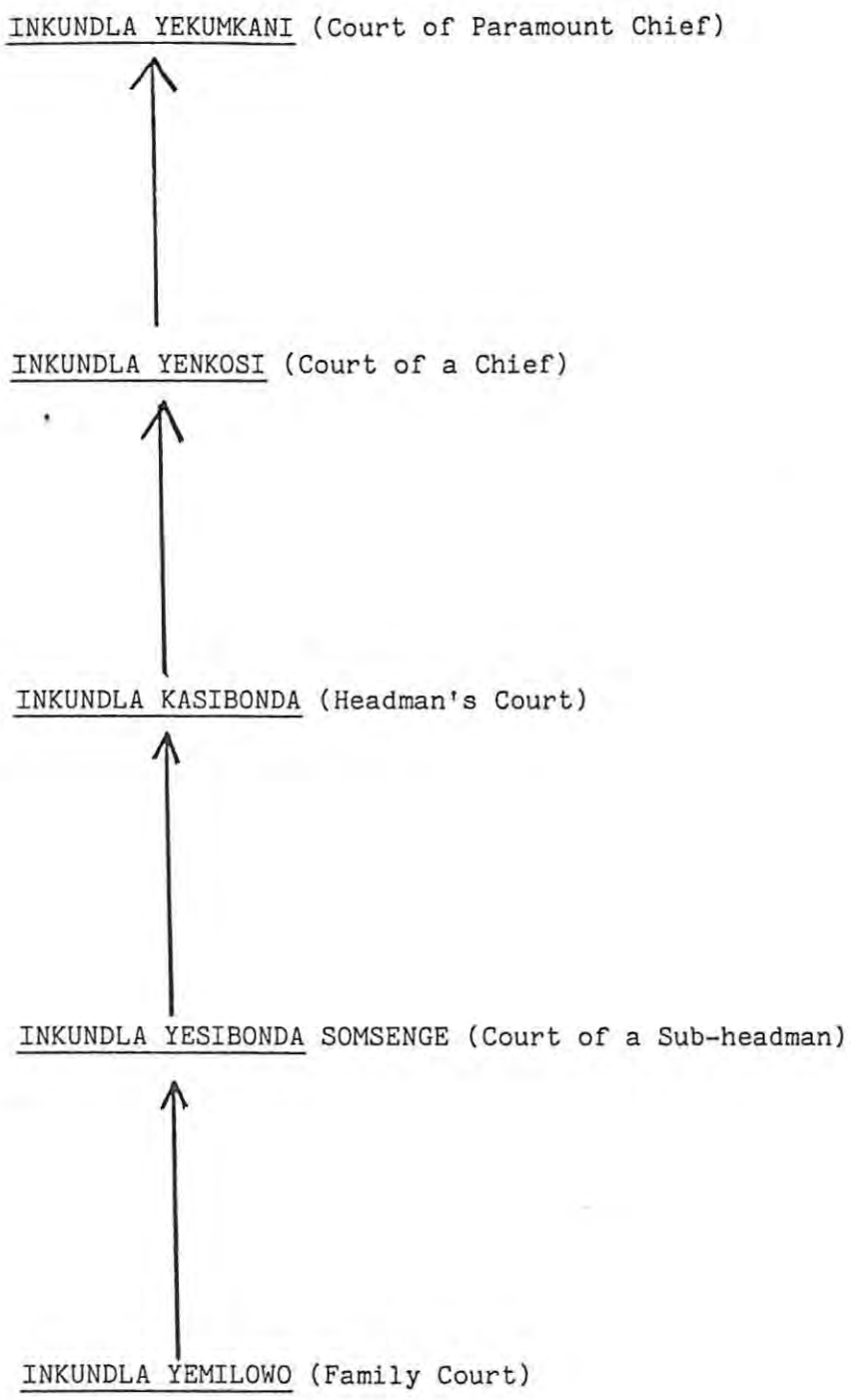
27) 1883 Comm. Section 8 p.14; see also Kerr 1957 : 317; Mqeke 1982 : 47


INKUNDLA YEKUMKANI (Court of Paramount Chief)
INKUNDLA YENKOSI (Court of a Chief)
INKUNDLA KASIBONDA (Headman's Court)
INKUNDLA YESIBONDA SOMSENGE (Court of a Sub-headman)
INKUNDLA YEMILOWO (Family Court)

I JURISDICTION AND COMPOSITON OF THE ABOVE COURTS

(a) Inkundla yemilowo

Professor Jacobs [28] incorrectly describes this court as "inkundla yamalowa". At page 96 of the Thesis the learned author seems to distinguish between inkundla yekhaya and inkundla yemilowo. This distinction can hardly be justified as the kraalhead does not constitute a court separate from the inkundla yemilowo. Inkundla yemilowo and inkundla yekhaya refer to one and the same thing. Sometimes this court is also known as inkundla yamathile or inkundla yamanantsi. Imilowo means close relations. However, at page 114 of the Thesis Professor Jacobs says that the two courts have in modern times come close to each other.

Traditionally this court is composed of adult males who belong to the same clan as well as other close relatives such as their nephews (abatshana) etc. It is normally held at the kraal of the most senior clansman.

According to custom the latter has to be consulted whenever a major customary family activity such as intonjane, circumcision, marriage ceremony is to take place. Complaints relating to the above are also lodged with him. A married woman who is aggrieved by the refusal of her "dowry-eater" to provide her with trousseau (impahla zokwendisa) will bring her complaint to this senior clansman who will, in turn, summon the adult males of the clan to come and settle the issue. Inkundla yemilowo plays an important role in the settlement of family disputes. The superior courts of Chiefs and Headmen do take cognizance of its role as a dispute settlement organ by referring cases

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28) See Jacobs 1974 : 93.
This work will, hereafter, be referred to as the Thesis.

involving family disputes back to these courts. This is in line with the fundamental principle of Xhosa law that subordinate members of the family should obey the head of the family; the latter obey the Chief and the Chief, in turn, should obey Qamata (God). This shows that customary law has a strong religious base. The superior court would either on its own motion or at the instance of any interested member of the court refer a matter back to the family court. The present writer's research in the Chief's courts of the Ciskei has revealed that this practice is still adhered to. [29]

Professor Jacobs [30] has also found that among the Imidushane family courts entertain a wide range of cases such as seduction, insurbodination, misconduct, ill-treatment, marital separation and adultery. He concludes that a family court has a role which is similar to that of an arbitrator.

(b) Inkundla yesibonda somsenge (Sub-Headman's court)

Umsenge is a tree. The name denotes the relationship that exists between the headman and the sub-headman - the fact that he is supposed to be the "eyes" and "ears" of the headman within his locality. Women who want to cut thatch grass as well as men who want to fell some trees to build cattle kraals and for ceremonial occasions are expected to approach the sub-headman for permission. Should a member of the locality (ward) contravene the law he will first be brought to the sub-headman's court particulary if the wrongdoing pertains to a petty matter. [31] If the culprit pleads for mercy by offering payment, a sub-headman is competent to accept the payment and to deal with it in the manner prescribed by custom. If the wrongdoer refuses to pay or is guilty of contemptuous behaviour, his case would be referred to the headman's court because the court of a sub-headman lacks the power to enforce its judgment. This court is composed of all interested adult males of the ward. [32]

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29) See in this connection case numbers 3/77 and 85/79 which are included in the case study in Appendix A.

30) See Thesis at 117

31) See Mqeke 1982 : 49

32) See pages 90-91 of the Thesis

During March 1982 the present writer attended a tribal court hearing at Kwenxura tribal authority under Chief D M Jongilanga. In one of the cases tried that day there was a very interesting case involving two married women. The case involved a charge of using abusive language. From the evidence it appeared that the accused had used disgusting language. It also appeared that the complainant had reported the matter to the sub-headman. When the latter had called the men of the locality, the accused was sent for but refused to come. The matter was referred to the location headman who also referred the case to the tribal authority because of the contemptous behaviour of the accused.

At the tribal authority hearing she was found guilty and fined R40,00.

The court also warned her that she would be banished from that area if she should appear before the court again charged with the same offence.

(c) Inkundla kasibonda (Headman's Court)

One fully agrees with Professor Jacobs that headmanship is different from what it used to be. In the olden days headmanship was also hereditary and a Headman would be recognised by the Chief, acting on behalf of the Paramount Chief, at the request of the elders of the royal family concerned.

Nowadays a Headman is voted into office by all adult members of the location concerned.

A Headman's court is composed of all interested adult males of the area of his jurisdiction. In the past this court enjoyed unlimited powers of jurisdiction in respect of civil and criminal matters arising within its area. [33] Both appeal against the decision of the Headman's court lay to the chief's court. In areas without

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33) See also pages 110-111 of the Thesis.

Chiefs an appeal would go direct to the Paramount chief's court as was the case with Ityala Lamawele where an appeal was noted from the court of Headman Lucangwana to the court of Paramount Chief Hintsa at Butterworth. Today a Headman's court merely functions as a clearing house for the Chief's court which sits as tribal authority. Only Headmen who act as chairmen of community authorities enjoy civil and criminal jurisdiction.

(d) Inkundla yenkosi (Chief's Court)

Just like the Headman's Court a court of tribal Chief enjoyed unlimited jurisdiction in both civil and criminal matters. Traditionally a Chief's Court was composed of the various Headmen under him who consituted his Council (Amaphakathi) as well as adult tribesmen of the area. Although in theory, an appeal lay from the Chief's Court to the court of the Paramount chief of the tribe, in practice, a decision of a Chief's Court was regarded as final.

Normally Councillors do not take kindly to a notice of appeal as they interpret it as being a contempt of court. In the past a person who wanted to appeal would only indicate his intention to do so when the imisila yenkundla (court messengers) had come to effect payment. [34]

Nowadays a Chief's Court in the Ciskei enjoys limited criminal and civil jurisdiction. Professor Jacobs, [35] after pointing out that the present tribal authority system was accepted by the Xhosas with reasonable ease because it is basically based on the traditional pattern noted the following changes :

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34) The informants also confirmed this during my fieldwork. In a speech he made at the end of the short course for Chiefs and Headmen President Sebe warned the chiefs to desist from discouraging litigants from noting appeals against their judgements.

35) Jacobs 1979 : 15

1. The tribal authority secretary has, to some great extent, in addition to his new duties taken over the duties of the Amaphakathi. He receives taxes, penalties, complaints and is responsible for receipts, orders and minutes. He also sends messages verbally and telephonically, receives correspondence and pensions are paid out in his office.

2. Ward Headmen are elected by members of the ward and answerable to the magistrate in respect of the administration of the ward. Further, in specific cases ward Headmen are assisted by elected committees where even women participate in the deliberations.

3. Tribal authority meetings, national gatherings and tribal court proceedings, take place in the tribal authority building and no longer in the tribal chief's place (Komkhulu). Tribal court messenger (Umsila) is today a specially trained official.

4. Tribal court proceedings are today opened with a prayer. Some of the changes the present writer has observed in the Chief's Courts of the Ciskei pertaining to procedure will be commented upon under III below.

(e) Inkundla kaKumkani (Court of the Paramount Chief)

In his remarks on the Summary of "Kaffir Laws and Customs" Knox Bokwe states : "Among the Amaxosa Kafirs, the paramount chief of all their tribes is that of the Gcaleka tribe - represented now by Kreli - and an appeal may be noted against any other Chief's decision to him in Council as the supreme court, passing through all the process of the inferior court". [36] Bokwe also stated that the Paramount Chief's kraal was never unattended by the Amaphakathi; they relieved each other as the necessity arose for their going to their homes.

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36) 1883 Comm. App. B p.37

In his notes in Macleans Compendium, Mr Warner has the following to say regarding Amaphakathi :

"The "Amapakati" have the privilege of going to 'busa' at the great place; that is, they go and reside on the Chief's kraal for a longer or shorter period, according to their own inclinations; and while they remain there, they form the court or ministry for the time being; during which time they enjoy many privileges. They settle all law suits laid before the chief, and assist him with their counsel in all state affairs; and they share in all the fines which may accrue to the chief during their ministry. They are also employed as 'imisila', or sheriffs, to enforce the sentence of the Chief, and they receive the fees appertaining to that office." In the Ciskei this Court does no longer exist. In the Republic of Transkei, on the other hand, this Court has been revived under the name of Regional Authority Court in terms of the Regional Authority Courts Act No.13 of 1982. 38)

In the Transkei these courts operate both as courts of first instance in criminal matters and courts of appeal in civil matters. In criminal matters their jurisdiction is similar to that of a district Magistrate's Court. As far as the present writer could establish the personnel of these courts are not required to possess any legal training.

II COURT FEES AND FINES

The fines were always in the form of cattle and the nature of the fine would depend on a number of factors; the seriousness of the case and ability of the defendant to pay.

In addition to the fine the court could still require the defendant to pay court fees varying from a small stock e.g. sheep or goat to large stock.

Nowadays the court fees do not accrue to the Chief personally but are paid into the trust account of the tribal authority. This aspect will be dealt with again in chapter 3 below.

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37) Maclean 1968 reprint at 76-77

38) Further on this court see Koyana 1983 : 33-34

III PROCEDURE

(a) Main features of the law of Procedure

Broadly speaking it can be said that the traditional Xhosa law of procedure exhibits the following characteristics :-

(i) Trial takes place in an open court and is a public affair.[39] Interested adult males including strangers participate in the proceedings.

(ii) Rules of natural justice are observed, that is, both parties are given sufficient opportunity to state their case as fully as possible;

(iii) No legal representation;

(iv) In the past women were excluded from court hearings. Today they are no longer excluded. The reason is that trials are no longer held near the cattle kraals[40] but in the tribal authority buildings.

In the tribal courts of Ciskei married women are not debarred from bringing actions unassisted as long as they can give a reasonable explanation as to why the legal guardians are not present in Court. The present writer established this in an interview he had with the tribal authority chairmen of the Ciskei during the short courses for Chiefs and Headmen.

During the present writer's visit to the Gwali tribe of Chief Burns Ncamashe in Alice in 1982 the latter informed the writer that at his court women do not only attend the Court proceedings but also participate actively by putting questions to the parties. He

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39) See also Brookes 176

40) A cattle kraal is regarded as a sacred place which is associated with the spirits of the ancestors. Women are, by custom, expected to avoid a stock kraal or its immediate vicinity as a mark of respect.

recounted a story in which a man had driven away his daughter-in-law by physically taking away her articles of clothing. He said that during the hearing women asked very interesting questions to the defendant to the extent that the latter at times, found it difficult to answer them.

(b) Organization of the courts

In the olden days court sessions were not held on scheduled days but a trial could be held whenever the occasion arose. As shown under Part A above there were always men who were in attendance at the great place known as Amathole Ogaga (that is, senior councillors who were mostly of the royal family).

With the passage of time statutory changes have taken place in this regard. In the Republic of Ciskei the time for the meetings of tribal authorities is set out in S 7 (1) of the Ciskeian Authorities, Chiefs and Headmen Act No 4 of 1978 as amended. This section reads : "A tribal authority shall hold an ordinary meeting not less than once every three months on the day and the time and place fixed by the chairman". The chairman of a tribal authority is usually the Chief of the area concerned and if there is no Chief, it shall be a Headman; (S 4 (1) (a) and (b). A quorum which consists of any number of members exceeding one third of the members of the tribal authority is provided for in section 7 (4) of the Act. The procedure to be followed at any meetings or proceeding of a tribal authority, including the meetings of any committee of such tribal authority, shall be in accordance with the law and the customs of the tribe concerned.

(c) Initiation of legal proceedings

(i) Method of informing the accused or defendant of the case against him.

The court would send Umsila (messenger of the court) with a summons to the accused's or defendant's place of residence.

The summons was known as umsila wengwe (tiger's tail).[41] This was a symbol of authority. The summons would be left at a conspicuous place at the defendant's kraal, either in front of the huts or stuck on the outer portion of the thatched roof. It is said that a summons was usually served during the night. Soga says that the Umsila, when leaving the summons, would utter the following words : "Ze nimgcine lo mntu angadliwa ziimpuku" meaning "Please look after this person so that he may not be eaten by the mice".[42]

Once the owner of the kraal saw the summons at his kraal, he would take it and proceed at once to the great place. As has been alluded to above imisila yenkundla (messengers of the court) were people who had come to busa at the Great Place. Some people have spoken with disfavour about these court officials. Giving evidence before the 1903 - 5 Native Affairs Commission, the special magistrate, Mr Dick, after saying that there were no orders as to costs in cases involving African litigants before the Special Magistrate stated : "I must, however, here point out, that there is a most extortionate system amongst the Natives in regard to the payment of the messenger's fee".[43] On being asked to elaborate on his statement he continued : "Following the old Kafir customs, they have a man called "Umsila", that is, a messenger of the Chief. They used to have a a tiger tail, which this messenger used to carry in order to show that he possessed the authority of the chief, and wherever the tiger tail appeared the man was respected. The tiger tail has been abandoned, but this messenger still appears, and as soon as the judgement in a Native case is given, he is the one who goes out, in order to see the judgement carried out. If the judgement is given for two head of cattle, we will say, then in accordance with

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41) See also Soga 1974 at 98; See also Jacobs' Thesis at 75; Charles Brownlee 1896 : 174. However Kropf and Godfrey 1915 : 398 say that it was a white tail of an ox or the tail of a leopard.

42) Ibid.

43) 1903 Comm. 6112 Vol. 11 p.469.

Kafir Custom this messenger fetches these cattle and brings them up to the succesful litigant, and then he generally demands his payment from the succesful man, before he delivers up the cattle, and, generally without demur, he is given one of the beasts for his trouble, so that often in a judgement for two head of cattle, the messenger gets one. I have to a certain extent intervened; the price of cattle has gone up so high, that we have tried to stop this kind of charge". [44]

The procedure of laying a charge at the Great place was also too formalistic. This would be the position even in the case of an appeal from a Chief's Court. The would-be complainant was required, as from the moment he left his kraal on his way to the Great place, to shout at the top of his voice that he was laying a charge against so and so. [45] There is a great deal of controversy about the exact time when complainant would be required to shout out saying "Ndimangele" (I am preferring a charge). Some writers are of the view that he would shout as soon as he came within earshort. [46] According to Sityana the purpose of shouting was to inform the public that there was going to be a court case at the Great place. The reason for this was that homesteads were far apart from each other so that it would take a good deal of time to inform the people about the times of court sessions. [47] Nowadays this procedure is no longer followed.

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44) 1903 Comm 6113 pp 469-470. See also 1883 Comm. Section 16 pp 16-17. Nowadays the term Kafir is no longer used.

45) See Sityana 49, see also the following works : Soga 1974 : 98; Rev H H Dugmore in Maclean's Compendium (1968) pp 43-44; Soga 1932 : 41-42 and Jacobs' Thesis at 123.

46) See Soga ibid, Rev H H Dugmore's papers in Maclean's Compendium at 43.

47) See Sityana ibid.

(d) Conduct of trial

On the date set aside for the hearing of the case all interested adult males would converge at the Great place to listen to the case. At the commencement of the proceedings witnesses for both sides would be requested to retire to a place beyong earshot. Then the plaintiff would be asked to give evidence. Thereafter the defendant would be required to give his side of the story. The examination and re-examination of the parties is done by Umncwini (interrogator) who is usually chosen for his good knowledge of the traditional court procedure.

When he has finished examining the parties he would inform the court accordingly. Thereafter an opportunity would be given to any interested member of the audience to ask questions. If the defendant denied the charge, witnesses would be called and confronted with the evidence given by the parties.

After all the evidence had been given the court would give judgement.

(e) Execution of judgement

As was the case in the olden days the judgement of the court is executed by the court messenger. This aspect has already been touched upon above.

However with regard to the administration of corporal punishment on convicted boys, the court would appoint a strong man to administer the punishment in such a way that the offenders would think twice before they commit the same offence again.

IV EVIDENCE

As is the case with the law of procedure, the cultural differences between the two systems of law also manifest themselves in this branch of customary law as well. In a very informative article Professor Jacobs has amply demonstrated the effect of Western influence on the legal aspect of the culture of the AmaXhosa of the Ciskei.[48)]

48) P P Jacobs, 1979 : 13

The main features of the Ciskeian indigenous customary law affirm the popular belief that law is a formal reflection of a people's culture. [49] The rules and regulations governing the Chief's Courts have not introduced any specific changes with regard to the traditional law of evidence as applied in the tribal courts of Ciskei. In the Transkei the newly established Regional Authority Courts are said to be courts of records. [50]

Although the traditional law of evidence, like other branches of African customary law is a product of primitive unwritten system of law, it has, nevertheless, attracted a great deal of commentary from many writers on African law most of whom describe it in glowing terms. The following remarks by Mr S E van der Merwe [51] seem apposite here : "In contradistinction to the Anglo-American system of evidence, the Continental system - in so far as one can speak of a system of evidence in relation to the Continent - is a neat example of brevity and clarity. The same can be said of indigenous systems.

On the Continent the law of evidence is mainly treated in a few textbooks on civil and criminal law and procedure. One searches in vain for a Continental Wigmore. It would also be very foolish to search for an indigenous Wigmore. The reason for this is that the Continental and indigenous courts are not bound by mechanical rules of exclusion. The emphasis is placed upon the weight or cogency of evidence rather than upon the admissibility thereof. The Continental approach is that the judge should be completely free to attach such weight as he thinks fit to the testimony of the witnesses without concerning himself with the question of admissibility or inadmissibility".

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49) See Bennett 1980 : 31

50) See Rule 4 of the Regional Authority Courts Rules as promulgated in Government Notice No 224 of 22 November 1982

51) S E van der Merwe "Accusatorial and Inquisitorial procedures and restricted and free systems of evidence" in Sanders 1981 : 145; See also P P Jacobs' Thesis at 126.

Allott [52] regrets the fact that "the general law of evidence in British African Courts has not been influenced by African ideas, as it can be plausibly argued that the African modes of eliciting the facts of a case will usually be much more effective in an African society than the English". The most striking feature of the African customary law systems of evidence is that they are basically similar. The traditional African law of evidence in the Ciskei exhibit the following characteristics :

Distinguishing features of the traditional African law of evidence

(a) Oral Evidence

All evidence in the tribal courts is given orally. However the tribal courts nowadays are required, in terms of the rules and regulations governing them, to prepare copies of written records. (rule 5)

In seduction and pregnancy cases courts sometimes receive evidence of written communications between the parties.

(b) Taking of oath

Although the taking of oath is foreign to the traditional court procedure and there is nothing in the rules requiring the taking of oath, nowadays the parties in a Chief's Court are sworn in before they can give evidence. [53] The oath is administered by Umncwini. Ukuncwina means to examine closely. In both civil and criminal cases Umncwini actually assumes the role of a prosecutor in an ordinary criminal case. The difference between him and the prosecutor lies in the fact that Umncwini does not represent any party to the proceedings.

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52) See A N Allott "African customary law" in Cotran and Rubin, Readings in African law (1970) Vol (1) p 83 at 84; see also Mqeke 1982 : 47; B J van Niekerk, "Principles of the indigenous law of procedure and evidence as exhibited in Tswana law" in Sanders 1981 : 130; Koyana, 1983 : 261.

53) Jacobs 1979 : 15. The latter says that tribal court proceedings are opened with a prayer.

(c) Exclusionary rules

The Tribal Courts in the Ciskei like elsewhere in Africa [54] are not bound by any mechanical rules of exclusions. There are no rules relating to the admissibility and relevance of evidence. All evidence including hearsay is admissible.

Although Professor Jacobs [55] states that in the evaluation of evidence the norm of reasonable man is used among the Imidushane the writer has found no evidence of this among the Imidushane East under Chief Jongilanga. It is also difficult to imagine how this concept can be used in a tribal court whose officers lack any form of legal training. The learned author also points out, correctly, it is submitted, that although in theory there are no rules regarding compellability of witnesses, spouses can hardly implicate each other unless it is a case in which one spouse has instituted an action against the other. In a Tribal Court it is easy for a witness to say : "Andazani nalento" meaning that he knows nothing about the matter. In the same way a defendant has a right to refuse to answer the charge preferred against him in an inferior court by merely saying that the case should proceed to a higher court. In the olden days a defendant would not be free to refuse to answer questions when the case was tried at the Great place as that would be treated as contempt of court. [56] In a very interesting article Kotze [57] says that a "field research by members of the Department of Anthropology at the University of Zululand also revealed that customary law spouses are very seldom called to testify against each other, the main reasons being the preservation of marital harmony and the danger of possible bias and fabrication resulting from the marital state". It is unthinkable that a Tribal Court composed of

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54) See Jacobs Thesis at 126 and S E van der Merwe in Southern Africa in need of law Reform ibid.

55) See page 323 of the Thesis.

56) See also Maclean's Compendium at 44.

57) See J J Kotze 1983 : 162.

Xhosa traditionalists could compel a spouse to give evidence against the other unless it is a case by one spouse against the other; tribal courts always lean in favour of preserving the family unit. That is why a tribal court will refer a case involving a family dispute back to a family court. In the light of this the present writer sees no sound legal basis for compelling customary union spouses to give evidence against each other in criminal proceedings in the ordinary courts. [58)]

(d) Opinion evidence

In disputed paternity cases, opinion evidence relating to the degree of physical resemblance of the child to the alleged father is usually admitted. Again in seduction cases evidence of women who inspected the girl to see whether intercourse took place is freely accepted. A senior official in the Ciskei Department of Justice informed the writer that amongst the Amazizi at Peddie young girls are still inspected to see whether they have been sexually interfered with or not. Should evidence of sexual intercourse be present the alleged tortfeasor would be made to pay the customary Isihewula beast.

According to Soga opinion evidence was resorted to in the past in intricate cases on some obscure points of law where precedent could not be found, law authorities of neighbouring tribes were asked for advice. [59)] One such instance where expert evidence was called in the Xhosa legal history was in the case of Ityala lamawele discussed in chapter one under Precedent. From that case it can be inferred that one has to be an old sage of repute before one can be regarded as an expert.

(e) Real evidence

Real evidence as well as evidence of an eye witness is very important.

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58) See Mqeke 1980 : 43

59) See J. H. Soga : 1932 : 41

In Maqutu v Sancizi [60] it was held that the custom of taking intlonze was not confined to adultery cases only but that intlonze could be taken by force from any wrongdoer. In that case the defendant had taken plaintiff's blankets as intlonze when he found him stealing in his (defendant's) garden.

(f) Finally, circumstantial evidence also plays an important role in adultery cases where a "catch" has been made. However the decisions of the Appeal Court for Commissioners' Courts have modifed the law relating to "catch" by holding that "proof of a 'catch' which has no connection with any alleged act of intercourse merely shows intimacy between the wife and the alleged adulterer, and as such may be acceptable as evidence aliunde in support of her testimony". [61] However, in Gumbi v Gumede [62] the court held that the rule that if evidence is given which is acceptable as prima facie proof of adultery, no corroboration is required unless at least equally cogent evidence is given in denial, is applicable to cases decided under Native law and custom.

In this case plaintiff in the Commissioner's Court, said that after searching for his wife one evening he hid near a path he suspected his wife and defendant would come along and he described what happened when his suspicion became a fact. The defendant closed his case without leading evidence. One of his grounds of appeal was that the evidence of the plaintiff was insufficient to prove adultery and that the finding that a coat belonging to him was picked up at the place where adultery took place was not a "catch". The Native Appeal Court dismissed the appeal.

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60) 1936 NAC (C&O) 86; see also Bekker and Coertze 1982 : 361 and the cases cited therein .

61) Seymour's Customary law ibid as well as cases cited therein.

62) 1959 N A C (NE) 26

B THE PERIOD 1906 - 1927

The effect of White rule in the Ciskeian customary court system and the law can conveniently be considered under the following headings :

(i) The period 1806 - 1833
(ii) Sir Benjamin D'Urban and Sir Andries Stockenstrom
(iii) Maitland and Pottinger proposals
(iv) The governorship of Sir Harry Smith
(v) Sir George Grey's system of administration
(iv) The Union of South Africa and the passing of the Black Administration Act No 38 of 1927 as amended

The Period 1806 to 1833

Before 1835 the effect of White settlement in the area which later came to be known as the Eastern Cape did not have any significant impact on the administration of justice among the Xhosa speaking people. The Chiefs and their subjects continued to live in accordance with their own laws and customs without any interference. The traditional court system of the African people remained as before.

This state of affairs could be attributed to the attitude of the colonial office. It would seem that the latter had intended to conduct the relationswith the Xhosas on the basis of justice, humanity and principles of international law. The following passage by Dracopoli [63] seems to support the above assumption. The learned author quotes Lord Glenelg, then in charge of the colonial office, as saying : "The general principles by which the British policy towards the Aborigines of Southern Africa should be governed, are obvious, and beyond the reach of doubt .... In our relations with those tribes, it yet remains to try the efficiency of a systematic and perservering adherence to justice, conciliation, forbearance, and the honest acts by which civilisation may be advanced, and Christianity diffused amongst them and such a system must be immediately established and rigidly enforced. In response to a despatch from Sir Benjamin D'Urban in connection with the treaties the latter had concluded with the various Xhosa Chiefs. Lord Glenelg stated : "First, for the reasons already given, I cannot admit that the British Sovereignty over the country between the Fish River

63) J L Dracopoli, 122

and the Keiskamma rests on any solid foundation of international law or justice". [64] Some writers refer to this period as a period of non-intercourse. [65] In this period therefore the traditional African court system and law remained unaltered.

(ii) Sir Benjamin D'Urban and Sir Andries Stockenstrom treaty system

The second phase of the evolution of the customary law court system could be traced to the arrival of Sir Benjamin D'Urban as the Governor of the Cape Colony. His Governorship introduced two major changes in the administration of justice : the subjection of African people to Roman Dutch law for the first time in the field of criminal law and the concommitant aboliton of customary criminal law.

These changes were brought about by means of a series of treaties of peace agreements which D'Urban concluded with the various Xhosa Chiefs of the tribes occupying the territory between the Keiskamma and the Great Kei rivers in September 1835 in terms of which they and their followers were accepted as British subjects. Although they were allowed to retain possession of their lands and locations, they would be governed by colonial law and authority. The officers who were appointed as Resident Government Agents and Commissioners among them were instructed that the only criminal matters to be judged and dealt with under English law were these specified in the second article of the treaties. These included murder; rape; setting fire to houses or property; theft whether of horses, cattle, sheep, goats or other property; treason or taking up arms against the king or the government of the Colony. The Chiefs were informed that contravention of the above laws carried severe punishment including death penalty and would be equally invoked even if the crimes were committed by any members of the tribes against each other. In terms of the treaties the practice

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64) Ibid.

65) See A E du Toit, "The Cape Frontier : A Study of Native Policy with special reference to the years 1847 - 1866" AYB 1954 (1) p.56

of pretended witchcraft was also peremptorily forbidden under penalty of severe punishment. The colonial law would not be applied to "interfere with the domestic and internal regulations of their tribes and families in so far as these do not involve a breach of the above cited laws". 66) In terms of the treaty customary criminal law was virtually abolished and replaced by Colonial law. The Chiefs would only entertain minor offences as well as civil disputes arising from custom.

From the available literature it would seem that the conclusion of the treaties did not arise out of any genuine desire on the part of the colonial government to make Africans British subjects but was actually necessitated by the concern to maintain the policy of non-intercourse and was also a reaction to protests by people such as Dr Philip and other philantropists. Dr du Toit says that D'Urban had initially wanted to expell the belligerent Chiefs from their land which was now known as the province of Queen Adelaide with its headquarters at King Williamstown. 67)

According to the learned author the Chiefs were recognized as magistrates and resident agents were appointed to each important Chief under the supervision of the agent general chief magistrate Houghan Hudson. It also seems that D'Urban's intention was to substitute colonial law for tribal law in all respects. 68) He says that Colonel Smith carried on as the Supreme Chief with the aid of Martial law mixed with what he describes as "Smith law" which, in essence was the application of common sense in the absence of precedent. It is said that he aimed at subverting chiefly authority and substitute that of the magistrate. 69)

D'Urban's treaty system did not enjoy the approval of the colonial office. In his despatch to D'Urban, Lord Glenelg told him that

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66) See (1826 - 36) 20 British Parliamentary Papers 775-785. See also the 1883 Comm Section 9 p.15; A E du Toit, : 9

67) Ibid

68) Ibid

69) See John Benyon; 15

the claim of sovereignty over the new province should be renounced because it rested "upon a conquest resulting from a war, in which, as far as I am present enabled to judge, the original justice is on the side of the conquered, not of the victorious party". [70] In the same despatch D'Urban was also informed of the appointment of the Lieutenant-Governor.

There is a great deal of controversy surrounding the rejection of D'Urban's treaty system. One view is that it was due to the barrier of prejudice which existed between Sir Benjamin D'Urban and Lord Glenelg. [71] Another view is that the latter had been influenced by the views of the Aborigines Committees particularly the evidence of Andries Stockenstrom who was apparently a star witness before the Aborigines Committee. [72]

Dr du Toit also mentions the fact that D'Urban's despatches were not always timeous and often took a long time before they reached the Colonial Office.

Stockenstrom's treaties with the Ciskeian Chiefs

Captain Andries Stockenstrom took the oath as Lieutenant-Governor of the eastern districts on 25 July 1836. On his assumption of office he found that the colonial laws were not adapted to the requirements of the Africans.

According to Theal [73] on 13 September 1836 Stockenstrom attended a meeting of the tribal Chiefs and their principal men at King Williamstown. The Chiefs had been called together to be officially

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70) Dracopoli : 123

71) Benyon op cit at 16

72) A E du Toit op cit at 10

73) See Theal 1964 : 148

introduced to him and to hear Colonel Smith's farewell remarks. It is said that at that meeting the Chiefs expressed some concern over the fact that their powers were being taken away from them and demanded the restoration of their land. At the same meeting Chiefs also requested that punishment for dealing in witchcraft should be restored. In view of these requests Stockenstrom decided to abandon certain forts.

He then proceeded to Shiloh to ascertain the views of a Tembu Chief Mapassa. After meeting with the latter he called another meeting of Chiefs and their followers at King Williamstown on 1 December 1836 to arrange for the withdrawal of the British flag from the province of Queen Adelaide.

After obtaining certain undertakings from the Chiefs, Stockenstrom issued a proclamation on 5 December 1836, renouncing British dominion over the territory and also releasing the people from allegiance to the King. He also repealed Sir Benjamin D'Urban's proclamations of 10 May, 16 June and 14 October 1835.

At the instance of the Secretary of state the land ceded by Sarili (Kreli) beyond the Kei was restored to him and he was also released from the obligations contracted by his father and himself. On the same date treaties were concluded between the Lieutenant-Governor on behalf of the King and the following chiefs, (1) Maqoma, Tyali, Botomane, Eno and Sutu for herself and her son Sandile; (2) Umhala, Umkayi, Gasela, Siyolo and Nonibe for herself and her son Siwani and (3) Pato, Kama and Kobe. Theal says that the boundary between the colony and the African territory was said to be that agreed upon by Lord Charles Somerset and Ngqika (Gaika) in 1819, that is, the Keiskamma from the sea up to its junction with the Tyumie, thence the Tyumie up to where it touched a ridge of high land connected with Katberg and thence that ridge and Katberg to the Winterberg.

According to Theal (at 151) the treaties placed the African Chiefs on political equality with the King's government. In terms of the treaties colonists were to have no more right to cross the boundary eastward without the consent of the Chiefs. Similary Africans would

not cross to the European side without the consent of the colonial government. White people would be subject to African law and custom when they were in the African territory. The same would apply to Africans when on the European territory. Of importance to our discussion was a stipulation that European agents were to be no longer magistrates. This meant that the pre-D'Urban legal position was restored. The Chiefs were once again free to exercise their civil and criminal jurisdiction without restriction. Stockenstrom's treaties therefore restored the territorial jurisdiction of Chief's Courts. Basically the new treaty system reflected the thinking of the colonial office - the fact that they wanted to base their relations with the African tribes on firm foundation of international law, justice and humanity.

Theal has criticized Stockenstrom's treaty system as being worthless since they sought to create equality between civilisation and barbarism "between a British magistrate and a Kafir Captain".[74] Napier shared the same opinion.[75]

(iii) Maitland and Pottinger Proposals

In September 1844 Sir Peregrine Maitland, at the clamour of the inhabitants of the border districts, announced the abrogation of the Stockenstrom treaties. He induced the chiefs to accept new treaties. Dr du Toit says that in terms of the new treaties annual salaries would be granted to Chiefs and ceded territory would be considered part of the colony and the Chiefs and their subjects would occupy it subject to good behaviour.

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74) Theal, op cit at 153. The treaties of Stockenstrom and the Xhosa chiefs form the subject of a critical examination by J Pretorius in an unpublished doctoral thesis entitled, "The British Humanitarians and the Cape Eastern Frontier 1834 - 1836" submitted to the University of Witwatersrand in 1970 at 330.

75) See A E du Toit 1954 : 15

In August 1847 Sandile was proclaimed a rebel and deposed from chieftainship. In November the Governor made the following proposals for the future government of the conquered territory :

(a) The country East of Gaikaskop and of the Tyumie and Keiskamma rivers up to Indwe river he proposed to call British Kaffirland, which would be inhabited by tribes under the superintendent of Magistrates;

(b) No chieftainship would be recognized;

(c) The territory would be divided into three areas, the north of the Amatolas to be called Tambookieland under Umtirara; the central region to be inhabited by the Gaikas; and the portion adjoining the sea by the other Rarabes;

(d) Commissioners with magisterial powers would be placed over the Gaikas. In each kraal, he would appoint a Headman with constabulary powers and responsible for the order of the kraal and with authority to administer customary law in minor disputes. Over groups of kraals he suggested placing superior Headmen chosen from former Chiefs or Amaphakathi (Councillors).

(e) Witchcraft, rainmaking and practises abhorrent to western ideas would be forbidden, whereas education, industry and Christianity would be promoted.

The major flaw of the colonial thinking with regard to the Cape lay in the fact that Governors were not given sufficient opportunity of putting their proposals into effect. For instance while the above proposals were being written the colonial secretary appointed Sir Henry Pottinger as the new Governor as well as High Commissioner with special instructions for settling affairs even beyond the boundaries of the Cape. Before returning Maitland had emphasized that the British rule in Kaffirland should be enforced by Native police supervised by Europeans. The power of the Chiefs would be entirely abolished except in Tambookieland.

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said : "I have taken an oath at King Willia
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The validity of the above criticism is born
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76) Dracopoli op cit at 156 - 157; it is interesting to
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Colonial Office.

77) See A E du Toit 1954 (1) A Y B at 19

as a condition of validity of customary practices and usages. True to the Colonial Office practice Pottinger was recalled before he could implement his proposals and was replaced by Sir Harry Smith.

(iv) The Governorship of Sir Harry Smith

Smith was no stranger to both the area and its African inhabitants. When he was charged with the execution of Sir Benjamin D'Urban's policy he proposed the introduction of a code of tribal law to be applied by a White administrator. It seems that Smith's aim was to ultimately replace customary law with the "British" law. 78) Professor Benyon says that during D'Urban's period Smith had wished to be named High Commissioner of all tribes east of the Keiskamma. 79)

After the "War of Axe" in 1846 when the Chiefs and tribes who had taken up arms had thrown up the sponge, the new Governor Sir Harry Smith, acting in terms of the instructions given to his predecessor and himself by the Imperial Government, issued a proclamation dated 23 December 1847, declaring the treaties and conventions previously subsisting to be abrogated and annulled and the sovereignty and the authority of Her Majesty, the Queen was extended as far as the Great Kei river. Ciskei then became known as the British Kaffraria. In the latter the Chiefs and their people became subject to Colonial law and such rules and regulations as Her Majesty's High Commissioner should deem best calculated to promote their civilization, conversion to christianity, and general enlightenement. 80)

On 7 January 1848 Smith called another meeting of the Chiefs and their councillors. At that meeting the Chiefs undertook to obey the laws and commands of the High Commissioner as the great Chief and representative of the Queen of England. The Chiefs would be recognized

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78) Saunders, Annexation of the Transkei, 1976 A Y B at 2. By "British law" he must have meant English law as there is no such thing as British law.

79) Benyon at 15. At page 53 the learned author shows that Smith's earlier experience as administrator of the short-lived Province of Queen Adelaide had persuaded him of the efficacy of direct, or magisterial techniques for controlling the frontier chiefdoms.

80) 1883 Comm Section 13 p.16

as rulers of their tribes according to African customary law. However the Commissioners would act as Magistrates with appellate jurisdiction over Chief's courts. The judgment of the latter could be set aside if inconsistent with justice and humanity. A litigant would appeal from the Commissioner's Court to Chief Commissioner whose judgement was final.

Although it was realised that Roman Dutch law of the colony was not appropriate to the Africans in their primitive state, African customary law was not recognized. Some people found this strange in view of Sir Harry Smith's previous declared intention with regard to a code of Native law. 81)

Sir Harry Smith introduced the idea of "Sticks of Office" which were to be used by all messengers from the Commissioner's office. A messenger had to carry a "stick of office" as a symbol of authority just like the traditional African badge of office known as "Umsila wengwe" (tiger's tail) which was used by "Umsila wenkundla" to indicate the official character of his errand.

According to Dr du Toit in 1851 Smith first realized the danger of suppresing important Native customs and accordingly instructed Mackinnon and Maclean to inform the chiefs that the Government would in future uphold their authority and would no longer interfere with Native laws and customs (my own emphasis).

The inconsistency of the Cape Governors' policy towards the Chief and his court was a source of unhappiness to the Chiefs and gave them a cause to defy the government. Sandile did so in 1851. This led to his deposition and replacement by Charles Brownlee. The appointment of the latter did not receive the support of the Colonial

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81) See A E du Toit locit at 31 who says that the only direct reference to Native law was made in detailing the duties of the Native Commissioners. See also Benyon at 54 who makes a similar observation. He also mentions the fact that Colonel G H Mackinnon ruled British Kaffraria as Chief Commissioner through a blend of martial law and ordinary - unimproved tribal law.

Office which was of the opinion that another African from among the leading members of the tribe should have been appointed instead. [82] Because of this Sandile's mother, Sutu was proclaimed regent with eight councillors appointed by the Governor and eight members nominated by her.

When Mlanjeni War broke out some concern was expressed in British Parliament that the cause of the war was interference of the Whites with the affairs of the Africans and an "unceasing and galling attempt to subvert the influence and authority of their chiefs". [83] In January 1852 Sir Harry Smith was recalled and replaced by Sir George Cathcart. The latter "substituted military control as the principle of policy. Under his system, Chiefs were allowed to rule with little interference from White Commissioners who now fulfilled more limited, quasi-diplomatic functions". [84] Cathcart was himself succeeded by Sir George Grey.

(v) Sir George Grey's System of administration.

During Grey's period important changes were effected with regard to the jurisdiction of Chief's Courts.

For example the 1883 Commission Report states that in 1855 Sir George Grey affected an important change in the administration of justice among the Africans by taking away the right of the Chiefs to appropriate to themselves court fines imposed in criminal cases. He offered the Chiefs and their "Amaphakathi" certain fixed monthly stipends in lieu of the fines and fees they formerly received. [85] According to Professor Benyon Grey believed that by paying the Chiefs a stipend in lieu of the normal perquisites of their courts and gradually substituting the jurisdiction of White Magistrates the internal cohesion of the chiefdoms would give way, leaving him with a leaderless African proletariat, some

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82) See A E du Toit at 58.

83) du Toit op cit 63

84) See Saunders op cit at 4. According to Dr du Toit at 93 Cathcart made a verbal declaration to the assembled chiefs at the conclusion of the war in March 1853

85) 1883 Comm Section 18 p.17

some of whom could be settled in detribalised village communities.[86]

A further development in the policy of curtailing the judicial powers of Chiefs and one which received adverse comment from a cross section of witnesses who gave evidence before the 1903 - 5 Native Affairs Commission was yet to be embarked upon by Sir George Grey. He divided the location of each Chief into districts under Headmen and sub-districts under assistant Headmen who were paid by the crown. In the 1883 Commission Report it is said that these men were answerable for the good order of their kraals, for the detection of robberies; for the restoration of stolen property and generally for the performance of all instructions relating to the maintenance of tranquility. They were immediately responsible to their own Chiefs, but ultimately to the European Magistrates who were their paymasters.

"In the administration of justice, they (the Magistrates) were directed to give their decisions, jointly with the chiefs, acoording to equity and good conscience - at the commencement deviating from Kafir precedent only so much as might be necessary to attain this; but keeping in view the law should by degrees ultimately merge into that of the Cape Colony, so modified as to suit the state of the native population".[87]

At this period one also finds that they were two kinds of magistrates : resident magistrates who heard cases in accordance with Colonial Law and special magistrates who applied customary law. In a way the latter had replaced the traditional Chief's Court. The only defect in this system and the one which was regarded by many as being inequitable lay in the fact that the special magistrate was an unofficial adjudicator with no power to enforce his judgment. He was just like the African Headman

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86) Benyon Loc cit at 64.Sir George Grey found it anomalous for Chiefs to exercise independent powers of jurisdiction in a British possession - See A E du Toit at 94.

87) 1883 Comm Section 19 pp 17-18

working under him. For example, Mr Rose Innes, a solicitor, who gave evidence before the 1903 - 5 Native Affairs Commission complained that African litigants in cases involving restoration of dowry, adultery and seduction had no legal redress; "they have no magistrate or any tribunal to which they are at liberty to take their disputes which arise out of Lobola marriages. No tribunal is open for them to go. No legal redress is provided". 88) The problem in connection with the above matters was that they could not be taken to a resident Magistrate's Court as common law did not recognise the socalled "Lobola Marriages". In his evidence before the Commission Mr Rose Innes stated that in those matters the attorneys had agreed among themselves to accept the decision of the Special Magistrate as final and never lodged an appeal". So that it is peculiar altogether, and the system rests upon the personality of an able man, backed up by the desire and wish of the Natives to have their cases settled in this way and according to their own laws and customs; and it is an unqualified success. Mr Dick enforces his judgements through his headmen. The system has no legislative or even legal sanction" 89) The lack of official forums to bring cases involving restoration of dowry promoted immorality in that fathers-in-law started enticing their daughters away from their husbands and then gave them in marriage to other men. 90)

Another drawback with the system of special magistrates lay in the fact that in the areas where there were no special magistrates people had nowhere to bring their disputes concerning cases involving marriage customs which were not recognized by the ordinary Colonial Courts. For example in places such as Keiskammahoek where there was no special magistrate, one finds an assistant resident magistrate who looked upon dowry paid in connection with a

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88) 1903-5 Commission Report, paragraph 8667 at 626. Whitfield at 5 describes the special magistrate's court as an extra-legal court which was established because of the reluctance to recognise African law. See also Howard Rogers, Native Administration in the Union of South Africa (1933) 219-220

89) At paragraph 8668 ibid.

90) See in this connection the evidence of Mr Seti who was a clerk in the office of the special magistrate in King William's Town. 1903-5 Comm 7788 p.564

customary marriage as an immoral contract and refused to have anything to do with a dowry case in his court or give it a hearing. The refusal of the magistrate to hear these cases meant that the litigants were forced to settle those cases in their own way and they did so. [91] It also appears from the evidence of Umhalla, a Ndlambe that those chiefs who had fought against the Government had their lands taken away from them and were demoted to headmen with no power to enforce their judgements. [92]

Although the Government wanted to superimpose colonial law on the unwilling African population, the latter continued to live in accordance with their own traditional laws and usages, "to which they appear to be attached by habit and familiarity, as well as by the fact that their mode of procedure is simple and inexpensive. [93]

Dr Brookes [94] quotes the statement of a district magistrate of Herschel who reported to the Government on 26 December 1882, as follows :- "Although Herschel is in the Colony and strictly speaking, altogether under the Colonial law, it has been found absolutely necessary to settle most of what we call Native civil cases, such as dowry, etc., by Native law and custom. So far there has been no hitch in particular, the magistrate sitting as arbitrator generally and having the assistance in many cases of headmen". In this period it is also evident that the few Chiefs who had retained their chieftainship like Chief Dom Toise and Chief Kama had also lost their judicial powers and were no different from other Headmen. In his evidence before the 1903-5 Commission Chief Toise said that he did not try cases but merely listened to a dispute and referred it to a special magistrate. [95] Mr E Dower, the chief clerk in the Native Affairs Department, was specifically asked by the Commission as to whether they had any Chiefs in the Cape Colony, he replied in the negative.

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91) See 1903-5 8666 pp 625-626

92) See 1903-5 Comm. 6572, 6575, 6967, 6969. See also Rogers op cit. at 113. See also Saunders 1976 A Y B at 3.

93) 1883 Comm Section 23 p.18

94) E Brookes at 183

95) See 1903-5 Comm 7370 and 7373 at 542

He added : "We recognise them as headmen. In one case the question was raised in regard to chieftainship, and the particular individual was described officially as the chief Headman. There is no one in our books in the Cape Colony recognised as a chief". [96] Mr R J Dick, special magistrate of King Williamstown added his views on the subject as follows : "Under the tribal system the chief is supreme and he is not supreme now. We use the Headman simply as you use your Borough Inspectors and Collectors under your municipal form of Government; they are acting partly as constables and partly as collectors of revenue, and to be messengers for the convenience of the Natives; as a means of communicating news to the people of their villages". [97] Mr Dick concluded that despite non-recognition of the tribal court system, Africans preferred to go to their own courts. It seems that Sir George Grey had very little or no respect for African customary law and the institutions administering that law. He did exactly the same thing in New Zealand with regard to the Maori customs. [98] This explains his failure to follow the lead given by his predecessor, Sir George Cathcart. Moreover foundation for the recognition of Native law and custom had already been laid by the colonial office. The following remarks by Dr du Toit seem to confirm that : "In 1847 the Natal Native Commission had recommended that Shepstone, the Diplomatic Agent to the Native tribes, should 'adapt his decisions to the usages and customs of the Native law where such accommodation can be effected without violating the requirements of justice'". They were of the opinion that to abrogate laws and usages practised by the Natives from time immemorial would be productive of great evils. This Report had evidently caused Earl Grey to revise his attitude towards the problem of Native administration, instead of introducing the law of the conqueror, he wrote to

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96) 1903-5 Comm 174 at 19.

97) See 1903-5 Comm 6056 at 464

98) See A E du Toit 1954 (1) A Y B at 93

Sir Harry Smith,"Native law should be retained and abrogated only in the case of such laws, customs and usages as are abhorrent from and opposed to the general principles of humanity and decency". [99] According to the learned author the new approach was not without precedent in other parts of the British Empire and he gave the examples of the policy followed in British India as well as British Guiana. It is an ironic twist that the Mlanjeni War had prevented the promulgation of the instructions accompanying the Letters Patent erecting British Kaffraria into a separate Government. [100] It is also clear that Sir Harry Smith's determination to accord full recognition to tribal laws and customs at the early stage of the Mlanjeni War was partly due to the Colonial Secretary's directive discussed above coupled with his fear that the Chiefs might win the war.

It is also remarkable that after a long association with the Western systems of procedure and evidence Africans were still not yet ready to take these over as their own. They preferred their own court system and law because they reflected their cultural values. The Union Parliament had to take account of this fact in 1927 when the Black Administration Act No 38 of 1927 was passed.

An important event of this period and one which had made the case of recognition of African customary law even stronger, was the appearance of Maclean's Compendium of Kaffir laws which Maclean, who had then become a Chief Commissioner in MacKinnon's place, had wanted to be used by his magistrates as a guide in formulating their judgments. "It marked a major milestone toward the codification of African law. Beyond the Compendium

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99) A E du Toit op cit at 92

100) A E du Toit at 93

and informal recognition of tribal law Grey was not prepared to go. Rather than be bound to the legal formalities that would apply after the promulgation of the Crown Colony Letters Patent of 7 March 1854, Grey - and Maclean - preferred to keep British Kaffraria's constitutional status undefined. Only in October 1860 did the province become a legitimate Crown Colony; so the entire system of rule was in fact brought into working order by the undefined powers of the High Commission ... In essence law in British Kaffraria came to rest on executive rather than judicial, prescription."[101] The formal incorporation was made in terms of Act No 3 of 1865. No provision was made for the recognition of African law and custom, hence the establishment of an extra-legal court at King Williamstown.

Although Sir George Grey had wanted to extend his "settler - magistrate - missionary policy of uplift and assimilation"[102] to the Transkeian territories he did not succeed in doing so. His successor Philip Wodehouse had the same ambition.[103] However, Wodehouse succeeded in extending the Cape system in Lesotho.

When he had established his authority in Lesotho in 1868 he introduced great changes in the administration of justice at the level of Chief's Courts. Although the Chiefs could still try any civil and petty criminal cases, the enforcement machinery was not at their disposal and a party could bring the same case to the magistrate on appeal. Sandra Burman[104] says that the new dispensation was designed to encourage a litigant to refuse to pay a fine levied by a Chief. In her own words the Chief's power was further weakened by a regulation which declared that seizing property against the owner's will, except in the execution of a magistrate's order, was theft. "This deprived a chief of his right of eating up which not only lowered his normal income from court fines, but gravely affected his ability to enforce his orders

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101) John Benyon at 66 - 67

102) Benyon at 73

103) Benyon at 74

104) Sandra Burman at 42

and hence the attractiveness of his court for plaintiffs compared with that of the magistrate. In addition, much more surely than any single prohibition, the right of appeal to a magistrate spelt the decline of those practises to which there were different Sotho and magisterial attitudes and which were discouraged by the administration, such as the retention of a widow's children by her husband's family. Since it would usually be to the advantage of one party in a dispute involving such practices to take his or her case to a magistrate, whether in the first instance or on appeal, rights inherent in those practices would become virtually unenforceable and access to the Chief's courts meaningless for traditionalist adherents to such customs. Equally objectionable to Chiefs was the section in the regulations that declared all men to be equal before the law, thereby making it possible to charge even the Paramount chief himself in court". [105]

Burman also refers to the alterations in criminal law that were scarcely to the liking of the Sotho people and which were similar to the measures introduced by Colonel Smith in the Ciskei in 1836. [106] According to Burman the introduction of death penalty for arson when committed with intent to kill and severe punishment for rape - a flogging not exceeding fifty lashes, or the confiscation of property, or both - were alien to the traditional Sotho way of thinking. In Sotho law both crimes were punished with fines and rape was considered a relatively minor offence. [107]

Meanwhile in the Ciskei then known as British Kaffraria Maclean had been discouraging the magistrates from entertaining cases involving "ikhazi" despite the fact that Royal Instructions issued to the High Commissioner in 1860 had definitely laid down the recognition of Native law. [108] Wodehouse, of course, disapproved Maclean's

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105) See Burman op cit at 42-43

106) See British Parliamentarry Papers at 254

107) Burman at 46

108) See A E du Toit at 164

objection and was supported in this regard by the Colonial Secretary who saw nothing immoral in the practice of "ikhazi". Newcastle agreed with the governor that the lieutenant-Governor by interfering with Native custom, had virtually contravened the Royal instruction which preserved the laws, customs and usages prevailing amongst the Natives and that the power of amending such laws and providing better administration was reserved to the Crown. Because of the opposition of missionaries to polygamy the Governor explained to them the new legal status of Africans as a result of conversion from Kaffraria into a British Colony as follows : "The practical effect of converting any territory into a British colony is to render all its permanent inhabitants subjects of the British Crown; and that in the case of Kaffraria it becomes the duty of the Government without the reference to its expediency, to regard all the inhabitants of whatever race as equal in the eye of the law". [109)]

However after the annexation of Kaffraria the Supreme Court refused to recognise "ikhazi" cases. [110)] Recognition of lobola cases was expressly given legislative sanction in 1927 when the Black Administration Act was passed. Section 11(1) of the Act precludes any court of law from pronouncing on the legality of ikhazi.

It is particularly remarkable that some Europeans during this period had openly demonstrated their preference of certain aspects of the traditional procedure in hearing cases between Africans. The following statement by Charles Brownlee, who contributed some notes in Maclean's Compendium are instructive. The learned author after showing that by Native law the guilt or even complicity, of a person in crime could be proved and the man punished whereas European law would not be able to touch him said : "When strong grounds of suspicion were brought against anyone he had to prove

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109) Wodehouse to Lieutenant - Governor of Kaffraria on 25 November 1862 quoted by A E du Toit at 166. See also Rogers at 219.

110) See A E du Toit at 166 N. 12

his innocence : If I lose a sheep or an ox and find beef or mutton concealed or being used in a hut ... it does not rest with me to prove that that was the flesh of my ox or sheep, but the person with whom the flesh is found must prove it to be his. By Colonial law the case is reversed, the proof rests with me. In the present state of the Native, it is quite necessary that this law should remain unchanged". 111)

During this period one also finds piecemeal recognition of certain African customs. For example section 7 of Kaffraria Ordinance No 10 of 1864 expressly recognized the marriage of a Xhosa, Fingo, Tambookie (Tembu) according to the customs of his tribe. It was only in 1927 that the traditional African Court system was given express recognition.

VI The Union Parliament and the Black Administration Act No 38 of 1927

In the aforegoing discussion dealing with the differing approaches of the various Cape Governors in the administration of justice in the Ciskei, then known as the British Kaffraria, an attempt was made to show how the mother country had contributed to the confusing policies of these governors by recalling them soon after they had drawn up their policy programmes regarding the thorny issue of the recognition of the African court system and law. This was particularly true of the governorship of Maitland and Pottinger.

Of all the Governors it was Sir George Grey who had brought about great changes in the traditional African Court system. For example since his time to the present day the court fines imposed by a tribal court in criminal cases accrue to the state revenue and no longer go to the pockets of the chiefs. Any chief who fails to do so makes himself open to criminal prosecution and possible deposition. Sir George Grey's village system is still there in different guises. His successor Sir Phillip Wodehouse did not want to interfere with Grey's scheme.

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111) See "Notes by the Gaika Commissioner" G H 8/23, March 19, 1863. This was a Draft of an Ordinance to amend and declare the law relating to natives. These notes are handwritten and are kept at Government Archives, Cape Town.

It is a matter of regret that Grey, in effecting the above changes, did not always uphold the rules of fair play. For instance in trying to convince the Colonial office of the urgent need to curtail the judicial powers of the Chief with regard to the question of Court fines he distorted the facts with regard to the operation of the traditional African Court system. In a despatch dated 18 December 1855 addressed by him to Her Majesty's Secretary of State for the Colonies, Right Honourable Mr Labouchere, Sir George Grey described the prevailing course of procedure in British Kaffraria under the African law as follows : "Accusations and complaints were brought before the chief of the tribe by any person who deemed himself or the public to have been injured. Such complaint was then heard by the chief and his Councillors, who imposed a fine of so many head of cattle or horses upon the party to whom they attributed guilt. The fine was levied by messengers sent by the chief, and upon its being brought to the chief's kraal the messengers were first paid for levying it. The chief then took such portion as he pleased for himself, distributed a part among the councillors who heard the case, and the remaining portion, in a civil case, was handed over to the complainant, who shared his portion among those of his friends who assisted him in the prosecution. In all cases of murder or acts of violence committed on the person, and in cases of witchcraft, the whole fines imposed and levied were taken in the first instance by the chief, although at his pleasure or caprice he gave a share of this to his councillors".[112] He concluded by saying that it was impossible for any people subject to such a system to advance in civilization. The correct pre-colonial traditional court procedure is described in the first part of this chapter.

It was after the Union of South Africa that concrete steps were taken with regard to the traditional African Court system. In 1911 the Select Committee on Native Affairs of the Union House of Assembly recommended that legislation be introduced "admitting of the

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112) 1883 Comm. Section 16 p.17

recognition by Courts of law of such native laws and customs as are already embodied in the law in force within certain parts of the Union".[113] It seems that at first the government merely wanted to empower the magistrate's courts within the Union to take cognizance of the traditional African court procedure in cases involving African litigants without re-instating the authority of the Chiefs. This assumption is implicit from the provisions of the Native Disputes Bill, 1912 which is given as an appendix to chapter IX of Brookes' work.[114]

The 1911 proposals were given effect to only in 1927 when the Union Parliament passed the Black Administration Act 1927, as it is now known. This Act has attracted a great deal of commentary from textwriters and articles on African customary law. It is not necessary to enumerate these in a work of this kind.

In essence the Act has partially restored the civil and criminal jurisdiction of the courts of Chiefs and Headmen. It took exactly 94 years to do this after the Chief's judicial powers were interfered with for the first time in terms of D'Urban's treaty system. Before this the Tribal Court only functioned as an unofficial arbitrator. This, in turn, was the source of injustice because in cases involving African marriage customs considered objectionable by the common law courts African litigants had no recognised tribunal to turn to. The Act, therefore, has sought to reverse this lack of justice.

In terms of the Act the trial of both civil and criminal matters as well as the execution of sentence will be in accordance with Black law and custom prevailing within the tribal area of the Chief concerned.

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113) Whitfield 4-5. See also Howard Rogers at 221. The learned author says that it was increasingly recognised that the discrepancies and variety of conditions in regard to the application of Native law involved serious injustice to the Natives.

114) See Brookes at 206-210

(1) Civil jurisdiction of the Chief's Court

The civil jurisdiction of the Chief's Court is dealt with in S 12 of the Act. This section reads : (1) "The Minister may :-

(a) authorise any Black chief or headman recognised or appointed under subsection (7) or (8) of section two to hear and determine civil claims arising out of Black law and custom brought before him by Blacks against Blacks resident within his area of jurisdiction.

(b) at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph (a), authorise a deputy of such chief to hear and determine civil claims arising out of Black law and custom brought before him by Blacks resident within such chief's area of jurisdiction.

Provided that a Black chief, headman or chief's deputy shall not under this section or any other law have power to determine any question of nullity, divorce or separation arising out of a marriage.

(2) The minister may at any time revoke the authority granted to a chief, headman or chief's deputy under subsection (1).

(3) A judgment given by such chief, headman or chief's deputy shall be executed in accordance with the procedure prescribed by regulation under subsection (6).

(4) Any party to a suit in which a Black chief, headman or chief's deputy has given judgment may appeal therefrom to any court of Commissioner which would have had jurisdiction had the proceedings in the first instance been instituted in a court of Commissioner, and if the appellent has noted his appeal in the manner and within the period prescribed by regulation under subsection (6), the execution shall be suspended until the appeal has been decided (if it was prosecuted at the time

and in the manner so prescribed) or until the expiration of the lastmentioned period if the appeal was not prosecuted within that period, or until the appeal has been withdrawn or has lapsed : Provided that no assistant Commissioner shall hear an appeal under this subsection unless no Commissioner (as distinct from an assistant Commissioner) has any judicial jurisdiction in the said area and provided further that no such appeal shall lie in any case where the claim or the value of the matter in dispute is less than ten rand, unless the Commissioner of the Court to which the appellent proposes to appeal, has certified after summary enquiry that the issue involves an important principle of law.

(5) The Court of Commissioner may confirm, alter or set aside the judgment after hearing such evidence (which shall be duly recorded) as may be tendered by the parties to the disputes, or may be deemed desirable by the Court.

(6) The Minister may make the regulations mentioned in subsection (3) and (4) and generally regulations prescribing the procedure which shall be followed in any action taken under this section".

It is obvious that the Act has not only partially restored the judicial powers of the Chief but has also introduced new concepts and remarkable changes. For example the Act has introduced the concepts of "recognized" and "appointed" Chiefs and their deputies. Traditionally a Chief was born and not appointed. It is also possible in terms of this section that the Government may refuse to recognise as a Chief somebody who is regarded as such under customary law. This may be done on political grounds. For instance in terms of section 5 of Proclamation No R143 which applied in the Ciskei, "no person shall be entitled to be a member of a regional authority -

(a) if he has been convicted in the Republic or the Territory of South West Africa -

(i) of treason or any offence in terms of any law endangering the safety of the Republic, or

(ii) of any other offence and sentenced therefor to a period of imprisonment in excess of twelve months without the option of a fine or ordered to be detained under any law relating to work colonies and the said period has not expired or such order has not finally ceased to be operative at least three years before the date on which he otherwise would be eligible for membership of a regional authority".[115] Under this section a person may be disqualified from becoming a Paramount Chief. Under section 51 of the Ciskeian Authorities, Chiefs and Headmen Act No 4 of 1978 if there is reason to believe that a Paramount Chief, Chief, Headman, is guilty of misconduct in that he, inter alia, becomes a member or takes part in the affairs of an organisation or association whose objects are subversive of or prejudicial to the constituted Government or law and order or attempts by unconstitutional means, including the holding of meetings or gatherings, to persuade, incite or force any person or persons to alter their allegiance or loyality to the Ciskei may be suspended and charged with such misconduct. If found guilty he may be deprived of his office.

Again the Act has introduced the concept of deputy-Chief which is foreign to traditional African law. In the olden days there was no need for the appointment of deputies as the "Amaphakathi" were virtually the Chief's "eyes and ears". These Councillors who were always in attendance at the Great place were competent to hear and decide cases. In terms of the Act only those Chiefs, their deputies Headmen who have been authorised by the Minister

115) S 4 of Proclamation R143 of 1966

are competent to hear cases. For example in terms of S 17 of Proclamation No 110 of 1957 no chief or headman shall try and punish any Black in his area unless he has been conferred with jurisdiction to do so under the act. Section 14 of Government Notice No 2252 of 21 December 1928 specifically precluded any chief who had not been specially authorised to do so, from trying or deciding any criminal charge. The above Government Notice was promulgated in terms of S 2 (7) of Act 38 of 1927.

II CRIMINAL JURISDICTION OF CHIEF'S COURT

This is dealt with in section 20 of the Act. This section reads as follows :-

"(1) The Minister may :-

(a) by writing under his hand confer upon any Black chief or headman juridiction to try and punish any Black who has committed, in the area under the control of the chief or headman concerned :-

(i) Any offence at common law or under Black law and custom other than an offence referred to in the Third Schedule to this Act and;

(ii) Any statutory offence other than an offence referred in the Third Schedule to this Act, specified by the Minister; Provided that if any such offence has been committed by two or more persons any of whom is not a Black or property belonging to any person who is not a Black other than property, movable or immovable belonging to the South African Black Trust established by section four of the Development Trust and Land Act, 1936, or held in trust for a Black tribe or Community or aggregation of Blacks or a Black, such offence may not be tried by a Black chief or headman;

(b) at the request of any chief upon whom jurisdiction has been conferred in terms of paragraph (a), by writing under his hand confer upon a deputy of such chief jurisdiction to try and punish any Black who has committed, in the area under the control of such chief, any offence which may be tried by such chief.

(2) The procedure at any trial by a chief, headman or chief's deputy under this section, the punishment, the manner of execution of any sentence imposed and subject to the provisions of paragraph (b) of subsection (1) of section nine of the Black Authorities Act, 1951 (Act No 68 of 1951) the appropriation of fines shall, save in so far as the Minister may prescribe otherwise by regulation made under subsection (9) be in accordance with Black law and custom : Provided that in the exercise of the jurisdiction conferred upon him under subsection (1) a chief, headman or chief's deputy may not inflict any punishment involving death, mutilation, grievous bodily harm or imprisonment or impose a fine in excess of forty rand or two head of large stock or ten heard of small stock or impose corporal punishment save in the case of unmarried males below the apparent age of thirty years.

(3) Any jurisdiction conferred upon a chief, headman or chief's deputy, under the provisions of this Act before the date of commencement of the Black Administration Amendment Act 1955, and which at that date has not been revoked under any such provision, shall be deemed to have been conferred under and subject to the provisions of this section." In terms of subsection (4) the Minister may at any time revoke the jurisdiction conferred upon a chief, headman or chief's deputy under any provision of the Act before or after the commencement of the Black Administration Amendment Act, 1955. In terms of subsection five if a Black chief, headman or chief's deputy fails to recover from a person any fine imposed upon him in terms of subsection (2) or any portion of such fine, he may arrest such person or cause him to be arrested by his messengers, and shall within forty eight hours after his arrest bring or cause him to be brought before the commissioner in whose area of jurisdiction the trial took place.

If the Commissioner is satisfied that the fine was duly and lawfully imposed and is still unpaid either wholly or in part he may order such person to pay the fine or the unpaid portion thereof forthwith and if such person fails to comply forthwith with such order, sentence him to imprisonment with or without compulsory labour for a period not exceeding three months.

"In hearing the appeal in terms of subsection (6) the Commissioner shall hear and record such available evidence as may be relevent to any question in issue and shall thereupon either :-

(a) confirm or vary the conviction and

(i) confirm the sentence imposed by the chief, headman or chief's deputy and order that the said sentence be satisfied forthwith; or

(ii) set aside the sentence imposed by the chief, headman or chief's deputy and in lieu thereof impose such other sentence as is in his opinion the chief, headman or chief's deputy ought to have imposed; and

(iii) impose a sentence of imprisonment with or without compulsory labour for a period not exceeding three months on default of compliance forthwith with the order or sentence made or imposed under sub-paragraph (i) or (ii); or

(iv) set aside the sentence by the chief, headman or chief's deputy and in lieu thereof impose a sentence of imprisonment with or without compulsory labour for a period not exceeding three months without the option of a fine;

(b) uphold the appeal and set aside the conviction and sentence"S 20(7)

In terms of subsection (9) the Minister may make regulations prescribing the manner in which and the period within which an appeal under subsection (6) shall be brought.

Although the criminal jurisdiction of Chief's courts has been severely curtailed, the Act has succeeded in giving the Chief's courts the necessary powers to enforce their judgments - a considerable improvement from the pre 1927 legal position. The Chief's courts are competent to entertain cases concerning customary criminal law which is discussed in chapter 5.

In this period we also notice a remarkable change of judicial attitude towards African law. In 1929 the Appellate Division in Ngcobo v Ngcobo [116] was even prepared to give full recognition to African law as law. On the other hand the Native Appeal Court, as it was then known, accepted the fact "the repositories of the laws are the chiefs and councillors, and in fact the whole body of the people, for as the laws are few and simple every man is supposed to know them". [117]

C THE PERIOD FROM 1927 TO 3RD DECEMBER 1981

(I) Establishment of Tribal Authorities and Community Authorities

In 1951 Black Authorities Act No 68 of 1951 was passed to provide, inter alia, for the establishment of certain authorities and define their functions.

Sections 2 of the Act empowers the State President, with due regard to Black law and custom :

(i) to establish a Black tribal authority in respect of a Black tribe and

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116) Ngcobo v Ngcobo 1929 A.D. 233 at 236.

117) Hon. C. Brownlee 1883 Comm. App. C.4 p.58 quoted with approval in Fuzile v Ntloko 1944 NAC (C&O) 2 at 8.

(ii) to establish a community authority in respect of a Black authority or two or more Black tribes or communities jointly or one or more such communities.

In terms of S 2 (2) a tribal authority shall be established in respect of the Black area assigned to the Chief or Headman of the Black tribe concerned and a community authority shall be established in respect of a Black area or areas assigned to the Black Community or Black tribes or Communities concerned.

In terms of S 4 a tribal authority shall, subject to the provision of the Act,

(a) generally administer the affairs of the tribes and communities in respect of which it has been established;

(b) render assistance and guidance to its Chief or Headman in connection with the performance of his functions, and exercise such powers and perform such functions and duties, including any of the powers, functions or duties conferred or imposed upon its Chief or Headman under any law as are in accordance with any applicable Black law or custom.

In terms of S 4 (3) no judgment, decision or direction given or order made by a Chief or Headman or the deputy of a Chief in the exercise of jurisdiction conferred upon him by or under any law, shall be deemed to be invalid by reason of his having, in consequence of the operation of subsection (1) or (2), been given or made by such Chief, Headman or deputy acting on the advice or with the consent or at the instance of a tribal authority, and any judgment, decision or direction so given or order so made shall for all purposes be deemed to have been given or made by such Chief, Headman or deputy.

Section 4 (3) was presumably inserted as a result of the decisions such as Mogale v Mogale [118] and Makapan v Khope [119] where the locus standi of the chief-in-council was questioned.

Perhaps the legislature wanted to put the matter beyond doubt. In addition tribal authorities today function as the official forums for tribal litigation. A Chief's Court no longer holds session next to the cattle kraal but in the offices of Tribal Authorities.

(II) The creation of Ciskeian Territorial Authority

In 1972 the Ciskeian Territorial Authority became a self governing territory under the name of the Ciskei in terms of Proclamation No R187 of 1972. Up to 1978 the Black Authorities Act continued to apply in the Ciskei.

Under S 31 of the 1972 Ciskeian Constitution Proclamation the personal status of Paramount Chief and Chiefs is expressly protected. The section further provides that with regard to ceremonial and tribal matters and at ceremonial occasions within his area the Chief shall take precedence over the Chief Minister and Ministers, except in respect of matters or occasions connected with the business of the Legislative Assembly.

Although the section does not deal with the court system it does show the high esteem in which the Chief is held in the territory. This may mean that in tribal matters including trials a Cabinet Minister resident in the area of jurisdiction of a Chief can be amenable to the jurisdiction of the Chief's Court.

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118) Mogale v Mogale 1912 T P D 92.

119) Makapan v Khope 1923 A D 551 at 557.

(III) The Ciskeian Authorities, Chiefs and Headmen Act No 4 of 1978

In 1978 the Ciskeian Legislative Assembly enacted the Ciskeian Authorities, Chiefs and Headmen Act, 1978 (Act No 4 of 1978) to "provide for Tribal, Community and Regional Authorities in the Ciskei, to define their constitution, powers, functions and duties, to regulate the recognition, appointment, deposition, discharge and discipline of Paramount Chiefs, Chiefs and Headmen and to define their duties, powers and functions and to provide for matters incidental thereto".

In the schedule dealing with the laws repealed under the Act the following Acts are repealed :

(a) The Black Administration Act 38 of 1927 : SS 2 (7), (7) bis, (7) ter, (8), 3, 4 and 5 (1) (a) (8) bis, (8) ter.

(b) Black Authorities Act No 68 of 1951 : SS 1, 2, 3, 8, 8A, 12A, 13, 16 and 17, only in so far as they apply to Tribal and Regional Authorities and to Chiefs and Headmen and sections 4, 5, 6, 9 and 10 and the whole of Proclamation 110 of 1957 containing Regulations prescribing the duties, powers, privileges and conditions of service of Chiefs and Headmen.

With regard to the establishment of Tribal and Community Authorities the provisions of the Act are the same as those of the repealed Black Authorities Act. However the following sections deserve comment : section 3 (1) provides that "if there exists in a tribe or community a tribal or community government functioning in accordance with the law and custom observed by that tribe or community, the tribal authority shall, subject to the provisions of subsection (2), be constituted in the manner in which the tribal or community Government is constituted : Provided that any chief and headman appointed in respect of any tribe in respect of which a tribal uthority has been established or which forms part of a community authority shall ex officio be a member of such tribal or community authority".

Section 4 reads :

"(i) (a) The Chief of a tribe shall ex officio be the chairman of the tribal authority concerned.

(b) If no chieftainship has been created in respect of a tribe, the members of the tribal authority shall elect a chairman from amongst the ranks of headmen who are members of such Authority and such chairman's period of office shall be five years commencing on the day of his election : Provided that if only one headman is a member of such tribal authority he shall ex officio be the chairman thereof". The same conditions apply to the chairmanship of a Community Authority(S 4 (2) (a) and (b)). The powers, functions and duties of Tribal Authority are dealt with in section 5. Under this section a Tribal Authority is empowered to administer the affairs of the tribe or tribes in respect of which it has been established and also to assist and guide and support its Chief, Headman and chairman in the exercise of any power conferred upon him.

Another important section in regard to the operation of Tribal Authority is section 10. In terms of S 10 (2)"there shall be paid into the trust account of the tribal authority —

(a) all fees and charges which according to custom are payable to the tribe or tribal authority;

(b) all amounts derived from any transaction with regard to any property of the tribe or tribal authority..."

Sections 3 and 4 of the Act support the argument advanced above to the effect that the Chief, or in his absence the Headman functions or performs his judicial functions in consultation with the Tribal or Community Authority that has been established for his area. The elected members of the Tribal Authority are his Tribal Council - in Xhosa Isigqeba samaphakathi.

Section 10 supports the argument that when hearing cases the Chief functions in an official capacity so that it should not be proper to sue him personally for any acts or omission committed in the exercise of his judicial authority. 120)

In terms of S 43 (6) a Headman shall retire from office upon attainment of the age of 60 years unless the Minister, at the request of the Tribal Authority concerned, ratifies his further retention for such period as he may determine after consultation with such Tribal Authority. In terms of S 62 every recognition or appointment of a Paramount Chief or Chief under section 43 and their deposition under S 51 (16) (e) "shall be laid upon the Table in the Legislative Assembly within fourteen days after such recognition, appointment or discharge or within fourteen days after receipt by the Minister of such report or statement, as the case may be, or, if the Legislative Assembly is not then in session, within fourteen days after the commencement of its next ensuing session".

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120) See the writer's comment on the case of Bhengu v Mpungose 1972 B A C (NE) 124 in August 1983 De Rebus 399 at 400.

CIVIL AND CRIMINAL JURISDICTION

S 63 amends S 12 of the Black Administration Act by substituting for paragraph (a) of subsection (1) the following paragraph :

"(a) Authorize any chief or headman recognised or appointed under section 43 (3) of the Ciskeian Authorities, Chiefs and Headmen Act, 1978 to hear and determine claims arising out of the law and custom of Blacks brought before him by Black against Black resident within his area of jurisdiction or the area of jurisdiction of the Community Authority of which he is chairman". From this section it seems that civil jurisdiction is not conferred on all Chiefs and Headmen but only on those who are chairmen of Tribal or Community Authority. It is clear from the provisions of section 4 of the Act that in areas where there is no chieftainship a chairman of a Community Authority shall be elected from ranks of Headmen.

Section 64 amends S 20 of the Black Administration Act by substituting in paragraph (a) of subsection (1) for the words preceding sub-paragraph (1) of the following words :

"(a) By writing under his hand confer upon any Black chief or headman jurisdiction to try and punish any Black who has committed, in the area under the control of the chief or headman concerned or in the area of jurisdiction of the Community Authority of which he is chairman" and

(b) by the substituion in subsection (2) for the words "twenty pounds" of the words "one hundred rand". The lastmentioned represents an improvement on the criminal jurisdiction conferred in terms of the Black Administration Act where the maximum fine a Tribal Court can impose is R40,00.

In terms of section 56 (e) failure to attend court proceedings or place in response to an instruction given by the Paramount Chief, Chief or Headman of the area is an offence. In terms of Section 58

the court convicting any person of contravening a provision under this Act for which no specific penalty has been provided may impose upon him a fine not exceeding two hundred rand or imprisonment for a period not exceeding twelve months. Since no specific penalty has been given for the contravention of S 56 section 58 applies.

The changes effected by the Act regarding the civil and criminal jurisdiction of Chiefs and Headmen are reflected in the certificates of appointments issued to Chiefs and Headmen as shown in the annexure B.

D INDEPENDENCE PERIOD, THAT IS, FROM 4 DECEMBER 1981 TO THE PRESENT DAY

On the 4th of December 1981 the Ciskeian Legislative Assembly passed the Republic of Ciskei Constitution Act 1981 (Act No 20 of 1981) establishing Ciskei as a sovereign democratic, independent republic in a conferedation of Southern African States (S (1)).

PREAMBLE

The preamble to the Ciskei Constitution reads :

"Whereas we, the true traditional and elected representatives of the people of Ciskei, in humble awareness of our responsibility before Almighty God and our nation, and deeply concious of the destiny of our nation in close constitutional, political and economic co-operation with all peace loving nations in the Southern part of Africa, have assembled ourselves in a Constitutional Convention to frame and adopt a Constitution for the independent Republic of Ciskei, in which people, irrespective of race or creed, may dwell and prosper in freedom".

(I) Recognition of Chiefs and Headmen

The Constitution Act is divided into twelve chapters. Chapter X deals with land and tribal matters. In terms of S 69 all duties and functions lawfully exercised by Chiefs and Headmen immediately prior to the commencement of this constitution shall remain in force until varied or withdrawn by the competent authority. In

terms of S 70 (1) the appointment or recognition of Chiefs and Headmen shall, subject to the provisions of subsection (2) vest in the President in Executive Council. Subsection (2) states that the creation of a new chieftainship shall be at the discretion of the President and shall not be confirmed by the President except after consideration of a recommendation by the Executive Council. In terms of S 71 (1) the existing Chiefs and Headmen shall be deemed to have been appointed by the President. Subsection (2) provides that all powers, authorities and functions lawfully exercised by Tribal and Regional Authorities in Ciskei immediately prior to the commencement of this Constitution shall remain in force until amended or withdrawn by the competent authority.

The provisions of S 72 are also important. This section reads : "72 (1) Subject to the provisions of this Constitution, there shall continue in operation and continue to apply except in so far as such laws are superseded by any applicable laws of Ciskei or are amended or repealed by the National Assembly in terms of this Constitution

(a) any rule of law which immediately prior to the commencement of this Constitution was in operation in Ciskei; and

(b) any rule of law which, upon the addition of any land to Ciskei applies on or in respect of such land except that in relation to such additional land the laws of the Ciskei shall apply in cases of conflict take precedence ...."

(II) Existing Court Structure

The legal position regarding the existing courts is dealt with in section 76 of the Act. This section reads : "Notwithstanding anything contained in section 82 (1), but subject to the provisions of this constitution -

(a) every court in existence in a district of Ciskei immediately prior to the commencement of this Constitution other than a court constituted under section 10 of the Black Administration Act, 1927 (Act 38 of 1927), shall remain in existence and in operation in accordance with its existing constitution and jurisdiction until altered or disestablished by or under any act of the National Assembly.

(b) The powers conferred upon any Commissioner in terms of any section of the said Black Administration Act, 1927, shall be exercised by a Magistrate's Court", (S76 (1)). "(2) In the application of subsection (1)(a) any appeal to a court of a Commissioner or a Commissioner in terms of section 12 or 20 of the Black Administration Act, 1927, shall lie to the Magistrate's Court or the corresponding judicial officer of such court in the district concerned, as the case may be, and any reference in the said sections 12 and 20 to a "court of a Commissioner" and "a Commissioner" shall be construed as a reference to a Magistrate's Court and to such judicial officer as aforesaid, respectively : Provided that, until an act of the National Assembly otherwise provides, any regulations made under sections 12 and 20 of the said Black Administration Act, 1927, shall apply mutatis mutandis in respect of any action taken under those sections in a Magistrate's Court or before a Magistrate".

Under the Schedule dealing with the repealed laws the following Acts are some of those repealed :

(a) The Black Administration Act No 38 of 1927 : Sections 1, 2, 9, 10, 11, 13,14, 15, 16, 17, 18, 19, 22 ter, 24, 25, 26 and 31.

(b) The Black Authorities Act No 68 of 1951 : so much as is unrepealed;

(c) The whole of Proclamation R187 of 1972.

(III) Ciskeian Administrative

Authorities Act No.37 of 1984

In 1984 the Ciskeian Government enacted the above Act. In the Preamble it is stated that the purpose of the Act is to "consolidate and amend the laws providing for the establishment of tribal and regional authorities, to define the powers, functions and duties of such authorities, to regulate the appointment, disciplining or discharge of paramount chiefs, chiefs and headmen and to prescribe their powers and duties, to confer civil and criminal jurisdiction on chiefs, chiefs' deputies and certain headmen, to provide for the imposition of voluntary tribal taxes and to provide for incidental matters".

In schedule 5 the following Acts and Proclamations are said to be repealed :

(a) The Black Administration Act 38 of 1927, S S 5(1) (b), 12, 20, 21, 21 A, 34, Second Schedule and Third Schedule;

(b) Ciskeian Authorities, Chiefs and Headmen Act No.4 of 1978;

(c) Proclamations

(i) Proclamation R45 of 1961;
(ii) Proclamation R191 of 1968;
(iii) Proclamation R197 of 1971;
(iv) Proclamation R110 of 1972.

The new Act has retained the provisions of the repealed Ciskeian Authorities, Chiefs and Headmen Act.

The civil and criminal jurisdiction of tribal courts is now dealt with in sections 39 and 40 respectively. The new Act speaks of "tribal courts" as against chief's courts. The civil and criminal jurisdiction of the tribal courts remain unchanged.

In S 42 of the Act it is stated that any reference to a "chief" and a "chief's deputy" shall be construed as including a reference to a Paramount Chief and the deputy of a Paramount Chief respecitvely.

The Act contains three Schedules :

Schedule I gives information about the country's Tribal and Community Authorities - their composition and the area where they are situated.

Schedule II contains similar information about regional Authorities.

Schedule III deals with "Rules For Chiefs' Civil Courts". The nomenclature here is particularly interesting because in Chapter 7 the Chief's Courts are said to be tribal courts. In the writer's opinion this terminology will help avoid the apparent confusion which results when one reads sections 12 and 20 of the Black Administration Act 38 of 1927 as amended together with the provisions of S 4 (3) of the Black Authorities Act No.68 of 1951. At the first blush one may be tempted to think that a chief's court as constituted under SS 12 and 20 of the Black Administration Act and a tribal authority as constituted in terms of the Black Authorities Act are two separate entities each with its own defined area of jurisdiction. The Ciskeian measure puts the matter beyond doubt.

With regard to the appointment and dismissal of Paramount Chiefs, Chiefs, their deputies and Headmen the only important difference is that the right to appoint and dismiss these officials now vests with the State President-in-Council. [121)]

No legal representation is permitted in the tribal Courts.

Banishment orders are dealt with under "Miscellaneous Provisions" in Chapter 9.

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121) See SS 23 and 24 of the Act.

The new Act is no improvement on the Ciskeian Authorities, Chiefs and Headmen Act of 1978 in so far as the jurisdiction of the tribal courts is concerned.

In the fieldwork conducted by the writer on the functioning of the Chief's courts in the Republic of Ciskei it has been observed that these courts are still active. However, it has also been observed that some chiefs need some kind of training as they do not always realise that there is a limit in their criminal and civil jurisdiction. This will be shown in the following case study illustrating decisions of these courts on civil and criminal matters. In this case study it is intended to show, inter alia, the following particulars :

(a) The district in which the case has been registered and the chief and the tribal Authority who tried the case;

(b) The particulars of the parties;

(c) The decision of the Court;

(d) The date on which the case was registered.

What follows is not taken verbatim from the record but the facts as constructed after reading the record.

These cases dated back from 1976 to 1983. The case number is the same as the one appearing in the Magistrate's office Record Book.

E CASE STUDY

ALICE

1. Case No. 3/77 before Chief S Mqalo of Amakhuze Tribal Authority and his Tribal Authority. The parties were :

   Nomathokazi Jwambi v Nobandla Dibela.

   The accused was charged with assault with intent to do grievous bodily harm. According to the record a knife had been used.

Although the accused was charged with assault with intent to do grievous bodily harm, according to the particulars furnished it was alleged that she had incited her child to assault complainant. The accused denied that she incited her child but that she had just intervened and the complainant was not injured. The accused was discharged for lack of evidence. The case was heard on 23 September 1977 and was registered on 2 December 1977.

2. Case No 4/77 before the same Chief and his Tribal Authority. The parties were :

N Beja v T Poswa.
The accused was charged with assault and robbery. They admitted having assaulted the complainant but denied robbing her of her money. She also admitted that the complainant's clothes were still with her. Se was found guilty and fined R10,00. She was also ordered to return the clothes. The case was heard on 23 September 1977 and registered on 2 December 1977.

3. Case No 41/79 before the same Chief and his Tribal Authority. The parties were :

No-Amen Ndongeni v Regina Gengele.
The accused was charged with theft. She was found guilty and fined R7,00. The case was heard on 23 March 1977 and registered on 7 June 1979.

4. Case No 30/82 before Chief Mabandla of Krwakrwa and his Tribal Authority. The accused were :

Yalezwa Gqirana v S Thabatha.
The accused was charged with assault, it being alleged that she stabbed the complainant. She admitted the charge and was found guilty. She was ordered to pay R10,00 plus R2,00 Court fees not later than 27 May 1982. The record does not indicate when the case was tried and when it was registered.

5. Case No 4/79 before Chief Mavuso of Gaga Tribal Authority and his Tribal Authority. The parties were as follows :

Adonis Matebeni v Nombudede Goduka.

The charge was Stock Theft. It was alleged that the accused stole and slaughtered a sheep belonging to the complainant. The accused pleaded guilty and was found guilty and was fined R26,00 being the value of the sheep plus Court fees R5,00. The case was heard on 9 November 1978 and registered on the same day.

ZWELITSHA

6. Case No 12/79 before Chief Mdlankomo of Khambashe Tribal Authority and his Tribal Authority. The parties were :

No-Awethi Nyangiwe v (1) Notema Magalaza
(2) Matotose August
(3) Thembile Hotsholo

The accused were charged with Stock Theft. The complainant alleged that accused No 1's sons stole her ox and sold it. The Court found Mr Hotsholo guilty of stealing complainant's ox since it was sold with his (Hotsholo's) stock card. He was sentenced to pay R400,00 within 30 days and R3,00 Court fees. The other two accused were each fined R20,00 payable within 30 days. In addition they were given 8 cuts for "insolence" plus R3,00 court costs.

7. Case No 25/80 before Chief A M Siwani of Imidushane Tribal Authority and his Tribal Authority. The parties were :

Benson Ngqose v (1) Dankeni Nxomeka
(2) Nomuntu Nxomeka
(3) Nonkundla Nxomeka

The charge was Stock Theft. They were all found guilty and ordered to repay the sheep plus R10,00 Court expenses. The case was heard on 28 October 1980 and registered on 5 November 1980.

8. Case No 33/76 before Chief Toise of Amagasela Tribal Authority and his tribal Authority. The parties were :

Pindile Ngemntwana v (1) Makankana
(2) Mntunaye
(3) Tozamile

The accused were charged withtheft of money. They were found guilty and fined twenty rand and R5,00 each for Court fees. The case was heard on 22 July 1976 and no date given for registration.

PEDDIE

9. Case No 9/83 before Chief Msutu of Msutu Tribal Authority and his Tribal Authority. The parties were :

Tom Msutu v Nombuqu Nkohla.
The accused was charged with assault with intent to do grievous bodily harm. Accused pleaded self defence and was found guilty as charged. The Court sentenced the accused to pay a fine of R200,00 within 14 days from the date of judgment. The case was registered on 22 May 1983. The case was heard on 7 May 1983.

10. Case No 19/83 before the same Chief and his tribal Authority. The parties were :

Nongenile Dumba v Lungephi Tshentu.
The accused was charged with theft of a fowl belonging to the complainant. The accused admitted the charge. The Court found him guilty and fined R40,00 payable within 14 days from the date of judgment. The case was heard on 27 October 1982 and registered on 15 July 1983.

MIDDLEDRIFT

11. Case No 3/83 before Chief S Kama of Kama tribal Authority and his Tribal Authority. The parties were :

Nzima Khaphetshu v Fukamile Mani.

The accused was charged with assault S.B.H. He pleaded guilty and was fined R150,00 plus R3,00 Court fees and a further two sheep for committing assault at the Great place. The date of trial is not given but the case was registered on 28 February 1983.

12. Case No 21/78 before Chief Kama and his tribal Authority. The parties were ;

Nowandile Siphango and Mtose Mtoloyi v Thomas Mountain.

The accused was charged with Stock Theft - a carcas of a sheep was found in one of the accused's huts. The accused was ordered to pay a sum of R30,00 with costs. The case was heard on 4 October 1978 and registered on 20 October 1978.

This list is not exhaustive and some of the cases observed have been shown in Appendix A below. At this stage it is merely intended to show the extent to which the Chief's Courts in the Ciskei fail to observe the limits of their jurisdiction both in causes of action and with respect to punishment.

When regard is had to the fact that legislation intended for the self-governing states is, in all cases, published in the vernacular language of each state and also the fact that when a Chief or Headman is given a certificate conferring both civil and criminal jurisdiction, he is also issued with a document containing all the offences mentioned in the Black Administration Amendment Act 1955 in both English and Xhosa in the case of Ciskei, one is tempted to say that the breach of the law in the instances shown above does not arise out of ignorance on the part of the Chief but out of sheer laziness to remind themselves of these matters, that is, to refresh their memories by going through the information contained in their certificates of appointments. See in this connection Annexure B below. In some cases the court imposes

ridiculously low sentences in serious cases; take the second case in the case study dealing with assault and robbery where the accused was sentenced to a mere R10,00. The present writer finds this strange because the Chiefs often complain that the type of sentences imposed in the Western type Courts are not severe enough to deter others from committing the same crime.

RECOMMENDATIONS

The major defect in the present traditional court system lies in the lack of statutory recognition of the indigenous family courts as all embracing dispute settlement organs. This omission loses sight of the fact that these constitute the hallmark of the administration of justice in African societies particularly the Xhosa-speaking peoples of the Ciskei and Transkei. The present writer would even go so far as to plead for the recognition of their role both in the formation and dissolution of a marriage tie in respect of spouses in rural areas.

In the rural areas the formation of a marriage tie between prospective spouses cannot be realized without the consent of the Imilowo of both families even in the case of civil or Christian rites marriages.

The Imilowo assume a great deal of mediation role in quarrels between husband and wife. It is the present writer's opinion that a good number of marriages could be saved if matters giving rise to divorce could first be referred to these indigenous family courts before the divorce court could grant an application for divorce in a divorce action. It should be remembered that along with lobolo, Imilowo play a stabilizing role in an African marriage. Onozaku-zaku (dowry agents) from the bridegroom's place are chosen by Imilowo to go and negotiate with the Imilowo of the bride's people for the formation of the marriage tie. Before a customary marriage can be dissolved inter-family discussions are first exhausted. In rural areas both civil or Christian rites marriages and customary marriages follow the same pattern in so far as the preliminaries are concerned.

Therefore the recognition of the African pre-divorce methods before a civil divorce action would have the effect of harmonising the principles of customary family law with those of the received law. At the level of the official courts of Chiefs and Headmen one would recommend the increase of both criminal and civil jurisdiction in respect of causes of action as well as to persons.

In the Ciskei at present the Chief's courts cannot impose a fine in excess of R100 or two head of cattle. It is the present writer's opinion that the punitive jurisdiction of Chief's courts should be increased so as to promote the effectiveness of these tribunals and also to enable them to fall in line with the developments in other independent national states.

In Bophuthatswana there is a slight improvement in this regard especially on matters of sentence.

On the limits of jurisdiction in the matter of sentence, S 7(1) of the Bophuthatswana Traditional Courts Act, 29 of 1979 states ; "Save as otherwise in this Act or any other law specially provided, a tribal court, whenever it may sentence a person for an offence :-

(a) by a fine, may impose a fine not exceeding two hundred rand or two head of large stock or ten head of small stock;

(b) by corporal punishment, may impose whipping with a cane only and only in the case of unmarried males below the apparent age of thirty years and the number of strokes imposed shall not exceed seven strokes;

(c) by compulsory labour, impose compulsory labour to be performed periodically or continuously for a period not exceeding one hundred - and eighty hours at the place designated by the court and under the control of the tribal authority or its delegate".

In the Ciskei the writer has observed that the need for the increase of punitive jurisdiction of tribal courts can be shown by the extent to which these tribunals exceed their jurisdiction not only on matters of sentence as is evidenced in the list of cases in Annexure A : See case Numbers 3/77; 4/77; 12/79 (case in point); 9/83; 3/83, but also in the list of criminal matters entertained by the Chief's courts despite the fact that such matters are expressly excluded from their jurisdiction.

It is worth nothing that the Republic of Transkei has gone a step further in the way of improving the jurisdiction of the courts of Chiefs in that country. In terms of the Chief's Courts Act, 1983 (Act No.6 of 1983) the jurisdiction of the Chief's Courts has been considerably increased. Section 3(3) of the Act provides : "In the exercise of the jurisdiction conferred on him in terms of this Act a Chief may not inflict any punishment involving death, mutilation, grievous bodily harm or imprisonment or impose a fine in excess of :-

(a) four head of large stock with an alternative fine calculated at a rate not exceeding one hundred rand per head; or

(b) twenty head of small stock with an alternative fine calculated at a rate not exceeding twenty rand per head; or

(c) four hundred rand".

The extent of jurisdiction here hardly needs any comment.

The present writer is greatly impressed by the Bophuthatswana provision relating to the imposition of compulsory labour. In the case of an impecunious accused who is unemployed the tribal court can order him to do a variety of community services such as the building of dams, road construction etc. This can also be done in the case of seduction and pregnancy suits involving school children. The offending boy can be ordered to do a community service at a fee like, for instance, a clerical work at the tribal authority offices for a specified period until he can raise the required amount.

The Ciskeian Government is, at present, committed to rural development. To this end tribal authorities are expected to play a leading role. This aspect also features prominently in the Swart Commission Report which has been accepted by the government. [122] These matters are mentioned to show that the tribal authorities could use the suggested penal jurisdiction for the benefit of the country as a whole.

With regard to civil matters it is the present writer's opinion that time has come to extend civil jurisdiction of the chief's courts to matters arising from common law.

Such improvement would enable the chief's courts to hear cases of defamation of character involving litigants in their respective areas of jurisdiction. [123] If the training of chiefs and their councillors continues there would be no need to question the competency of these tribunals to entertain these matters.

With regard to the increase of jurisdiction of the courts as to persons, the present writer also feels that time has come for these courts to hear cases involving Blacks and non-Blacks whether they be Whites or Coloureds. The Botswana Customary law (Application and Ascertainment) Act of 1969 which extends the application of customary law in that country to cases involving tribesmen and non-tribesmen in the tribal courts has already created a precedent in this regard. The non-access of the non-Blacks to the Transkei's Regional Authority Courts constitutes a major weakness in what can otherwise be described as an important tribal tribunal.

The definition of a Chief in the Ciskeian Administrative Authorities Act includes a Paramount Chief and thus makes a Paramount Chief who is the head of a tribal Authority to be subject to the same limitations in the exercise of civil and criminal jurisdiction, as an ordinary chief and headman who is a chariman of a tribal authority. The present writer finds this quite anomalous and should be improved in the same way as in the Transkei.

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122) The Swart commission of Inquiry into the Economic Development of Ciskei was appointed in July 1983 in terms of Government Gazette Vol. 11 No. 43 of 1 July 1983.

123) In this regard see Mqeke 1981 : 375

CHAPTER 3

CHIEFS' AND HEADMEN'S CIVIL COURT RULES

Although both the Commissioner's Court and Appeal Court for Commissioners' Courts were abolished on independence, the Chiefs' and Headmen's Courts were retained. The rules governing these courts were also carried over. The Ciskeian National Assembly has expressly made these rules part and parcel of Ciskeian laws in terms of the Administrative Authorities Act, 1984 (Act No 37of 1984). Most of these rules have been considered by the Appeal Court for Commissioners' Courts. With regard to the legal status and authority of these decisions after independence reference can be made to the following sections of the Republic of Ciskei Constitution Act 1981 (Act No.20 of 1981) : Sections 72 (1) (a) and (b); 76 (d) (ii) and (e).

Section 72(1) reads : "Subject to the provisions of this constitution, there shall continue in operation and continue to apply except in so far as such laws are suspended by any applicable laws of Ciskei or are amended or repealed by the National Assembly in terms of this Constitution :-

(a) any rule of law which immediately prior to the commencement of this Constitution was in operation in Ciskei; and

(b) any rule of law which, upon the addition of any land to Ciskei applies on or in respect of such land except that in relation to such additional land the laws of the Ciskei shall in cases of conflict take precedence ...."

In terms of section 76(e) all judgements and orders of the said High Court or any other Court (other than the Supreme Court) referred to in paragraph (a) or (d) shall have the same force and effect as if they had been given or made by the Supreme Court of Ciskei or, as the case may be, the court of corresponding jurisdiction in the Republic of Ciskei.

Section 76(d) refers to Appeal Court for Commissioners' Courts as well as the Black Divorce Court. In terms of section 76(b) the powers

conferred upon any Commissioner in terms of section 9 of the said Black Administration Act, 1927, shall be exercised by a magistrate's court. In terms of section 76(2) any appeal to a court of a Commissioner or a Commissioner in terms of section 12 or 20 of the Black Administration Act, 1927, shall lie to the magistrate's court or the corresponding judicial officer of such court in the district concerned, as the case may be, and any reference in the said sections 12 and 20 to a "court of Commissioner" and "a Commissioner shall be construed as a reference to a magistrate's court and to such judicial officer as aforesaid, respectively, provided that, until an Act of the National Assembly otherwise provides, any regulations made under sections 12 and 20 of the said Black Administration Act, 1927, shall apply mutatis mutandis in respect of any action taken under those sections in a magistrate's court or before a magistrate.

As the magistrate's court has taken the place of the commissioner's court which was inferior to the Appeal Court for Commissioner's Courts, it would follow that these courts should follow the decisions of the Appeal Court for Commissioners' Courts in terms of the principle of stare decisis.

With regard to the Supreme Court of Ciskei these decisions would be persuasive only. Here one should also bear in mind that the Supreme Court takes judicial notice of all written customary law. In this chapter, therefore, it is intended to deal with these rules as have been interpreted by the decisions of the Appeal Court for Commissioners' Courts. In its 1984 session the Ciskeian National Assembly passed the Administrative Authorities Act, 1984 (Act No.37 of 1984). In Schedule 3 the Act contains the rules for the Chiefs' Civil Courts. Apart from minor changes as to the wording and the arrangement of the rules, their content is the same as the old rules as promulgated in Government Notice No. R 2082 of 29th December 1967.

As the new rules are basically a re-enactment of the old rules the decisions of the Appeal Court for Commissioners' Courts vis-a-vis the old rules will carry the same weight with regard to the new rules. The latter will be considered hereunder. It is also important to note that the arrangement of the Ciskeian rules follow a slightly different pattern as some of the old rules have been incorporated into the enabling Act. For instance the old rule 4 which forbade a chief from adjudicating upon any matter or thing in which he is pecuniarilly or personally interested has been incorporated into S 54(2) of the Act. In terms of the latter section any chairman or other Councillor of a tribal or regional authority who attends a meeting or takes part in the proceedings of such an authority during the discussion of or voting on any matter in which he has directly or indirectly by himself or through his spouse, partner or business associate any pecuniary interest shall, unless it is proved that he did not know that he had such interest, be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding six months or both such fine and such imprisonment. The old rule 5 which excluded legal representation in a Chief's court has become the new section 41 of the Act.

Although the old rule 1 has been incorporated in section 40(3) in so far as the trial of criminal matters are concerned and nothing is said about the trial of civil claims it seems that there will be no difference in practice in view of the fact that in matters of procedure tribal courts do not distinguish between criminal and civil matters. As the new rule 1 deals with interpretation of terms, the discussion will commence with rule 2. It is important that in terms of r 1 a Chief means a Paramount Chief, a Chief, a Chief's deputy or a Headman who has authority to hear and determine civil claims under section 39 of the Act and a Chief's court shall be construed accordingly. The clerk of the court means the clerk of the magistrate's court. The word "form" as used in the following discussion means a form prescribed in the annexure to these rules.

RULE 2

JUDGEMENT IN ABSENCE OF PARTY

This rule empowers a Chief's court to give a default judgement where the defendant or his representative fails to attend the trial at the time and place fixed for the hearing of the action (r 2 (1)). Judgement may only be given at the request of the plaintiff when the court is satisfied that the notice of action was given to the defendant personally and that the defendant was at the time of receipt of such notice within the area of the Chief. The judgement should not be for an amount in excess of the amount claimed; the court may, in addition to the amount claimed, also make an order for costs of action (r 2 (1)).

As shown above a notice of action is served on the defendant by the messenger (umsila wenkundla) of the court and such messenger is the proper person to advise the court about the mode of service and also about the whereabouts of the defendant. The requirement of personal service, it is submitted, is an important and desirable safeguard, as the persons usually involved in such suits are ordinary peasants with little or no education. Rural people are reluctant to accept court service from unauthorised person. 124)

Similarly if the plaintiff fails to appear at the time and place fixed for the hearing of the action, the court is empowered, when requested to do so by the defendant, to dismiss the plaintiff's claim (rule 2(2)). The dismissal of the claim is not fatal as plaintiff is free to institute the action afresh either in the Chief's court or magistrate's or Commissioner's court in the areas where Commissioners' Courts are still in existence. 125)

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124) The present writer observed this at Kwenxura Tribal Authority during March 1982. In one of the cases heard on that day it emerged that the defendant had refused to accept a court process from the Headman's child saying that he could not accept a piece of paper from a child - a fact which the defendant repeated at court on the day of trial.

125) See Meyiwa v Myeza 1979 ACCC (NE) 208. At page 211 the Appeal Court for Commissioners' Courts stated that a dismissal of a claim has the same effect as an "absolution judgment". This case is discussed at pages 92-93 below.

However, in Mduduma v Sitwayi [126] it was held that where courts of Commissioners and Chiefs have concurrent jurisdiction and the case is pending in one court, proceedings based on the same cause of action should not be instituted in the other court.

RULE 3

RESCISSION OF DEFAULT JUDGEMENT

The period within which a party may apply for the rescission of a default judgement is given in rule 3(1) as being "not later than two months after such judgement has come to his knowledge".

The new rule used to form part of rule 2(3) and the latter made provision for rescission of a default judgement "within two months after such judgement has come to the knowledge of the party against whom it is given". In the present writer's opinion the two provisions are to the same effect, namely that a defendant should, before the expiration of two months after he has acquired knowledge of the default judgement, apply to the Chief who gave the judgement or his successor in office to rescind such judgement. [127] The Chief or his successor has a discretion to grant or refuse such application. It is not clear whether application here means written or verbal application because the rule merely states that "any party against whom a default judgement has been given under rule 2(1) or (2) may, not later than two months after such judgment has come to his knowledge, apply to the chief ..." In terms of rule 3(2) if the judgement is rescinded, the Chief or the secretary of the tribal authority, as the case may be, shall report the rescission to the clerk of the court who shall note the rescission in the "remarks" column of the register referred to in r 6 against the particulars of the case in question.

In Kulu d.a v Mtembu [128] the defendant applied for the condonation

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126) 1970 BAC (S) 19

127) Nkosi v Khumalo 1954 NAC (NE) 123

128) 1954 NAC (NE) 5. See also Qhotshwayo v Tafeni 1952 NAC (S) 265

of late noting of appeal against a default judgement instead of applying for the rescission of the judgement. The court held that a party should exhaust all available remedies in a lower court before appealing to a higher court. The court also warned that courts of law should not refuse to rescind where there is a doubt as to whether the default may have been otherwise than wilful. Reference was made to the case of Newman v Ayton [129] where the court stressed that courts of law should lean rather towards re-opening than towards refusing. In the result the defendant was advised to apply to the Chief for a rescission of the default judgement.

In Mchunu v Mchunu [130] plaintiff sued defendant for lobolo in respect of his sister. Defendant resisted the claim and sought to set off cattle due by plaintiff to him. The hearing was adjourned and on the day set down for the resumption of hearing the defendant was in default and the Chief gave judgement against him. The Chief refused an application by defendant to rescind the default judgement. On appeal the question arose as to whether the court was to deal with the case on the merits or as an appeal against the Chief's refusal to rescind the default judgement. The additional Commissioner ruled that it made no difference as in any event the case had to be heard de novo. In a further appeal the Appeal Court for Commissioners' Courts held that if the appeal had been against a refusal to rescind the default judgement there was no need for the merits of the main issue to be considered. The presiding officer should have confined himself to the issue on appeal. The court held that the correct procedure for the defendant to have followed was, in terms of section 2(3) of the Chief's and Headmen's Courts Rules, to have asked the Chief to rescind his default judgement and if his application were refused, to have appeald against that refusal to the Commissioner's Court.

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129) 1931 CPD 455

130) 1955 NAC (NE) 72

It should be noted that Mchunu's case was decided in terms of S 2(1) of the rules as promulgated in Government Notice No.2885 of 1951. Under section 2(1) of the 1951 rules no default judgement could be given within 48 hours after the time fixed for hearing of the action. Mchunu's case was followed in Zungu v Mtshali.[131] In this case the court also explained the fact that Mchunu's case was decided some 3 years before the proviso to rule 1 was added by Government Notice No.886 of 1958.

The said proviso states that no appeal shall lie from a default judgement given by a Chief under subsection (1) of section two unless and until an application for rescission of such judgement has been refused. The court also held that an appeal against the default judgement itself was competent when there had been compliance with rule 9 as amended by Government Notice No.886 of 1958 and with Chiefs' and Headmen's Civil Rule 2.

"Subsection (5) of Rule 2, (supra) requires a chief to report a rescission of a default judgement to the clerk of the Court for the purpose of having it recorded. There is no like provision to cover the case of a refusal to rescind but there appears to be no reason why a chief should not be caused, administratively or by judicial process, to appear to state whether or not he has refused to rescind - see the cases of Mdlalose vs Sikakane 1959 NAC 67 (NE) and Tabata v Sidinana 1962 NAC 5 (S) regarding testimony by chiefs in regard to cases heard in their courts".

In Mokhesi v Nkenjane [132] plaintiff obtained a default judgement. An appeal was heard without compliance with rule 2(3). It was held that the court had no jurisdiction.

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131) 1967 BAC (NE) 58

132) 1962 NAC (S) 70

In Mkhabela v Ndlangamandla [133] the defendant applied to the Commissioner's Court to have the Chief's default judgement set aside without first applying to the Chief for the rescission of the judgement. The Appeal Court for Commissioners' Courts attributed the irregularity to the ignorance on the part of the clerk of the court who had assisted the defendant with the lodging of appeal. Instead of advising him to apply for recission of the judgement he assisted him with the noting of appeal. It also appeared that if the defendant had been properly advised he would still have had time to apply for rescission. The court pointed out that the Commissioner should not have heard the appeal but should have struck it off the roll as being non-appealable. The court concluded that the proceedings before the Commissioner's Court were irregular and were accordingly set aside. The Commissioners were also urged to give guidance to their Clerks of Courts, the Chiefs as well as the parties with regard to the observance of the rules of court.

RULE 4

ADJOURNMENT OF OR DELAY IN HEARING OF ACTION

This new rule has taken the place of r 3 in the old rules.

In terms of r 4(1) a Chief may adjourn the hearing of any action from time to time as the circumstances may require. This provision takes account of the fact that a case may be adjourned for a variety of reasons. In terms of r 4(2) "if a chief delays the hearing of any action unduly or refuses to deal with any case or to make any decision, any party to the proceedings may after due notice to the other party, apply to the magistrate for relief"... The magistrate may, after hearing the application, under subrule (2) :

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133) 1974 BAC (NE) 404; See also Gumede v Mkhwanazi 1959 NAC (NE) 24.

(a) give such order as he may think fit for the speedy trial of the case or matter by the chief; or

(b) if it appears that the interests of justice so require, order that the case or matter be heard in the magistrate's court, whereupon the proceedings in the chief's court shall forthwith be stayed" (r4(3)).

In terms of r 4(4) "if the magistrate makes the order contemplated in sub-rule (3) (b) he shall at the same time order the plaintiff and the defendant to file with the clerk of the court their statements of claim and of defence (or alternatively, pleadings in terms of the rules of the magistrate's court) within such time as he shall fix and thereafter the case shall be heard and determined in his court.

The provisions of r 4 are intended to avoid a plea of Lis pendens being raised at the magistrate's court in the light of the decision in Sitwayi's case (supra). If the matter pending before a Chief's court is one beyond the Chief's court's jurisdiction such a plea cannot succeed. [134]

RULE 5

CHIEF'S WRITTEN RECORD

This is another novel feature in the traditional procedure and is provided for in r 5. Although it is often said that a Chief's court is not a court of record, a Chief is, however, required under r 5(1) immediately after the pronouncement of judgement, to cause to be prepared a written record in quadriplicate containing the following particulars :-

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134) See Ngwenya v Mavana 1975 BAC (S) 75 at 76

(a) name of plaintiff
(b) nane of defendant
(c) particulars of claim
(d) particulars of defence
(e) judgement and the date of judgement

The above particulars appear in Form 1 as shown in the annexure to the rules. The written record should be signed by the Chief and the secretary of the tribal authority or as the case may be by the Chief and two members of the Chief's court.

One copy shall be handed to the plaintiff and another copy to be handed to the defendant. One copy shall be delivered or posted to the clerk of the court so as to reach him not later than two months after the date of the judgement and the fourth copy shall be retained by the Chief or the secretary of the tribal authority for record purposes.

Either party to the proceedings in the Chief's court may, within two months from the date of judgement file a copy with the clerk of the court.

The requirement regarding the written record and the furnishing of the copies thereof by the Chief or any of the parties to the action, is intended to ensure compliance with r 6 which requires registration of judgements of a Chief's Court. The importance of rules 6 and 7 cannot be overstressed as failure to comply with them will render such judgement void and of no legal effect. In terms of r 7 a judgement of a Chief's court which is not registered as prescribed in rule 6 within two months after such judgement has been pronounced shall lapse. Non compliance with rule 6 and 7 does not only affect the rights of the parties to the case particularly the successful party, but may also render the chief personally liable for loss suffered by the plaintiff as a result of such non-compliance. [135] In Zulu v Nxumalo [136] the court held if neither the Chief nor the successful party, delivers to the

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135) Bhengu v Mpungose 1972 BAC (NE) 124 - In this case the Court also held that rules 6 and 7 are peremptory.

136) 1953 NAC (NE) 1; See also Khumalo v Mhlongo 1965 (NE) 42

commissioner having jurisdiction the original or the duplicate respectively of the Chief's relevant written record within the period prescribed in rule 7(2) of the old rules, the Chief's judgement lapses. There is much to be said against holding a Chief personally liable for any acts or ommission performed in connection with the hearing of a case particularly in the light of the fact that fines imposed by a Chief's Court no longer accrue to the Chief as was the position before the advent of colonial rule but are paid into a trust account which is subject to the control of a district magistrate. [137)]

Again in an appeal against the Chief's judgement in the magistrate's court the written record is very important as it forms the "criterion", in so far as the pleadings and judgement in a Chief's Court are concerned. [138)]

It has been held that the written record of the Chief's Court should be presumed to reflect the true elements of the trial before him. If it is alleged to be incorrect, it can only be corrected on application to the magistrate and on notice to the Chief and the other party. The magistrate will be required to investigate and decide the issue. [139)] If the correctness of the Chief's written record is not challenged, the defendant's admission in the Chief's court stands. [140)] It is important to note that the admission referred to above can only bind the defendant if it is legally enforceable. [141)] In this case plaintiff claimed a replacement of his cow killed by that of defendant or its value being R240,00. The defendant admitted liability in the Chief's court and the judgement was awarded accordingly. Defendant nevertheless appealed and the Commissioner found in terms of custom that defendant was not liable as the animal had not shown previous vicious propensities. In a further appeal the Appeal Court for Commissioners' Courts held that

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137) In the Ciskei this matter is provided for in S 6(2) (c) of the Administrative Authorities Act 1984 (Act No.37 of 1984)

138) Khumalo v Khumalo 1953 NAC (NE) 4 : Ngubane v Hadebe 1968 BAC (NE) 13

139) Ntshingilili and others v Mncube 1975 BAC (NE) 100, Am v Kuse 1957 NAC (S)92, Khalankomo v Xaba 1981 ACCC (NE) 25

140) Malufahla v Khalankomo 1955 NAC (S) 95; Gambushe v Makhanya 1980 ACCC (NE) 10

141) Meyiwa v Myeza 1979 ACCC (NE) 208

although admission of liability in a Chief's court bars further proceedings such cannot be true if the admission was not an admission which could be legally enforceable.

The court therefore found that the defendant's admission had no force in law. This means that in an appeal from the Chief's court the court will be expected to scrutinize admissions made in the Chief's courts to see whether they qualify as admissions which can be regarded as legally enforceable or those which have no force in law. [142] In Magubane v Nzimande and Another [143] plaintiff sued defendant for damages for wrongful attachment of cattle. The claim in the Chief's court was for 3 doors, 2 boxes, plough, 6 pots, two full sacks of beans and 12 bundles of corn. According to the written record which had been signed by the Chief and two members of his court, the court had given judgement to the effect that defendant should collect all the things mentioned above from the people who had taken them. Defendant had also been ordered to pay £1.4s.6d. (about R2,4c) costs. As a result of this judgement four head of cattle belonging to appellant were attached by the tribal messenger. The appellant was the guardian of the second respondent and the first respondent was messenger of the Chief's Court. The second respondent sued the appellant. The latter then brought an action in the Commissioner's Court, alleging that the attachment was wrongful and unlawful and claiming the return of the four head of cattle or their value about R220,00. A default judgement was granted but was subsequently rescinded. In the interim plaintiff gave notice that he would amend the summons and claimed six head of cattle alleging that there had been an increase of the two heifers subsequent to the attachment.

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142) See also D J Swanepoel, "Meyiwa v Meyezwa (Sic) 1979 ACCC (NE) 207 - admitting liability in a chief's court" in (1981) 5 Bulletin of the Institute for Public Service and Vocational Training of the University of Zululand, 22.

143) 1963 BAC (NE) 4; See also Zulu v Zulu 1962 NAC (NE) 94; Mbuto v Cele d.a. 1977 ACCC (NE) 247; Jeni v Xinabantu 1961 NAC(S) 62; Mpanza v Dubazana 1969 BAC (NE) 51 and Dimaza v Gxalaba 1955 NAC (S) 93.

The Commissioner found that although according to the written record of the Chief the plaintiff in the Chief's court had only been advised to collect all things mentioned in the summons from the people who had taken them, the judgement had in fact been that if the defendant could not return the articles he should pay R40,00 and that on that judgement the first respondent had attached four head of cattle and delivered them to the defendant; that according to the custom of the tribe cattle are handed over to the judgement creditor and not sold and that the cattle had not been wrongfully and unlawfully attached by the first respondent. An appeal was noted against the Commissioner's judgement. One of the grounds of appeal was that the Commissioner ought to have found that the original Chief's judgement did not authorise the execution thereon by the second respondent in that the Chief's judgement was a mere directive to the plaintiff to endeavour to recover the missing articles from the person who had removed them and could not, as such be executed upon.

In finding that the judgement of the Chief had, in fact, been that, if the appellant could not return the articles in question he should pay their value R40,00, the Commissioner relied entirely on the evidence to that effect given by the Chief himself and rejected that of the plaintiff who had denied that the Chief had ordered him to pay R40,00 if he could not produce the articles.

The Appeal Court for Commissioners' Courts found that the Commissioner had erred in deciding the action on the basis that the judgement of the Chief's court was the judgement which, the Chief stated in evidence he had given.

Reference was made to the case of Malufahla vs Kalankomo [144] where it was laid down that the criterion in so far as the pleadings and judgement in a Chief's court are concerned is the Chief's written

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144) 1955 NAC (NE) 95

record. The Appeal Court for Commissioners' Courts confirmed the view expressed in Kalankomo's case and went even further and stated that regulation 6 of Chiefs' and Headmen's Civil Court rules requires a chief to prepare or cause to be prepared a written judgement immediately after pronouncement of judgement and the maxim "Omnia praesumuntur rite esse acta" applies to the preparation of such a record. The correctness of the judgement as recorded must, therefore, be presumed and can only be challenged by following the procedure laid down in the case of Kunene v Madondo 1955 NAC 75". The court concluded that the judgement of the Chief as recorded could clearly not support the execution levied on it as it was, at most, merely a direction to the appellant to restore the articles in dispute and provided no sanction in the event of his failure to do so. The court ordered the second respondent to restore the animals. The appellant's Attorney did not press the appeal in respect of the claim for damages against the first respondent (messenger of the court) as he conceded that he had not acted maliciously in attaching the cattle. In the result the Commissioner's judgement was altered to read "for plaintiff for three of the four cattle attached and their two progeny plus the fourth beast attached or its value R40,00 with costs".

It is clear from the provisions of rule 5 that the written record must speak for itself and must contain all the necessary particulars relating to the case. In Cele's case, supra, the court found the written record of the chief's court extremely vague in that it simply recorded that, "Plaintiff claims the defendant for making her daughter pregnant" to which the defendant equally vaguely replied alleging that the girl had rejected him ten months previously. The Chief merely stated that he gave judgement against the defendant. Nowhere was it shown what exactly the judgement was which was given in favour of the plaintiff.

In Gambushe's case, supra, it was held that if the Chief's judgement was vague and it was not clear what the defendant was admitting, the defendant should not be held to what might be interpreted as an admission.

Although the Chief's written record forms part of the record on appeal to the magistrate's court, it was held in Ntlelwane v Kraai [145] d.a that notes made by the witnesses who had given evidence in the Chief's court and annexed to the Chief's written record do not properly form part of the record unless handed in by agreement of the parties for the purpose for which they were used.

Although the Appeal Court for Commissioners' Courts has held in Mdlalose v Sikakane [146] that a Chief's evidence concerning the proceedings in his court can only be admissible in the rare instances where it concerns a point actually in issue or relevant to the issue in dispute between the parties at the time, in Tabata v Sidimana [147] the Court held that the evidence of the Chief who presided at the trial of the case in the court of first instance, as regards admissions made by the defendant at such trial was admissible in the Commissioner's Court when the case came before it on appeal. In Nkomo v Jali [148] the court held that it is highly irregular for a Chief to be called in an appeal from his own judgement in order to hand in his reasons for judgement under oath and to be cross-examined.

In Zulu v Zulu [149] the court held that a defendant in an action in a Chief's court who, in the written record of these proceedings, is alleged to have admitted liability is not for that reason stopped from taking the Chief's judgement on appeal to the court of a Commissioner nor the fact that he is recorded as having admitted liability in the Chief's court precludes him from

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145) 1963 BAC (S) 33
146) 1959 NAC (NE) 67
147) 1962 NAC (S) 5
148) 1980 ACCC (NE) 58
149) 1962 NAC (NE) 94

availing himself on appeal of the right afforded him by rule 12 to file a fresh statement of defence and that he may do so - regardless of the fact that he has taken no steps to have the Chief's written record amended in regard to his alleged admission of liability.

INTERPLEADER CLAIMS

This is provided for in rule 8(2). This rule reads : "Any claim to property attached in the execution of the judgement of a chief's court which is made by any person other than the judgement debtor, shall be heard and determined by the Chief or by his successor in office".

Interpleader claims of this kind usually arise in connection with Nqoma contracts. In such a case the true owner of the livestock attached at the instance of the judgement creditor should first institute a claim for his animals (property) in the Chief's Court. In Mbambo v Sikhakhane [150] plaintiff claimed the return of six heard of cattle or their value being R800,00 from defendant who had cattle attached as a result of a judgement he had obtained in the Chief's Court against one John Mhlaba. Plaintiff claimed that he had sisaed (Sisa is the equivalent of Nqoma in Xhosa) the cattle with Henrietta Mhlaba, the wife of the defendant and were therefore not executable in respect of the judgement against the defendant. Plaintiff's claim was upheld by the Commissioner and defendant appealed. The Appeal Court for Commissioners' Courts held :

1. That this was by nature an interpleader action arising out of a judgement given in a Chief's Court and there is no provision for such action to be heard in the Commissioners' Courts;

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150) 1979 ACCC (NE) 190, Mbata v Zulu 1975 BAC (NE) 91, Dladla v Sikhakhane D.A 1975 BAC (NE) 94. In this case r 8(2) was said to be peremptory.

2. That the remedy lay in rule 8(2) of the rules of Court of Chief's and Headmèn in Civil Matters (GNR 2082 of 1967) which provides for any claim to property attached made by any person other than the judgement debtor to be heard and determined by the Chief delivering the judgement or his successor in office;

3. That the Court of the Commissioner had no jurisdiction to hear such claim and that the judgement of that court was void ab initio". Prior to instituting proceedings in the magistrate's court a litigant must first exhaust the remedies available to him in the Chief's Court. [151]

It is highly irregular for a Commissioner's Court to entertain a claim which should have been dealt with by the Chief's Court in terms of rule 8(2). In Makhanamfu v Twani and Another [152] the court held that the provisions of rule 8(2) are peremptory. In this case the appellant (applicant in the Commissioner's Court) sought, by way of notice of application dated 15 December 1978, the order as set below :-

"(a) An order directing the respondents to restore certain three cattle, to wit, a skemele cow heavily in calf and a bhelu young ox, to the applicant, and a mdaka ox.

(b) An order directing the messenger of the court to remove the said cattle from the possession of the Respondents and place them in applicant's possession.

(c) An order calling upon the respondents to show cause if any on the 16th January, 1979, at 10.00 a.m. why this order shall not be made final.

(d) Alternative relief.

(e) Costs of suit".

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151) Dlamini v Khumalo 1975 BAC (NE) 38

152) 1980 ACCC (S) 42

From the record it seems that the order applied for was granted on the same date in the following terms :-

"(a) That the messenger be and is hereby authorised to remove the three head of cattle, to wit, a mdaka ox, a skemele cow heavily in calf and a bhelu young ox from the possession of the Respondent and place them in applicant's possession.

(b) That a rule nisi be and is hereby granted calling upon the Respondent to show cause, if any, to the above Honourable Court on Tuesday, the 16th day of January, 1979, at 10.00 a.m. why this order should not be made final".

From the record it appears that the said animals had been attached and removed from the applicant's kraal by first respondent pursuant upon a judgement of the Pato Tribal Authority in favour of the 2nd respondent in a matter between herself and one Dudu Makhanamfu the brother of the applicant. The latter did not follow the procedure set out in rule 8(2) of the Chief's and Headmen's Civil Court Rules. The Court held that the procedure followed by the applicant was highly irregular and that the Commissioner's Court should not have countenanced (entertained) the application which should have been dismissed at the outset. It also appeared from the record that first respondent was the headman of Chalumna. The Appeal Court for Commissioners' Court also held that in ignoring the express provisions of rule 8(2) the applicant and the presiding Commissioner erred in the proceedings giving rise to the rule nisi. The appeal was therefore dismissed with costs. To enable the applicant to pursue his remedy in the proper manner in terms of rule 8(2) all the proceedings in the court a quo were set aside.

JUDGEMENTS

Unlike the Commissioners' Courts rules, the rules governing the courts of Chiefs and Headmen do not contain a specific rule dealing with judgements apart from default judgement in rule two which gives the circumstances under which a default judgement can be given. This omission is regretable as the insertion of such a provision could possibly serve as a guide to the Chief s' courts. Moreover such a provision would serve a practical purpose as it would remove some of the doubts relating to the Chief s' courts competence to give certain types of judgement, for instance, in Jiyane v Jiyane [153] it was held that an absolution judgement is unknown in the Chief's court. In view of this the Appeal Court for Commissioners' Courts altered the Commissioner's judgement of absolution from the instance to one dismissing the claim.

Although the technical term of judgement of absolution from the instance is unknown, such judgements are not uncommon in the Chief's Courts of the Ciskei. In Xhosa it is often said that "ityala lichithiwe" meaning that the case is dismissed. See in this connection case number 5 of 1982 emanating from Peddie. In case number 1 of 1977 emanating from Alice the matter was referred back to the family Court. See also case no 3/77. All these cases are shown in Annexure A below.

In practice the Chief's courts do give judgements of absolution from the instance. In Tsautsi v Nene and Another [154] the appellant sued respondents for six head of cattle or their value £30 as damages for the seduction and pregnancy of appellant's daughter. Respondents in their plea denied seduction. One Lefadi Tsautsi, appellant's representative stated in his evidence that he had reported the pregnancy to respondents and that first respondent denied the charge. He then went on to say, "I then took the matter before chief Jeremiah and his judgement was that my sister (the seduced girl) was rendered pregnant by the veld and then I decided to bring the matter in this court".

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153) 1966 BAC (NE) 12; See also Khumalo 1984 : 40

154) 1952 NAC (S) 73

The Commissioner, in dismissing the summons, added the rider that "the court having taken the point mero motu that the matter having been heard before a chief having civil jurisdiction, this court has no jurisdiction to hear the action, and that it should have been brought by way of appeal". It appears that in Commissioner's opinion the Chief's judgement was a final judgement. In a further appeal to the Appeal Court for Commissioner's Courts Sleigh (President) delivering the judgement of Court, said : "For a judgement to operate as an estoppel it is essential, inter alia, that it must be a final judgement and it may well be that respondent's attorney regarded the chief's judgement as one dismissing appellant's claim, which would, in effect, have been an absolution judgement.

Counsel contends that it was, and the evidence, in my opinion, supports this contention. According to Lefadi the Chief said that the girl had been rendered pregnant by the veld; second respondent says that the chief said he found no fault with first respondent, and the Chief himself says : 'Simpe (appellant's witness) said he had never seen Dibe (Libe) lying down with the girl and the girl in evidence had said Simpe had seen them and for this reason I rejected the complaint ..."

As has been shown in the section dealing with the conduct of trial above, that the procedure at any trial, the punishment, the manner of execution of sentence and the appropriation of fines shall be, except so far as the Minister may prescribe otherwise by regulation, in accordance with tribal law and custom; it is important that a judgement of a Chief's Court should be in accordance with law. In other words it must be a conclusion based on the facts of the case before court and be in accordance either with the provisions of any applicable statute or customary law prevailing in the court's area of jurisdiction. A judgement should be either for or against a party or parties to the proceedings and should not be given against somebody who was not a party to the action. In an appeal against a Chief's judgement in a case in which the Chief's Court

dismissed plaintiff's claim and ordered instead that a person who was not a party to the action should restore the property which was the subject matter of the claim, the Appeal Court for Commissioners' Courts altered the Chief's judgement to one dismissing the case to enable the plaintiff to bring the case de novo as it appeared that the reason why the Chief had given judgement affecting a person who was not a party to the action was to convey the impression that a wrong person had been sued. [155] It is implicit from rule 2 of the Chief's and Headmen's Civil Court rules that a judgement should not be for an amount in excess of the amount claimed. [156] It is also important that a Chief's court should, before giving a judgement, first ascertain whether it has jurisdiction to impose the type of punishment it proposes to give. In Mbata v Mvelase [157] plaintiff successfully instituted an action for the return of his beast which had been attached by a tribal constable in execution of a fine which had been illegally imposed. He was also awarded R20,00 damages for deprivation of the use of the animal. The limits of a Chief's court's jurisdiction in both civil and criminal matters have been dealt with above in the section dealing with the changes that have taken place regarding the traditional law of procedure and evidence.

Reasons for judgement

In terms of rule 11(1) the Chief should as soon as possible but not later than fourteen days after receiving the notice referred to in rule 10(1)(d), furnish the Clerk of the Court either personally or by deputy, with reasons for his judgement. If these reasons are not in writing, they shall be recorded by the Clerk of the court and form part of the record of the case on appeal. It is necessary that the Chief should comply with this rule and the magistrate can only dispense with such requirement if it is clear that the reasons are not forthcoming and must record such step on the record and give reasons why he

155) Mthiyana v Ndaba 1979 ACCC (NE) 268. This means that it will be irregular for a Chief's Court to give a judgement against the seducer's father if the latter was not joined as a co-defendant in the action. See also Mkombo v Mathungu, supra.

156) Mpanza v Madide 1969 BAC (NE) 31

157) 1968 BAC (NE) 32

proceeded with the appeal without the Chief's reasons for judgement.[158] He is not entitled to ignore altogether the fact that the reasons are not before him.[159] There is nothing wrong with a Chief's reasons for judgement being given in a vernacular; for purposes of an appeal they can be translated into English or Afrikaans by anybody competent to do so.[160]

Execution of Chief's judgement

In the olden days the manner of executing punishment differed; if the sentence was one of whipping it was carried out immediately by the man appointed for that purpose by the court in the presence of the members of the court in attendance and there was no provision for the medical examination of the convicted man to see whether he was physically fit for the purposes of the administration of corporal punishment. If punishment was in the form of a fine the period within which the fine was payable would depend largely on the ability of the man to pay. The execution of sentence was carried out by the messengers (imisila) of the court. The most common form of punishment was in the form of compensation to the victim and a small fine e.g. a sheep or a beast to be slaughtered and eaten by the members of the court (ibandla).[161] This form of punishment also enjoys some legislative sanction. Section 40(3) of the Administrative Authorities Act 1984, provides that "the manner of execution of any sentence imposed ... save as may be otherwise prescribed by regulation, be in accordance with tribal law and custom.

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158) Myeni v Myeni 1955 NAC (NE) 79 at 80, Zulu v Zulu 1955 NAC (NE) 65. In Zulu's case reference was made to the case of Zwane v Sitoli 1947 NAC (T & N) 30 where it was held that the appeal was not properly before the Court if the provisions of the rules were not complied with and if the case was not properly before the Court the proceedings would be null and void; See also Gumede v Nxumalo 1953 NAC (NE) 191; Dhlongolo v Dhlongolo 1952 NAC (NE) 226; Gazu v Ndawonde 1954 NAC (NE) 142; Mkize v Mkize 1952 NAC (NE) 194 and Sibiya v Zwane 1965 BAC (NE) 60.

159) Nkomo v Jadi 1979 ACCC (NE) 246. In order to show that he has not ignored the fact he must record the circumstances and reasons for his proceeding or not proceeding with the case.

160) See Khumalo, 1984 : 45

161) See Makapan v Khope 1923 AD 551.

As has been shown above section 40 of this Act deals with criminal jurisdiction of the Courts of Chiefs and Headmen in the Republic of Ciskei.

If, in a criminal case, a Chief, Headman or Chief's deputy fails to recover from the accused, a fine or any portion thereof, imposed by him, then he may personally arrest such person or cause him to be arrested by his messengers and he shall within 72 hours after his arrest or bring him or cause him to be brought before the magistrate (S 40 (4) (a)). As regards a civil case rule 8(3)(a) provides the procedure to be adopted when attachment is resisted by force and the Chief's messenger is of the opinion that the seizure cannot be effected without a breach of peace. [162] The procedure of arrest as outlined in S 40(4)(a) of the Act will only be invoked if the chief has failed to recover the fine by any lawful means. Should this happen the messenger must not attach; instead he must report the fact to the judgement creditor who, if he so desires, may apply to the Clerk of the court for the enforcement of the judgement. If the judgement has not been registered the Clerk of the court shall not take any steps for its enforcement. If the judgement has been registered as laid down in rule 6 it shall be enforced in the same manner as the judgements of a magistrate's court (Rule 8(3)(b)).

As the procedure in connection with the execution of a Chief's judgement shall be in accordance with the recognised customs and laws of the tribe, it has been held that there is no restriction placed on the value of the articles to be attached as is the case in the rules for Commissioners' Courts (S.N. No. R2083/1967 rule No.64) and in Magistrates' Courts (Section 67 of Act 32 of 1944). [163]

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162) Mbambo v Bele 1969 BAC (NE) 15 at 17; See also Mbambo v Chief Dhlomo 1955 NAC (NE) and Mazibuko v Shabalala and Another 1953 NAC (NE) 243.

163) Gungquza v Ntuli 1974 BAC (SD) 431 at 433.

In the same case the question arose as to whether according to custom articles other than stock and crops e.g. furniture, motor vehicles, etc. are attachable? The Court could find no authority to indicate that any property is exempt by custom from attachment and that in the absence of any specific restriction in regard to value under the rules for Chiefs' and Headmen's Courts as now framed the attachment of household goods, implements of cultivation, was in order. The Court also held that although the contention that such step would be opposed to public policy and natural justice has some merit, in the absence of any specific provision in the rules providing for the protection of certain property from attachment, any limitation would appear to be unenforceable.

However, if the judgement is for the delivery of cattle only with no alternative value for costs incurred, the messenger of the court is precluded from attaching anything but cattle.[164] It has been held that in terms of custom, execution of a tribal court's judgement may be levied against an heir who has inherited assets despite the fact he has not been substituted.[165]

It has been held that a messenger of the court who attaches cattle and completes execution by handing them over to the execution creditor acts wrongfully where he knows that the ownership of the cattle in question is in dispute. In Mpanza v Madide[166] a messenger of the court attached certain ten head of cattle despite notification that cattle were not the property of the execution debtor and his own admitted knowledge that the cattle were in dispute completed execution by delivering them to the execution creditor who in turn sold them to a second party who

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164) Gungquza's case, supra, at 434

165) Mbatha v Mabaso 1970 BAC (NE) 27, see also Kerr, Customary law 133-134 and the cases cited therein. Some of the cases mentioned by the learned author deal with exceptions to the heir's customary law liability

who also sold them to a third party for R392,00. The claimant then sued the messenger for damages based on the value of the seven of the ten head. It was held that the correct procedure should have been the institution of interpleader proceedings.

In Notanaza v Madiyane [167] it was held that if a Chief's judgement is valid then any attachment in pursuance thereof is also valid unless the contrary is proved and the person who alleges the illegality of the attachment must prove it. Attachment of property may be made anywhere within the Chief's area of jurisdiction by the Chief's messenger.

Suspension of execution of Chief's judgement

In terms of rule 8(1) execution of a Chief's judgement shall be suspended as provided by section 39(4) of the Act, on an appeal therefrom being noted within the time and in the manner prescribed in these rules. In Mbokazi v Mpungose [168] a Chief authorised the attachment of the defendant's cattle in satisfaction of his judgement after the latter had noted an appeal to the Commissioner's Court which subsequently upheld the appeal. The defendant then sued the Chief for the return of his cattle or their value when he had failed to recover his cattle from the original plaintiff.

In an appeal against the Commissioner's absolution judgement, the Appeal Court for Commissioners' Courts, referring to rule 8(1) of the rules for Chiefs' and Headmen's Civil Courts read with section 12(4) of the rules for Chiefs' and Headmen's Civil Courts read with section 12(4) of the Black Administration Act 38 of 1927, set aside the Commissioner's absolution judgement and remitted the case to him for hearing and passing of a fresh judgement. The Appeal Court for Commissioners' Court expressed its displeasure at the Chief's Court by ordering that fees payable

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167) 1943 NAC (C & O) 34

168) 1975 BAC (NE) 40

to the Chiefs should be disallowed. The court also stated that any future irregularity or failure by the Chiefs to comply with the rules of their court which prejudices any litigant will in addition to similar disallowance of fees, be brought to the notice of the Authorities for administrative action. The use of the word "shall" indicates that the provisions of this proviso are p eremptory and must be strictly observed by the Chiefs.

Obstruction of messenger an offence

In terms of rule 8(4) any person who obstructs a messenger of a Chief in the execution of his duty, or who, being a judgement debtor and being required by the messenger of a Chief to point out property to satisfy the judgement against him, falsely declares to the messenger that he possesses no property ... shall be guilty of an offence and liable on conviction to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding six months.

Appeal against chief's judgement

The time and the manner of noting an appeal against a Chief's judgement are fully set in rule 9. An appeal against any judgement or order of a Chief's court may be noted not later than two months after the date of the pronouncement of such judgement or decision.

In the Republic of Ciskei such an appeal lies to the magistrate's court. [169] The appellant is required to notify the Clerk of the court hearing the appeal, either personally or through a legal representative. In terms of the proviso to rule 9(1) no appeal shall lie from a default judgement given by a Chief under rule 2(1) unless and until an application for the rescission of such judgement

169) r 9(3)

has been refused. The appeal shall be deemed to have been properly noted as soon as the clerk of the court has been notified and the prescribed fees have been paid (rule 9(2)).

If the judgement lapses by reason of non-compliance with rule 6, the appeal shall also lapse (rule 9 (2)).

Should this happen the only course open to the appellant would be to note a fresh appeal accompanied with an application for condonation of late noting. [170] In terms of rule 9(3) the magistrate may on good cause shown extend the period prescribed in sub-rule (1).

HEARING OF AN APPEAL

The hearing of an appeal is governed by rules 12 and 13. In terms of rule 12 the plaintiff in the Chief's court may, not less than seven days before the date fixed for the hearing of the appeal, file with the clerk of the court and serve upon the defendant, a written statement amplifying his claim in the Chief's court (rule 12(a)). Similarly the defendant in the Chief's court may, not less than seven days before the date fixed for the hearing of the appeal file with the clerk of the court and serve the plaintiff a written statement of his defence to the claim and may also raise a counter claim notwithstanding that such claim was not raised in the Chief's court (rule 12(b)). In terms of rule 13 the magistrate's court may at or before the hearing of the appeal allow the statement of claim, defence or counter-claim referred to in rule 12(a) and (b) to be then and there recorded notwithstanding that the same may not have been filed with the clerk of the court within the prescribed time and shall require the plaintiff to plead to the counter-claim. In terms of rule 13(2) upon the day fixed for the appearance of the parties, the magistrate's court shall proceed to re-hear and re-try the case as if it were one of first instance in

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170) Mtiyane v Gumede 1956 NAC (NE) 92; See also Mabuyakhulu v Mabuyakhulu 1974 BAC (NE) 401 and Mabuyakhulu v Mabuyakhulu 1975 BAC (NE) 222 at 223

that court and may give such judgement or make such order thereon as provided in section 39(5) of the Act. The rules of the magistrate's court shall apply in respect of the execution of the magistrate's court decision (r 13(3).

As it frequently happens that the issues in cases taken on appeal from a Chief's court to a commissioner's court (and now to a magistrate's court) are not clear from the record of the proceedings furnished, the Appeal Court for Commissioner s' courts has held that it is advisable for a Commissioner at the commencement of the hearing of an appeal to call upon the plaintiff for a statement of his claim and on defendant for his reply so that at the outset there may be no doubt as to the matters in dispute. [171] In the same case the court held that a claim in a Chief's court for the delivery of cattle was in reality an application for a declaration of rights in and to the property rights of the sister of the parties. In Mdhluli v Mbuyane, [172] Mbuyane sued Mdhluli for refund of lobolo and obtained judgement in the Chief's court for refund of 10 head of cattle. On appeal to the Commissioner's court the Chief's judgement was altered to one for refund of £55 (R110,00) and two head of cattle. Plaintiff did not amplify his claim on appeal to the Commissioner. The Appeal Court for Commissioners' Courts could not understand why the Chief's judgement for 10 head of cattle should have been altered and increased to £55 and two head of cattle in the absence of any amplicifation of plaintiff's claim. The court also pointed out that the parties on appeal from a Chief's court should not be referred to as "appellant" and "respondent" but simply as plaintiff and defendant respectively. It also held that as rule 12(4) requires the commissioner to re-hear and re-try the case as if it were one of the first instance in his court, the plaintiff should adduce evidence first. [173] Although a commissioner's court and now also a magistrate's court is enjoined to proceed to re-hear and re-try the case as

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171) Zulu v Zulu 1957 NAC (NE) 6 at 7; See also Jeni v Xinabantu 1961 NAC (5) 62.

172) 1953 NAC (NE) 286. However amplification must not constitute a new cause of action. Biyela v Mtetwa 1953 NAC (NE) 56

173) See also Nxumalo v Mlungwana 1959 NAC (NE) 6

if it were one of first instance in his court the case still remains an appeal so that the court in giving judgements in such appeals should indicate whether the appeal is upheld or not. [174] In Mahlombe v Nt..ame [175] it was held that a court hearing an appeal from a Chief's court cannot dismiss the appeal without hearing evidence from the parties.

It seems that the successful party in an appeal from the Chief's court to the magistrate's court may cause the judgement to be executed in either court. In Gungquza v Ntuli [176] the messenger of the Chief's court attached property from defendant's kraal after the judgement of the Chief's court was confirmed on appeal to the Commissioner's court. In a further appeal to the Appeal Court for Commissioners' Courts it was contended, on behalf of the defendant, that rule 12(4) of the Chiefs' and Headmen's Civil Courts rules provides that "the successful party to an appeal may take out process of the court of such Bantu Affairs Commissioner for the execution of such jdugement or order" precluded execution in a Chief's court. The court held that in the context and in view of the use of the word "may" there would appear to be no reason why the successful party to an appeal to the commissioner's court should be restricted to issuing process only out of that court. That being so, the court held that the messenger of the Chief's court was entitled to proceed to execute the judgement of that court. This reasoning seems to be convincing as it tallies with the provisions of rule 8(1) dealing with the suspension of the execution of a Chief's judgement. After the appeal has been heard, the clerk of the court shall inform the Chief against whose judgement the appeal was lodged, about the outcome of such appeal and if there is a further appeal about such further appeal and, in due course, about the outcome thereof (rule 13(4). In the hearing of an appeal from a Chief's court it is important that the magistrate should follow the normal

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174) See also Khumalo op.cit. at 46.

175) 1975 BAC (S) 167; Thabede v Nkomonde and another 1980 ACCC (NE) 70

176) 1974 BAC (S) 431

civil court practice and procedure with regard to examination and cross-examination of witnesses. In Msani v Mgcece [177] plaintiff sued defendant in the court of Chief Elijah Zama in Umzinto district for taking his horse which defendant denied. The chief gave judgement for plaintiff and defendant appealed to the commissioner's court which allowed the appeal and set aside the Chief's judgement. Plaintiff appealed against the commissioner's judgement. The appeal was noted on the grounds, inter alia, that the commissioner erred in dismissing plaintiff's two witnesses without affording the defence an opportunity to cross-examine them and the plaintiff to re-examine them to clarify their evidence. He also contended that the court erred in holding that the evidence of one Bennet Mkhize had nothing relevant to the case.

The parties were not represented in the court a quo and the Appeal Court found that the mentioned grounds of appeal were very material to the case. From the record it appears that the witness Bennet Mkhize was called by plaintiff and after giving evidence one question was put to him by the court and the question was how did he know that the horses belonged to plaintiff. Bennet replied that he presumed this because they were at plaintiff's kraal. At this reply it is recorded : "Witness dismissed cannot tell court anything relevant". Balind Msani was then called and after recording the witnesse's evidence regarding the horses the court then recorded : "Witness dismissed".

In his reasons for judgement the Commissioner said that both witnesses had been closely questioned by the court as to their knowledge of the horses and in dismissing them the court was satisfied that they had no knowledge of the ownership of horses. Neither respondent nor appellant expressed any wish to further examine the witnesses, nor did they object to the dismissal of the said witnesses. On the point that the parties were not given

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177) 1978 ACCC (NE) 47

the opportunity to examine and re-examine the witness Bennet, the Commissioner admitted that the case had been conveyed informally and not recorded.

The court drew the attention of the Commissioner to rule 12(4) of the Rules of Court of Chiefs and Headmen in Civil matters which states : "upon the day fixed for the appearance of the parties the court of the commissioner shall proceed to re-hear and re-try the case as if it were one of first instance in that court and may give such judgement or make such order thereon as provided in Section 12(5) of the Act".

Smith (Acting President) delivering the judgement of the court said that according to the above rule the normal procedure applicable to the hearing of a civil case should be followed in that each party should be allowed to lead his evidence and call his witnesses on the issue before court and that cross-examination and re-examination should be allowed. Any other procedure that either party decides to adopt during the hearing should be recorded.

"It is only when all evidence has been recorded can the Commissioner decide which is relevant and which is irrelevant to the issue, and what weight must be given to the evidence of the various witnesses in coming to a decision". The court held that the action of the Commissioner in not permitting the cross-examination of the two witnesses should be regarded as fatally irregular. It also stated that if the parties did not want to make use of that procedure, such a step should be clearly recorded so that on bringing the matter on a higher tribunal such party could not "cry prejudice on the decision made against him". [178] The court then allowed the appeal with costs. The proceedings and judgement of the Commissioner were set aside and the case referred back for re-hearing of all relevant evidence and making of a fresh judgement on the merits thereof.

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178) per Smith at 52

Gross irregularity in the hearing of an appeal from the Chief's court arose again in Thabede v Nkomonde and Ano.[179] This case concerned the substitution of an heir in the proceedings for his deceased father. In this case the late Mhlanganyelwa Nkomonde was the defendant in an action brought before the Chief's court by one Gabangezwe Thabede where the latter claimed nine head of cattle "for residing with my wife (Nkomonde's daughter) and return her after she is pregnant". According to record the defendant denied the claim in the Chief's court but the judgement was given against him for nine head of cattle as claimed. The defendant, late Mhlanganyelwa, took no further steps in the matter and died about five months thereafter. The judgement was given on 7 August 1975. Later Richard Nkomonde, the son of the late Mhlanganyelwa and who claimed to be his heir came forward and appealed against the Chief's judgement on 1 December 1976. He filed an application for condonation of late noting of appeal. He also applied to be substituted as the defendant in the place of the late Mhlanganyelwa. On 1 September 1977 the Commissioner allowed both applications. The Commissioner then allowed the appeal and altered the Chief's judgement to read "Plaintiff's claim dismissed with costs". The plaintiff then noted an appeal against the Commissioner's judgement on 12 October 1977.

In hearing the appeal the Appeal Court for Commissioners' Courts made the following comments with regard to the procedure followed by the Commissioner in the hearing of the appeal from the Chief's court :

"There are some further matters from the record which call for comment. At the hearing plaintiff was present but refused to take part in the proceedings on the grounds that this case had been finalised in the chief's court and he did not know why he had been brought before the Commissioner's Court. No evidence was lead and

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179) 1980 ACCC (NE) 70

it was simply recorded that both applications were allowed as was the appeal and the Chief's judgement altered as indicated supra. In his reasons for judgement the Commissioner states that plaintiff's refusal to prove his claim was tantamount to his absenting himself from the proceedings and in terms of Rule 87(2) of the rules for Commissioners' Courts, granted judgement against him. From this the Court takes it that the Commissioner meant that he granted a default judgement. This is not the correct position as plaintiff was present and what he wanted to say (if he had had legal representation, it would have been by way of special plea) was that the substitution application was irregular in that the case between himself and the late Mhlanganyelwa had been settled and the Commissioner had no further jurisdiction in the matter. The Commissioner should have considered this matter and formally recorded his findings. He chose however to ignore this stand by plaintiff and without having any evidence before him found that the Chief's judgement to be manifestly wrong as apparent from his reasons for judgement. ...
A Chief's Court is not a Court of record and there was, therefore, no evidence before the Commissioner to enable him to decide whether or not the Chief gave a correct judgement on the claim before him. It is for this reason that the Rule 12(4) of the Chief's Courts rules G N R 2082 requires the Commissioner to re-hear and re-try the case as if it were one of first instance in his court". [180]

Although the present writer is in full agreement with the remarks of the Appeal Court for Commissioners' Courts, it seems that a plea of res judicata cannot be properly raised when the matter comes to the Commissioner's Court by way of appeal. [181]

System of law to be applied on appeal from Chief's court

In Gazu v Ndawonde [182] it was held that an appeal from the Chief's court may only be heard under customary law as the Chief's jurisdiction is limited to that system of law.

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180) per Smith, Permanent Member

181) Contrast this with Ngxolo v Samuel 1954 NAC (S) 40

182) 1954 NAC (NE) 142; See also Hlatshwayo v Msibi 1954 NAC (NE) 120 at 123; Cebekulu v Shandu 1952 NAC (NE) 196 at 199.

In Yeni v Jaca 1953 NAC (NE) 31 at 34 the Commissioner entertained an appeal from a Chief's Court in a case where the Chief had no jurisdiction as Common law was applicable. The Native Appeal Court altered the Commissioner's judgment to one dismissing the claim.
In Khumalo v Mbata 1969 BAC (NE) 48 at 49 it was held that a judicial officer may not arbitrarily change a system of law applicable.

Review of chief's judgement

There is no provision in the rules for a review of a Chief's judgement. The Chief's court judgement can only be assailed by way of appeal. In Latha v Latha and Another [183] plaintiff instituted an action against the respondents by way of application supported by affidavits for the setting aside of a Chief's judgement. Answering affidavits were also lodged by respondents. The court held that that method of assailing the Chief's court judgement was incompetent and that the only method available was by way of appeal.

In Mahlangu v Mothsweni [184] the court held that there is no authority either in the Black Administration Act 38 of 1927 or in the rules for Chiefs and Headmen's Courts for attacking a Chief's judgement by way of review.

Scale of fees

This is governed by rule 14. The wording of rule 14(1) is identical to that of old rule 13. It provides that the fees payable and recoverable in connection with any proceedings in a Chief's court shall be in accordance with the recognised customs and laws of the tribe. This, it is submitted, is intended to cover the aspects of traditional court procedure relating to the payment of a sheep or beast to be slaughtered and eaten by the members of the court. [185] Failure to observe customary procedure may give rise to an action for damages. In Ndlovu v Thabethe [186] and others plaintiff sued four defendants for R300,00 damages alleging that "defendants acting in concert wrongfully and unlawfully removed and/or caused to be removed the plaintiff's cow from his rightful possession and ownership The said cow has been unlawfully slaughtered by 2nd defendant".

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183) 1969 BAC (NE) 45

184) 1955 NAC (NE) 155; See also Bhulose v Bhulose 1947 NAC (T & N) 5

185) See also Makapan's case, supra, at 557; See also Mjatya v Holomisa (1910) 2 NAC (Henkel) 24

186) 1977 ACCC (NE) 210

First defendant averred that he, as a Chief's messenger had been directed by the Chief to effect attachment on a valid and lawful judgement. The cow had been attached on 26 February 1974 and was left in the custody of the plaintiff until it was sold in execution on 1 October 1974; Third defendant averred that he was an induna and denied having taken part in the transaction. Both defendants averred that the cow had been lawfully slaughtered by 2nd defendant who had brought it. Second defendant did not enter appearance to defend. Fourth defendant denied knowledge of the allegations.

On the day of trial, 1st, 2nd and 4th defendants being in default, plaintiff's attorney applied for default judgement against them jointly and severally, the one paying the other to be absolved. The case proceeded against third defendant. The Commissioner gave judgement for defendants with costs. Plaintiff lodged a timeous notice of appeal against that judgement. The Appeal Court for Commissioners' Courts observed that the Chief's messenger did not act in accordance with custom when attaching the beast. Although the court took judicial cognisance of the fact that the procedure followed in the case in the execution of judgement was wrong, it decided to seek the assistance of the Black Chiefs of the area to act as assessors.

The question was put to them as follows :

"Will you please explain to the court the customary procedure followed in the attachment of cattle in the execution of a judgement in a Chief's court, stating the rights and obligations of the judgement creditor and judgement debtor?

Chief Mhlabunzima Mapumulo explained the position as follows :

"Usually after one month (but not less than one month) if the judgement in the chief's court has not been satisfied, the judgement creditor seeks assistance from the chief's court. The chief directs his tribal messenger to attach a beast or beasts. The messenger proceeds to the kraal of the judgement debtor or to the dipping tank and points

out the beast or beasts (sic) giving instructions that the beast or beasts may not be disposed of in any way whatsoever. The beasts can also be attached and removed to the Chief's kraal but must be kept there for at least 14 days. The judgement creditor has taken active steps to have the Chief's judgement satisfied. This enables him to settle the debt or arrange for part payment or even for instalments if necessary. If he settles the debt or makes part payment or arranges for instalments the beast(s) is (are) not sold.

The beast can be sold at the Chief's or induna's kraal, at the judgement debtor's kraal or at the dipping tank. The Chief fixes the price. It is contrary to custom to attach a beast and sell or kill it immediately".

Chief Lawrence Mkize agreed with the above explanation. Accepting the assessors' explanation the court pointed out that defendant No 1 as tribal messenger should have known that the manner in which the attachment had been made was unlawful. Consequently the appeal was allowed with costs against the defendants jointly and severally. The judgement of the Commissioner was set aside and for it was substituted : "For plaintiff as prayed with costs against defendant No.1. Application for default judgement against defendant No.2 is refused. Defendant No.3 is absolved from the instance with costs. Defendant No.4 is absolved from the instance".

In the absence of any tribal fee the scale of fees stipulated in sub rule 1(a) to (g) applies.

RECOMMENDATIONS

The major weakness in the rules as they now stand relates to the provision concerning the lapsing of a chief's judgement by reason of non-registration thereof. The present writer sees no reason why a Chief's judgement should lapse. During the short course for Chiefs and their councillors the writer was at pains in trying to convince the chiefs about the necessity of the rule. Instead of letting a

Chief's judgement lapse the Government should take steps to ensure that the tribal authority secretaries who function as clerks of these courts should be made to register the Chief's judgements timeously. This can be done through the superivison of the district magistrates. Some of the problems mentioned in this chapter can be cured through continuing training of the Chiefs and their councillors.

CHAPTER 4

CUSTOMARY CRIMINAL LAW

In this chapter it is intended to discuss the legal position of customary criminal law in this country. Comparison of the legal position in the legal systems of other countries in Southern Africa will be made to highlight the extent to which customary criminal law still forms part of the general law of the land. A study of this kind is necessary because in most countries in Southern Africa the Chief's Courts are enjoined, in the exercise of their criminal jurisdiction, to apply customary criminal law. The exact nature of the customary law offences in the Ciskei has never, to the writer's knowledge, been thoroughly studied. A case study of these offences within the Republic of Ciskei is shown in Annexure A below.

(a) Definition of Crime

At common law a crime is defined as any "conduct which common or statute law prohibits and expressly or impliedly subjects to a punishment which is remissible by the State alone and which the offender cannot lawfully avoid by his own act once he has been convicted".[187] According to this definition to constitute a crime the following three elements should be present :

i) a violation of law
ii) the existence in law of a punishment for the violation
iii) a right in the state to ask from the courts that punishment should be inflicted for the violation.

Under customary law of the Xhosa-speaking tribes of Ciskei and Transkei a crime can be regarded as any conduct which is likely

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187) Burchell and Hunt, 88

to cause a breach of the peace in the Community. In the days when chiefs had sovereign powers the right to exact punishment vested in them. [188] The Xhosa word for a crime is "ityala". To the un-initiated the actual usage of the word can be a source of confusion : for example in Xhosa we say : "lityala ukuthandana nomfazi womntu" meaning that it is an offence to have a love affair with someone else's wife. On the other hand, when referring to a court case one often hears people say : "Lityala namhlanje" meaning that there is going to be a trial today.

According to Whitfield [189] when the chief held independant rule over the South African Native tribes the criminal code [190] comprised whatever cases might be arranged under the general heads of treason, murder, assault and witchcraft. The Xhosa nomenclature for the above is amatyala esizi meaning criminal matters. The term isizi had different shades of meanings in the olden days : the second meaning of the word was death-duty. [191] For example when the Paramount chief of the area concerned had visited a kraal whose head had passed away to give the customary warnings to the heir, he would be given some cattle when he went home as a token of respect.

In the light of the above it is surprising that the 1883 commission could find no system of criminal law known to the Africans inhabiting what was then known as the Transkeian Territories which could be adopted in its entirety and given shape to in a codified form.

The Commission also thought it unwise to sanction or codify customary criminal law or practice which was neither uniform nor certain.

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188) See Mbambo v Bele 1969 BAC (NE) 15 at 18; Mkunqana and others v Dumke 1939 NAC (C & O) 68; See also Whitfield 394; 1883 Comm Sections 31 & 32 p.21-22, Warner's notes in Maclean's Compendium at 59.

189) Whitfield Ibid

190) The present writer assumes that by criminal code the learned author meant criminal law as there was no codified tribal law during the pre-colonial period (my own emphasis).

191) See Hunter at 378 and 380; Hammond-Tooke at 71

The Commission came to this conclusion despite its findings that "the native criminal laws, in so far as effect can be given to them, can be defined by definitions from the colonial law. We have thought that in legislating for natives we should not innovate unless innovation was a necessity, to sweep away ancient native usages would be to deprive the law of the strong support which sympathy with national feeling always creates .... If, therefore, we had discovered among the natives a complete system of criminal law, we should not have hesitated to adopt it". [192] It seems that the above approach was consistent with the British colonial thinking. As shown in chapter 2 above the successive Cape Governors had undermined customary criminal law. In the Ciskei Sir George Grey went further by persuading the chiefs to surrender their criminal jurisdiction. Sir Philip Wodehouse did the same in Lesotho when the Cape colonial government took over the administration of the country. [193]

(b) Distinction between crime and delict

Customary law of the Xhosa-speaking peoples of Ciskei and Transkei distinguishes between crimes and the various civil wrongs. The following Xhosa terms are used to illustrate the above distinction : "Amatyala esizi (criminal matters) and amatyala embambano (civil matters). In this connection the 1883 Commission report [194] states : "Native law, it is true, recognises some distinction between crimes and those wrongs which give rise only to civil remedies. But this distinction is built upon the theory that all the members of the tribe belong to, and give strength to the chief. Any injury to the person of any member of a tribe, whether male or female, is therefore looked upon as an injury to the chief, to whom, and to whom alone, reparation is due. So-called blood cases come under the special jurisdiction of the

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192) 1883 Comm Section 32 at 21

193) See Burman 42

194) 1883 Comm Section 33 pp.21-22

chief, and no reparation in damages can be claimed by the person or family injured through violence or wrong to the person". The above classification is followed by most writers on African customary law. [195] It has also received judicial support in Mbambo v Bele. [196]

However, Dr Edgar Brookes [197] does not agree with this classification. He points out that Native criminal law can hardly be said to have formed a distinct system from Native civil law. In his own words all the European administrations in South Africa have drawn this distinction. The learned author's criticism can be attributed to the fact that a tribal court rarely makes the distinction between the criminal and delictual aspects of a wrongful act but deals with both in the same proceedings by the simple expedient of imposing a fine, on the defendant which incorporates the compensation considered to be due to the plaintiff. African legal systems do not even adopt different criteria in the evaluation of evidence presented to court. There are no rules relating to the quantum of proof. The classification of the wrongful act into specific legal labels is not without significance as the jurisdiction of the chief's court is severely limited in criminal matters. On the other hand it is not easy to fix a limit in civil cases arising from custom as causes of action invariably sound in cattle.

In Mdhluli v Mbuyane, [198] Mbuyane sued Mdhluli for refund of lobolo and obtained judgement in the Chief's court for refund of 10 head of cattle. It is not clear from the record how many cattle had been paid as dowry.

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195) See Whitfield ibid; Maclean's Compendium ibid; Sandra Burman at 30

196) 1969 BAC (NE) 15 at 18

197) Brookes at 176

198) 1953 NAC (NE) 286 . This was a civil case.

Again in cases involving the dissolution of customary marriages in a Chief's court the number of cattle claimed can exceed ten cattle. In seduction and pregnancy suits there is usually a flat rate amount of 5 head of cattle or their value which varies from tribe to tribe.

(c) The legal position of customary criminal law

With regard to the legal position of customary criminal law in the legal systems of the African states a matter that causes concern is the fact that whenever the subject is discussed it is always dealt with on the assumption that it is irrelevant. One often gains the false impression that customary criminal law either does no longer exist or if it does it will eventually fade away and ought therefore to be encouraged to die a quiet natural death. This was the general feeling of the delegates at the Bophuthatswana law Reform Conference [199] held at Sun City during August 1980. Professor Allott, in particular, was of the opinion that the reason for it has fallen away. It is possible that his assessment was not without reason and was probably made in the light of developments elsewhere in Africa.

Eugen Cotran [200] says that in East Africa customary criminal law has virtually ceased to exist as a separate system. According to the learned author all the three East African Governments (Uganda, Tanzania and Kenya) have chosen to have one written criminal law applicable to all. In all the three countries this result has been achieved by either abolishing customary criminal law or incorporating the very few customary offences into the existing general law in the Penal Code.

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199) This conference was attended by delegates from overseas, East and Southern African Universities

200) Eugen Cotran "Tribal Factors in the Establishment of the East African legal systems" in Tradition and Transition in East Africa (1969) ed. by Gulliver at 13 ; Fallers : 330

It seems that the decision to phase out customary criminal law was in line with the declaration of the 1960 London Conference on the future of law in Africa which was also attended by representatives from the East African countries and which recommended that the general criminal law should be written and be uniformly applicable to persons of all communities within a territory having its own separate judicial system. [201] It seems that Cotran does not favour the steps taken by the East African governments for he says : "If the Criminal law of a country is to be a reflection on the social, economic, and moral ideas and beliefs of the community, then it would have been necessary in the East African context, to produce a criminal law incorporating indigenous African ideas of crime, punishment, and criminal responsibility".

Cotran's views regarding the consideration of the indigenous African ideas of crime, punishment and criminal responsibility are of practical importance as the courts do sometimes take cognizance of these matters. In a recent decision of the Ciskei Supreme Court the court [202] regarded as a mitigating factor the fact that an accused person, a man of 28 years old, was not yet circumcised.

In Southern Africa indigenous courts are competent to apply customary criminal law under certain circumstances. [203] In Malawi President Banda appointed a Commission in October 1966,

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201) Ibid.

202) On this case, see J R Midgley, "The Uncut Kind" (1983) 12 Speculum Juris 103 at 104.

203) See J C Bekker, "The future of Indigenous courts in Southern Africa" in Southern Africa in need of law reform (1981) ed. by AGM Sanders at 195 as regards the position in Botswana, Lesotho, Zimbabwe and Malawi. See also Khumalo, "Swazi Customary law Courts", A Supplement to Civil Practice and Procedure in all Bantu Courts in Southern Africa and also his supplement on the Practice and Procedure of Customary Courts of the Republic of Botswana at pp 13-15.

to enquire into the administration of criminal justice in Malawi. The Commission was asked to enquire into the existing practice, procedure and rules of evidence followed in the High Court and under local customary law. The Commission was given a mandate to tour the country and prepare an exposition of customary law relating to criminal matters. The report of the Presidential Commission was laid down before Parliament and a motion to accept it was unanimously carried on 3rd April 1967. [204] The Commission made some far reaching recommendations; it recommended, inter alia, that defilement, indecent assault and rape are matters which lie peculiarly within the scope of local law and custom and that the jurisdiction of the local courts in these matters should be extended.

According to Simon Roberts [205] although there may be a good case for such a change in practice, this raises the general problem of the status of customary criminal law. In South Africa [206] and the independent Black states tribal courts are empowered to apply customary criminal law. Botswana seems to follow the pattern set by the East African governments. In terms of section 4 of Botswana Customary Courts (Amendment) Act 6 of 1972 no person shall be charged with a criminal offence unless such offence is created by the Penal code or some other written law. Professor Bekker is of the view that the intention behind this provision is that indigenous criminal law should eventually be superseded by written law. It is not clear whether the reference to written law also includes aspects of the law as recorded in the textbook.

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204) See the discussion of this in (1967) XI JAL 147

205) See 1967 Annual Survey of African law at 218

206) See S 20 of the Black Administration Act 38 of 1927 as amended. In the Ciskei the position is governed by section 40 of the Administrative Authorities Act 1984.

(d) Various kinds of offences

As reflected in Annexure A the most common offences tried in the chief's courts of the Republic of Ciskei include the following ;

1. Common assault
2. Insult (Use of abusive language)
3. Contempt of court (ukudela inkundla)
4. Disobedience to the Chief or Headmen

There were about eight cases of insult recorded in various magistrate's office record books.

There were about 100 cases of contempt of court which were heard before the tribal court of Chief Zibi of Middledrift between the period 14 September 1979 and 12 October 1979. All the accused were each fined R2,00 plus 25c court fees. There were about nine cases of disobedience to the Chief or Headman in the various magistrates' office record books. Other cases included drunkeness in court; drunkeness at funerals; unlawful dermacation of residential sites, felling trees in the commonage without permission and trespass on land. There was also a charge of holding a circumcision party on a Sunday.

It is interesting to note that various instances of disobedience to the Chief or Headman enjoy statutory recognition in both Ciskei and Transkei. In the Republic of Ciskei the position is governed by the National Security Act No.13 of 1982. Under S 56(1) any person who wilfully makes any statement verbally or in writing or performs any act which is intended or is likely to have the effect of subverting or interfering with the authority of the state, or any officer in the service of the state, or of any Chief or Headman; treats the Chief or Headman to whose authority he is subjected with disrespect, contempt or ridicule, or fails or neglects to show that respect and to render such services to such Chief or Headman as should be shown or rendered in accordance with tribal law and custom shall be guilty of an offence and liable to a

fine not exceeding R2 000,00 or to an imprisonment for a period not exceeding 2 years. This section should be read with S 55 of the Administrative Authorities Act 1984 (Act No.37 of 1984) which makes the obstruction of any Minister, Chief or other Administrative Authority in the lawful execution of his duty a serious offence punishable on conviction to a fine not exceeding five hundred rand or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

In terms of S 55(4) the provisions of this section shall be in addition to and not in substitution of the provisions of section 56 of the National Security Act, 1982 (Act No.13 of 1982). In terms of S 5 5(1) a Chief includes a Paramount Chief and a Headman as well as any deputy of a Chief or a Headman. The word "duty" includes a duty arising from the administration of any other law. It seems that the Chief himself is not above the law. Notwithstanding the fact that he can be charged for misconduct, S 54(1) of the Administrative Authorities Act makes it an offence for any Paramount Chief, Chief, his deputy, Headman or his deputy or Councillor to directly or indirectly exact or accept or agree to accept or attempt to accept for himself or for any other person any gift, reward or other consideration for or on account of his services as a Paramount Chief, Chief, Chief's deputy, Headman or his deputy as the case may be, or his doing or refraining from doing or having done or refrained from doing anything in such capacity as aforesaid. Contravention of the above section is visited with punishment by way of a fine of not more than two hundred rand or to imprisonment for a period not exceeding one year or to both such fine and such imprisonment.

In the Republic of Transkei the position is governed by S 12 of Transkei Public security Act No.30 of 1977 which prohibits statements and acts subverting the authority of Chiefs and Headmen.

This section punishes any person who :-

"(a) makes any statement, verbally or in writing or performs any act which is intended or is likely to have the effect of subverting or interfering with the authority of any hief or Headman.

(b) refuses or neglect to obey any lawful order, including an order in accordance with customary law, issued by a Chief or Headman to whose authority he is subject;

(c) treats the Chief or Headman to whose authority he is subject with disrespect, contempt or ridicule or fails or neglects to show that respect and obedience and to render such services to such Chief or Headman as should be shown or rendered in accordance with customary law, shall be guilty of an offence and liable on conviction to a fine not exceeding one hundred rand or to imprisonment for a period not exceeding six months".

It seems that the type of conduct which is punishable under S 12 will include instances of a subject's failure to observe customary practices such as the making of the traditional salutation to a Chief or Headman in circumstances where the custom demands so or cases where a subject disobeys a lawful order by a Chief or Headman. It is submitted that the case of S v Moshesh [207] falls in this category. In this case the appellant was convicted of unlawfully disobeying of a lawful order of a Chief duly appointed in terms of the Black Administration Act 38 of 1927. It appears that the appellant, a resident of Moshesh's location one of the locations under the jurisdiction of Chief George Moshesh, disobeyed the Chief's order.

It had been duly decided to move a school from one ward to a site in another ward in the location. The Chief had been requested by the School Board to render assistance in the removal of the furniture to the new site and had ordered the appellant and others to remove the furniture.

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207) 1962 (2) SA 264

Appellant had refused to comply with that order on the ground that he objected to the removal of the school to the new site. On appeal the argument for appellant was confined to the submission that the order was not lawful in that it was not based on any ground conferred by law. Reliance was placed on the decision in R v Skade. 208)

In confirming the conviction and sentence the court held that the chief was entitled to order residents in his area to carry out the operation.

It should be noted that the provisions of the Transkei Public Security Act are substantially similar to S 56 of the Ciskei National Security Act. It also seems that with the creation of new tribal courts with increased jurisdiction the position of customary criminal law will soon crystallize. The new tribal courts referred to above will be dealt with under chapter 6 below.

RECOMMENDATIONS

With regard to this Chapter it is recommended that continued research should be encouraged so that these customary offences can be identified and documented for the benefit of non-tribal courts which exercise appellate jurisdiction over them. Such a task would obviate the need for the use of Black assessors on such matters.

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208) 1957 (3) SA 315 (E).

CHAPTER 5

BANISHMENT FROM THE TRIBE

In this chapter it is intended to review the juridical nature of a banishment order to see whether it can be classified as a purely administrative action or as part and parcel of a chief's criminal jurisdiction. From what is to be said infra it would appear that the whole question of banishment orders needs urgent reconsideration. Cases involving banishment orders fall into three basic categories :

(a) Banishment by an order of the executive exercising the powers of a Supreme Chief.

(b) Banishment by the chief without recourse to law.

(c) Banishment by the chief through the normal legal process.

With regard to the first category there is a plethora of judicial decisions, the most important of which are the following :

Mokhatle & others v Union Government 1926 AD 71;
R v Mpanza 1946 AD 763;
Lengisi v Minister of Native Affairs and another 1956 (1) SA 786 (C.P.D.) and Saliwa v Minister of Native Affairs 1956 (2) SA. 310. (A.D.).

In the first case the appellants, nine in number, were members of the Bafokeng tribe residing in the district of Rustenburg in the Transvaal Province. It was common cause that the Bafokeng tribe formed a sub-division of the Baralong people, who in turn constituted a material section of the Batswana nation. On the 3rd October 1924, the Governor-General as supreme chief, issued an order directing that they were forthwith to leave the Phokeng Location, or any land in the tribal ownership of the Bafokeng tribe and were not to return without permission of the supreme chief. The grounds for the order were stated to be that the appellants had consistently defied the authority of their duly appointed chief, August Mokhatle and had

promoted dissension in the tribe, particularly in setting up an attitude of insult and abuse toward the said chief and also in organizing and encouraging opposition to the recognised tribal control. The appellants subsequently instituted an action in the Transvaal Provincial Division praying for a declaration that the order issued and executed against them should be declared null and void.

The court, however, gave judgement against them thereby upholding the validity of the order. The following two important questions were raised and considered by the trial court :

1. "can a paramount chief, according to Native law and custom, remove a recalcitrant or rebellious native from his tribe or the tribal property; and

2. if so, can this power of removal be exercised without an investigation or trial of the native or natives who have been so removed?". 209)

The Provincial Division decided both questions in the affirmative. The Appellate Division found that there was a good deal of evidence in support of the trial court's finding.

In dismissing the appeal with costs, Kotze, J A, stated the law as follows : "No reasonable ground has been shown why we should not accept the finding of the Provincial Division that, according to Native law and custom, a paramount or supreme chief possesses the power to direct the removal by means of expulsion from the tribal property of any natives who have committed acts of insubordination and hostility to the duly constituted authority of the chief or any sub-chief under him. And, secondly, that whether a previous investigation shall take place or not, before an order of expulsion

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209) at 75

is issued, is left entirely to the discretion of the supreme chief.

I come now to the other two contentions urged on behalf of the appellants and will first deal with the one which maintains that the order complained against amounts to a sentence of banishment, which in substance and effect constitutes the exercise of criminal jurisdiction over the appellants - a power which the supreme chief, under the provisions of Sec 5 of law 4 of 1885, does not possess. I think that a contention of this kind is not applicable to the circumstances of the case we are called upon to decide. The order against the appellants sets out that they are to leave the Phokeng Location or any land in the ownership of the Bafokeng tribe. They are thus removed from the area where they have shown themselves a source of disobedience and unrest to their location and tribe. It cannot be said that they have been banished or exiled from the Transvaal Province by way of punishment for a criminal offence.

They have not been accused of any crime. There are several ways in which removal or expulsion can take place, without in any way amounting to sentence of banishment as understood in criminal law. Take the case of a member expelled from a club, or from some religious or social body. Such an expulsion or removal cannot with any sense of accuracy be designated a sentence of banishment.

The Governor-General, as supreme chief, is, consistently with the circumstances, free to act and treat a case of insubordinate conduct on the part of certain natives as one of policy and of good government in regard to the particular tribe. If he does so act, he proceeds according to native law and custom in the exercise of his authority, as supreme chief, conferred upon him under the provision of the Transvaal Act. It seems clear, therefore, that it cannot be maintained that the Governor-General has exercised criminal jurisdiction over the appellants which, according to the Act, he does not possess". The learned judge of appeal also held that the

principles of natural justice did not apply in the circumstances.

However, in R v Mpanza and Saliwa v Minister of Native Affairs (supra) the Appellate Division while confirming the power of the Governor-General as a supreme chief, to banish individual Black tribesmen, adopted an entirely different approach with regard to the application of the rules of natural justice.

In Mpanza's case, the appellant, an exempted Black under the provisions of Law 28 of 1865 (Natal) was issued with an order by the Governer-General, acting under the powers conferred upon by him by S 5(1) (b) of the Black Administration Act No.38 of 1927 as amended, directing him to remove himself within 3 days after service of the order, from Orlando, Johannesburg to the farm Goldplace in the district of Ixopo in Natal. The Appellant disobeyed the order and in consequence thereof he was charged in the magistrate's court of Johannesburg and convicted of the offence of contravening S 5(2) of the Act. The conviction was upheld by the Transvaal Provincial Division and the appellant appealed to the Appellate Division.

By virtue of the provisions of S 31 (3) of Act 38 of 1927 the appellant's letter of exemption was deemed to have been issued under Act 38 of 1927 and that the appellant was therefore a Black who had been legally exempted from the operation of Native law.

The appellant contended that the legal effect of the document of exemption was to exempt him from the subjection to the provisions of S 5(1) (b) of Act 38 of 1927. It was held that a letter of exemption issued under the provisions of S 31 of the Act takes the form of a grant of exemption to the recipient from such "laws specially affecting natives, or so much of such laws as may be specified in such letter". The extent of exemption should be easily ascertainable from the terms of the letter. In the case of letters issued under the Natal law 28 of 1865 the exemption granted was an exemption from the "operation of Native law". The court also noted the fact that there are numerous legislative

provisions which affect Blacks only and that it may be difficult to say whether such provisions are part of Native law.

The court found that in the case under consideration the legislative provision in question was one which appears in the Black Administration Act and it provides that the Governor-General (now State President) may "whenever he deems it expedient in the public interest order the removal of any tribe or portion thereof or any native from any place to any other place or to any province or district within the Union, upon such conditions as he may determine". The court found that the idea of a supreme chief, at his discretion and without trial (my own emphasis) directing an individual to move his place of residence from one part of the country to another was foreign to the South African legal system.

The court also stated that the provisions of S 5(1) (b) of Act 38 of 1927, though they appear in a Union Statute are merely a re-enactment of a principle of Native law - for example section 5 appearing in chapter 2, the heading of which is "Tribal Organization and Control". The court remarked that tribal organization and control are a matter of Native law as such things were unknown among other inhabitants of the Union. The court concluded that the appellant was by reason of his letter of exemption, not subject to the provisions of S 5 (1)(b) of Act 38 of 1927 and consequently the appeal was allowed and the conviction of the appellant was quashed.

In Saliwa v Minister of Native Affairs, Saliwa was ordered to move from Glen Grey district then in the Cape Province to a certain location in the district of Pietermaritzburg in the Transvaal. The removal of Saliwa was carried out in pursuance of an order issued by the Governor-General-in-Council, it being stated that it was in the public interest that he be moved from that area. The order was given in terms of S 5(1) of the Black Administration Act, 38 of 1927, as amended. Saliwa was not afforded an opportunity to be heard before the removal was effected. Watermeyer C J found nothing in the Black Administration Act to indicate that Parliament

intended to confer on the Governor-General in respect of Natives in every part of the Union the powers which the Governor of Natal had.

Cape Province was not included in Section 1 of Act 38 of 1927 - an indication that Parliament did not intend that he should be the supreme chief of Natives in that Province. The court concluded that because the Governor-General was not a supreme chief in the Cape Province the principles of natural justice should apply and that Saliwa ought to have been given a right of hearing.

It is obvious that in the cases of Mpanza and Saliwa the provisions of S 5(1) (b) were given a restrictive interpretation - However, in Lengisi v Minister of Native Affairs and another, Olgilvie Thompson J refused to follow a similar approach. In Lengisi's case, Mr Lengisi was ordered to remove from Duncan Village, East London to a certain farm in the district of Barberton in the Transvaal. It was contended on his behalf that the power vested in the Governor-General under S 5(1) of Act 38 of 1927 to order an individual Black to "withdraw from any place" was, upon a true construction of that sub-section, restricted to ordering withdrawal from a place situated within an area occupied by a tribe and that since the place of applicant's residence in the district of East London from which he was ordered to withdraw is admitedly not occupied by a tribe, the order made by the Governor-General was consequently null and void. The court held that the power vested in the Governor-General under S 5 (1)(b) of Act 38 of 1927 to order an individual Black to withdraw from any place is not restricted to ordering withdrawal from a place situated within an area occupied by a tribe.

(b) Banishment by the Chief without recourse to judicial process was considered in the following cases ;

Sithole v Cebekhulu and others 1961 N A C (NE) 28;
Khuto v Vercueil, Letlhape and Mfatha tribal Authority C A & R No. 259/81 (B) and
Masenya v Seleka tribal Authority and Another 1981 (1) SA 522(T).

In the first case the Councillors of Chief Cebekhulu, acting on the instructions of the latter, demolished the plaintiff's dwelling place in an attempt to force his removal from the area under the control of the Chief. As a consequence of this plaintiff sued the Chief and 15 others of his followers at Empangeni Commissioner's Court for damages for the unlawful destruction of his dwelling and removal of certain furniture therefrom. The amount claimed was about R282,00. The summons was amended to indicate that instead of the property of plaintiff being removed, it was left unguarded by defendants and was removed by some person unknown.

The defendants pleaded that the hut had been destroyed as alleged but that they (defendants) did so in their capacity as members of the tribal council on instructions from the chief, who is referred to in the case as defendant No.1. They denied that the act was unlawful.

The Commissioner gave judgement in favour of the defendants and the plaintiff appealed on the grounds, inter alia, :-

1. That the Commissioner erred in law in holding that the first defendant had authority to remove or to instruct his followers to remove plaintiff or his kraal from the Reserve.

2. That the Commissioner erred in finding that plaintiff had committed gross contempt of the chief's court.

3. That insufficient regard was had to the fact that first defendant gave as his reason for instructing that the hut should be demolished the fact that plaintiff had been guilty of contempt of court and that the Commissioner ought to have found that the first defendant had acted mala fide in so instructing.

4. Having regard to the provisions of Proclamation No.123 of 1931 as amended, even if it could be found that first defendant had authority to eject plaintiff, the Commissioner ought to have

found that plaintiff should have been given notice of the first defendant's intention to eject him and in the absence of such notice, he ought to have found that the actions of defendants were unlawful.

5. That in view of the provision of Proclamation No.123 of 1931 the Commissioner ought to have found that the jurisdiction of the first defendant to eject plaintiff was ousted.

In his reason for the judgement the Commissioner stated that plaintiff had no legal right to be in the Reserve and that although he had been accepted by the Chief and had been given allotment, the permission of the Commissioner had not been obtained as provided for in S 3(2) of the Regulations published under Government Notice No.123 of 1931. The Commissioner also stated that because a Chief was charged by the regulations governing the powers and duties of a chief to preserve law and order in his reserve and because the right of grant of residence and ejectment of trespasser was inherent in African customary law in the chief, the court had found that the chief had acted within his customary law powers in taking steps to eject the plaintiff who had successfully prevented the chief's constable from contacting him.

Sections 21 and 22 of Proclamation No.123 of 1931 which regulated the occupation of land and the control of locations in Natal read :-
"Any person commits a breach of these regulations :-

(1) who, without having been duly authorised thereto either under these regulations or any other law;

(2) erects, establishes, occupies or uses any building or homestead on Commonage;

(b) encloses, ploughs, cultivates or braks up commonage otherwise than for burying dead bodies or refuse;

(c) encamps, takes up his abode or occupies commonage for any purpose whatsoever;

(2) who, contrary to the provisions of these regulations, causes damage to land, whether by neglecting to fill in any excavation or furrow or otherwise when removing improvements in terms of Section 13;

(3) who disregards or fails to comply with any order or finding made under the provisions of sub-section (3).

In terms of S22 in addition to any other penalty to which he may be liable, the court may order any person convicted of a breach of Section 21 to remove or demolish any hut, building or other obstruction erected, established, occupied or used without authority, or to repair any damage done to commonage within a time prescribed by the court not less than ten days after completion of sentence. On appeal the Native Appeal Court pointed out that irrespective of any original powers inherent in chiefs the promulgation of specific regulations to provide for a contingency which might previously have been dealt with by chiefs under those powers, superseded thosepowers. The Court was of the view that even the Commissioner himself could cause the destruction of the plaintiff's hut only if the latter failed to comply with an order to remove. In the opinion of the Court if a Native Commissioner's actions were controlled by regulations it could not be conceived that a chief, by virtue of inherent authority, could have greater latitude. Section 3(3) of the regulations empowered the chiefs to exercise certain functions and powers in connection with the occupation of land, with an appeal to the Native Commissioner.

In Sithole's case plaintiff was given no chance to appeal. The court noted that he was also deprived of the right of being heard in a criminal prosecution for contravening a provision of Section 21 of the Proclamation.

It was held that even if a chief had an inherent power to eject someone from his area, such ejection would have to be made in accordance with law. If Plaintiff insulted the chief, the latter could have tried him for contempt or instituted a prosecution under the provisions of Sections 2 (9) of Act No. 38 of 1927.

The court concluded that the chief and his Bandla had no right to take steps outside the law to rid themselves of the Plaintiff and to rely on his illicit occupation of the tribal land when the chief of the area had given him permission to reside there. With regard to the claim for specific damages the court found that plaintiff had failed to prove the damages claimed.

Plaintiff testified that he had expended R29,00 on erecting the hut and that evidence had not been challenged. In the result the appeal was allowed and the judgement of the court below altered to one for plaintiff for R29,00 damages and costs against defendants jointly.

Although the case had been decided on appeal in the light of the provisions of Proclamation No. 123 of 1931 as amended it seems that the dominant consideration was the chief's failure to comply with the rules of natural justice. It also seems that in interpreting plaintiff's conduct (contempt of court) the court viewed the matter according to the Western notion of the concept of contempt of court. Although the writer does not know the reaction of the Zulus to matters of contempt of court, among the Xhosa-speaking people contempt of court was viewed in a very serious light in the olden days and could result in the person concerned being 'eaten up,' that is, his entire stock could be confiscated and his kraal demolished in the way Sithole was treated in the instant case.

"Eating up is however absolutely necessary, when a kraal or clan resists the sentence or order of the chief, as he has no other means of upholding his authority and enforcing the law". [210] Recently, the Supreme Court of Venda in S v Mukwevho and S v Ramukhuba [211] held that the legal institution known as 'trek pass' which is an equivalent of a banishment order is not contrary to public policy and the principles of natural justice.

However, the court held that the validity of the 'trek pass' is subject to the following requirements :-

(a) that it may only be applied for serious transgressions which may arouse unrest in the tribe;

(b) that the tribesman must be aware of the nature of the charge against him;

(c) it is desirable but not essential that the tribesman be given an opportunity of stating his case;

(d) that the chief must exercise his discretion personally.

In an unreported decision of the Supreme Court of Bophuthatswana in Khuto v Vercueil, Letlhape and Mafatlha tribal Authority [212] the court stated that the validity of the 'trek pass' was subject to the provisions of the Bophuthatswana Constitution Act.

Section 67 of the Act provides that in proceedings involving questions of tribal customs it is in the court's discretion to decide such questions in accordance with tribal law applying to such customs except in so far as the court may find that

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210) Mr Warner's Notes in Maclean's Compendium at 60, see also Hammond-Tooke at 68-69.

211) 1983 (3) SA 498 (HV)

212) C A & R No. 259/81(B). This case is discussed by J J Buchner in (1982) 6 Bulletin of the University of Zululand at 13

such law is opposed to the principles of natural justice. In this case after a meeting called by applicant to discuss second respondent's alleged misconduct, applicant's membership of the tribe was terminated by second respondent, with the assistance of third respondent. He issued a 'trek pass' in which applicant was ordered to leave the tribal area within 30 days. The Bophuthatswana Supreme Court conceded that a 'trek pass' is a document recognised by customary law but that it was not an eviction order which can only be obtained after the 'trek pass' has been issued.

The court held that it is contrary to the principles of natural justice if customary law empowers a Chief to issue a 'trek pass' without informing the affected party the step which is contemplated and without affording him an opportunity of being heard.

In this case it transpired that second respondent's issue of the 'trek pass' was intended to silence his main critic and his actions were therefore actuated by bad faith on his part.

THE POSITION IN THE REPUBLIC OF CISKEI

In the Ciskei the matter is governed by S52 of the Administrative Authorities Act.

In terms of the Act the power of banishment from the tribe is vested in the State President of the Republic of Ciskei. Failure to comply with the removal order carries with it severe punishment. Section 52 of the Act reads :-

"The President may, whenever he deems it expedient in the general public interest and without prior notice to the person concerned, in writing order such person to withdraw from any place to any other place or to any district in Ciskei and not at any time thereafter or during a period specified in the order to return to the place from which withdrawal is to be made or to proceed to any

place or district indicated in the order except with the prior permission in writing of the Director-General : Department of Justice.

(2) If the order contemplated in subsection (1) cannot conveniently be served on the person concerned, it shall be sufficient to leave a copy of such order with an inmate of his place of residence who is of or above the apparent age of sixteen years or to affix such copy to the main entrance to, or in a conspicuous place at, his last known place of residence and such order shall thereupon be deemed, until the contrary is proved, to have come to the notice of such person.

(3) Any person, who disobeys or fails to comply with any order issued under subsection (1) or who neglects or refuses to comply with any condition thereof, shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year or to such imprisonment without the option of a fine : Provided that the President may, when issuing any order under subsection (1) or at any time thereafter, further order that the person who is required to withdraw shall be summarily arrested and detained and as soon as possible removed in terms of the order.

(4) Any person who has complied with an order issued under subsection (1) may at any time in writing make representations to the President for the withdrawal of variation of such order and the President may at any time vary or withdraw such order.

(5) The Director-General :

Department of Justice shall, not less often than once in every period of twelve months during which an order issued under subsection (1) is in operation, furnish the President with the reasons why such order should not be withdrawn.

(6) Upon the conviction of any person of a contravention of any provision of subsection (3), any magistrate may take all such steps as are necessary to ensure compliance with the order concerned or with any condition thereof and may by warrant under his hand authorise any police official or officials to do all such things (including the use of force) as may be required to ensure compliance with such order.

(7) Any person who hinders, obstructs or resists any magistrate or police official, or any person assisting such magistrate or police official, in the exercise of his powers or the performance of his duty under this section shall be guilty of an offence and liable on conviction to a fine not exceeding one thousand rand or to imprisonment for a period not exceeding one year".

It seems that even in the pre-colonial period the power of banishment was used sparingly; that is, when the land in question was required by the Chief or the person concerned was guilty of a serious political offence. Professor Kerr has dealt with this in the light of decided cases.[213]

THE POSITION IN THE TRANSKEI

In the Transkei the matter is governed by S 40 of the Public Security Act No 30 of 1977. In terms of this section any Chief authorized thereto by the President may, whenever he deems it necessary or expedient for the maintenance of the peace and public order in any area under his jurisdiction :-

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213) Kerr Customary law at 36-42.

(a) order any person, without prior notice to such person or any other person concerned, to remove with the members of his household and any livestock and movable property from a place within the area of jurisdiction of such Chief to any other place specified by such Chief within such area, either permanently or for such period as may be specified by such Chief;

(b) cause the demolition of any hut or dwelling owned by and occupied by a person referred to in paragraph (a) or members of his household, situate at the place from which he has been ordered to remove, without incurring any liability to any person for compensation (my emphasis) of the value of any such hut or dwelling;

(c) notwithstanding the provisions of subsection (2), cause the removal by force of any person referred to in paragraph (a), members of his household and any of his or their property, who fails or neglects to comply with an order issued under the said paragraph (a).

Any person against whom an order has been made under subsection (1)(a) and any member of his household who fails to or neglects to comply with such order, shall be guilty of an offence and shall be laible on conviction to a fine not exceeding two hundred rand or to imprisonment for a period not exceeding one year.

3. Any person against whom an order has been made under subsection (1) (a) may within thirty days appeal against such order to the Minister who may confirm, set aside or vary such order and may give such directions as he may deem fit in respect of any matter referred to in subsection (1) (b) or (c) and his decision shall be final.

4. A Chief shall not act in accordance with the provisions of subsections (1) (b) or (c) within thirty days from the date on which he makes an order under subsection (1) (a) or, if an appeal against such order has been noted, unless the appeal has been dismissed by the Minister (Justice) and no direction has been given by the Minister restraining the Chief from so acting".

The following comments can be made with regard to the provisions of this section:-

(1) the section authorises the violation of the principles of natural justice and therefore in conflict with the provisions of S 53 (1) of the Republic of Transkei Constitution Act of 1976. It should be understood that the provision amounts to statutory customary law and the application of customary law is subject to the provisions of S 53 (1) which are similar to the Bophuthatswana provision as interpreted in Khuto's case, supra.

(2) the operation of the banishment order will be suspended for 30 days from the date of issue or when an appeal has been noted. In other words the provisions of S 40 (1) (c) relating to removal by force will be suspended for a period of thirty days or in the case of an appeal for so long as the Minister has not given his direction in terms of S 40 (3) and (4).

The Transkeian provision has been included here because it deals with the administrative powers of the Chief to issue a banishment order.

In Masenya v Seleka tribal Authority and Another (supra) the court dealing with the argument that the authority of the State President to order removal of a Black person in terms of S 5 (1) (b) of Act 38 of 1927 excluded and terminated the power of a tribal chief to issue

a traditional 'trek pass', referred to the cases of R v Mpanza (supra) and Lengisi v Minister of Native Affairs and Another (supra) where it was held that the power of a chief to issue a 'trek pass' was expressly recognised and stated that the powers of banishment granted to the State President were purely supplementary to the traditional powers of the tribal chief. The court pointed out that a similar argument based on S 20(2) of the same Act was also fallacious because S 20(2) of the said Act deals with the criminal jurisdiction of the court of the tribal chief and has no bearing on the power of a tribal chief to issue an administrative order. The court held that an order of expulsion as that envisaged in S 5(1)(b) could not be said to be tantamount to a banishment or exile by way of punishment for a criminal offence.

This case puts it beyond doubt that a tribal chief can either administratively or through the normal court process effect a person's removal from a tribal area under the control of the chief concerned. However, it is to be borne in mind that when a chief acts administratively he is exercising a right derived from custom and a custom concerned has to be tested in accordance with the principles of public policy or natural justice.

A different conclusion may be reached in a country such as Ciskei where the Constitution Act has omitted any reference to the so-called 'repugnancy clause'. In two recent publications it has been suggested that the subject of banishment orders by tribal chiefs should be reviewed as chiefs are no longer sovereign.[214]

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214) See A J Kerr, "Customary Law in the Supreme Court" (1981) 98 S ALJ 320 ; J J Buchner : "Die trekpasgebruik van inheemse gewoontereg" in 1983 Desember De Rebus S 83 at 585.

C BANISHMENT BY THE CHIEF THROUGH NORMAL COURT PROCESS

It seems that this form of banishment is similar to an eviction order. It must be remembered that in the Khuto case (supra) the court stated that a 'trek pass' was not an eviction order which can only be obtained after 'trek pass' had been issued.

Instead of following the above procedure a chief can decide to resort to the normal court action by instituting ejectment proceedings against the offending member of the tribe.

The chief did so in Kekana v Mokgoko.NO[215]

In this case the chief, acting in his official capacity, sought an order for defendant's ejectment from a tribal farm occupied by the plaintiff and his followers. The plaintiff, chief of the Bakgotla-Ba-Mokgoko tribe, instituted the action with the consent of the Minister of Native Affairs in terms of S 3 (1) of the Black Administration Act 38 of 1927 as amended. The said chief and his tribe lawfully occupied Tribal Portion A of the farm Bultfontein No.472 in the district of Pretoria. It appeared that the said farm was registered in the name of the Minister of Native Affairs in trust for the Bakgatla-Ba-Mokgoko tribe.

The summons alleged that the defendant was in unlawful occupation of the said farm and further averred that "Despite demand defendant fails and/or refuses to vacate the said portions of the farm which he unlawfully occupies".

The Commissioner gave judgement for plaintiff as prayed with costs. The defendant appealed on the grounds, inter alia, that he had vested rights in the property as part owner and/or bona fide occupier, and/or bona fide possessor and/or in the exercise of a lien for the improvements erected by him;

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215) 1953 NAC (NE) 93. This case has been noted by Kerr Customary law at 36-37.

That the judgement offended the principle of non-enrichment.

In dealing with the above grounds of appeal Balk (permanent member) said that as the land belonged to the tribe the defendant could not be a part owner thereof.

As regard the defendant's rights as a bona fide occupier or a bona fide possessor of the land, he said that it was manifest from the Acting Assistant Native Commissioner's reasons for judgement that he accepted the evidence for plaintiff and that as there was no appeal on facts, the Appeal Court was not called upon to consider whether or not the Commissioner was right in so doing.

According to the evidence for plaintiff, it appeared that in the year 1926 the chief of the tribe on payment to him by the defendant of £24 accepted the latter as a member of the tribe and gave him his permission to reside on the land.

It also appeared that in the year 1934 the defendant failed to pay homage to the then new chief of the tribe whereupon the Lekgotla decided to refund to him the R48,00 he had paid in respect of admission to the membership of the tribe. The money was paid to the Commissioner at Hammanskraal so that the Commissioner could give it to the defendant. The latter was consequently ordered by the chief and Lekgotla of the tribe to leave the land. The defendant refused to accept the refund and to leave the land. According to the record since then the defendant persisted in his refusal to recognise and obey the chief of the tribe. The defendant was accused of having defied the chief and of interfering in tribal matters. The defendant was again given notice by the tribe on several occasions to quit the land. He failed to comply with these notices hence the institution of the court action.

The decision was taken at a public meeting convened for the purpose of considering the matter - The court held that the lekgotla's decision to refund the defendant of his membership fee as well as other subsequent acts by the chief and the lekgotla was tantamount to the termination by the tribe of the defendant's membership thereof. The court also held that the tribe had ample justification for terminating, according to Customary law, the defendant's membership and also giving him a notice to vacate the land because of his persistent recalcitrant attitude referred to above.

The court could not see how the defendant could rely on a right of retention in respect of his improvements to the land or the doctrine of unjust enrichment seeing that he had made no claim in regard thereto. The court concluded that the plaintiff was entitled to the order of ejectment sought by him and the appeal was dismissed with costs.

Steenkamp (President) in a separate concuring judgment emphasized that the Commissioner would not normally be justified in granting an order for the ejectment of a person from the tribe unless good reasons were given for the ejectment. He pointed out that a resolution by the chief and Lekgotla were not sufficient as such resolution might be based on personal grounds or grounds which in the opinion of the court were without substance, or illegal, immoral or did not justify depriving the person concerned of his rights. However, the learned President found that the conduct of the defendant in refusing to pay homage to the Chief and in ignoring the latter's instructions gave full justification to the steps taken by the Chief and his lekgotla.

There is no doubt that defendant, through the act of banishment, had suffered great material loss. On the record it appears that he had sunk a borehole to provide water for the school children but the court regarded the borehole as being a gift to the chief.

In the present writer's opinion there is a great deal of merit in the proposition that instead of banishing an individual from the tribe the chief should be given increased jurisdiction as to punishment so that they could deal with the rebellious member of the tribe judicially.[216] In an African society there is nothing so painful as being a stranger in a tribal area. Africans regard a home as their religion, that is, a place where rituals ought to be performed.

All in all the present writer is in full agreement with the suggestion that the whole question of banishment order should be reviewed. If the tribal chief retains such a power, its exercise should be subject to the qualifications suggested by the Venda Supreme Court in S v Mukwevho and S v Ramakhuba supra. Should it become necessary to banish a person, the Government should always make alternative accommodation for such a person.

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216) See in this connection Buchner ibid.

CHAPTER 6

COMPARATIVE COURT STRUCTURE

The present writer is in full agreement with Zweigert and Kötz [217] that "the primary aim of comparative law, as of all sciences, is knowledge if one accepts that legal science includes not only the techniques of interpreting the texts, principles, rules and standards of a national system, but also the discovery of models for preventing or resolving social conflicts, then it is clear that the method of comparative law can provide a much richer range of model solutions than a legal science devoted to a single nation..." Other major objectives of comparative law includes :

(a) To further international understanding;

(b) Better knowledge and understanding of one's system;

(c) Law reform in developing countries.[218]

In this chapter it is intended to examine the different solutions that have been adopted by some independent African States in Southern Africa in this area of customary law. Proposals for reform will be made in the course of the argument. In the Ciskei there is urgent need for reform of the law relating to the customary courts and their jurisdiction. In some neighbouring African States a great deal has already been done in this regard. A notable development has been the creation of new indigenous courts with increased jurisdiction. This has taken place in Malawi, [219] Zimbabwe, [220] Swaziland [221] and Transkei.[222]

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217) 1977 : 12; See also Campbell 150

218) Van Zyl 18-23. The learned author mentions about seven of these objectives; Stone 326; Pierre Lepaulle 856

219) See Chimango 39 at 54

220) See Ladley 95; Redgement at 27

221) See Khumalo, Supplement on Swazi courts chapter 3

222) See Koyana 1983 : 310

In Malawi Regional Traditional Courts and National Traditional Appeal Courts were established in 1969. The former can try most important criminal offences including murder and are also competent to pass any sentence including capital punishment. According to Chimango the jurisdiction of the Regional Traditional Court is only of first instance and purely criminal.

In Zimbabwe Village and Community Courts were established in 1981 when the Government enacted the Primary Courts Act No 6 of 1981. [223] In that country the indigenous court structure has been greatly revolutionized in that the personnel of the courts are no longer traditional chiefs and their councillors but a combination of elected and nominated members. [224]

In Swaziland an important change occurred in 1973 when the late King Sobhuza II established, in terms of the King's Proclamation to the Nation of 12 april 1973, the Swazi Royal Court. According to Khumalo the new court was born out of the Swazi custom of 'Kwembula ingubo' (my emphasis).

The words 'Kwembula ingubo' mean literally 'to open the blanket' . "It may have been taken from the practice that when a child is being chastized and it runs to its mother and opens her blanket for protection it is unjust for the chastiser to pursue the child and continue the beating. The custom is very old and has existed from time immemorial. It means an informal petition made to the sovereign for his intervention or mercy where the petitioner alone or with others is affected by an adverse decision of a court or a decision by a state official or person in authority or the adverse operation of decree or order which results in substantial prejudice to the petitioner". [225]

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223) Further on this Act see Ladley 95-114

224) See Ladley at 101-102

225) See Khumalo's Supplement at 12

The Swaziland model is a good example of how a developing country can improve its own law by looking to the good customary practices of the past. The Ciskei Government could do likewise by giving statutory recognition to the consensual and reconciliatory machinery of the dispute settlement organs below the level of Chiefs and Headmen. Proposals for reform in this regard have already been made in Chapter two above. Ciskei's neighbour, the Republic of Transkei, has followed the example of Swaziland by resorting to the pre-colonial legal position in reviving the old Paramount Chief's Court which now operates under the new name of a Regional Authority Court created in terms of the Regional Authority Courts Act No.13 of 1982. [226)]

These courts enjoy criminal and civil jurisdiction equal to that of a magistrate's court. The Act under which the Court has been established does not stipulate any form of training on the part of its personnel. This omission is regrettable as the increase of jurisdiction of tribal courts should go hand in hand with the necessary training otherwise the quality of justice in these courts will be suspect.

According to Professor Koyana, the Act has been criticized on the grounds, inter alia, that "it may not result in true and non-selective justice" as legal representation is not allowed. The fact that the court proceedings may not be published may mean that the courts themselves will not be kept in public eye.

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226) Further on these Courts see Koyana 1983 : 34

In Professor Koyana's opinion these criticisms merely reflect the outlook of the Western lawyer.[227] In Zimbabwe the personnel of the primary Courts were given some crash courses.

In view of the historical role of this court in both Ciskei and Transkei as shown in Chapter two the present writer could not be surprised if Ciskei decides to establish its own Paramount Chief's Court. No one can seriously discourage such a move provided that initially its jurisdiction is limited to matters arising out of customary law.

When the necessary training has been given to the personnel of the court its jurisdiction could be gradually increased to accommodate common law matters as well. The composition of the court is another matter that would have to be carefully considered.

As the Ciskei has only one Paramount Chief one could make such a court a traditional national court of appeal by including among its members the country's Paramount Chief as chairman, chairmen of all Tribal Authorities and Community authority of Ciskei, a senior magistrate in an advisory capacity only and such other members as the President-in-Council would deem necessary.

At present there are about thirty five Tribal Authorities and one Community Authority in the Republic of Ciskei. There are seven Regional Authorities.[228] This means that the envisaged Court would consist of about thirty nine to forty members.

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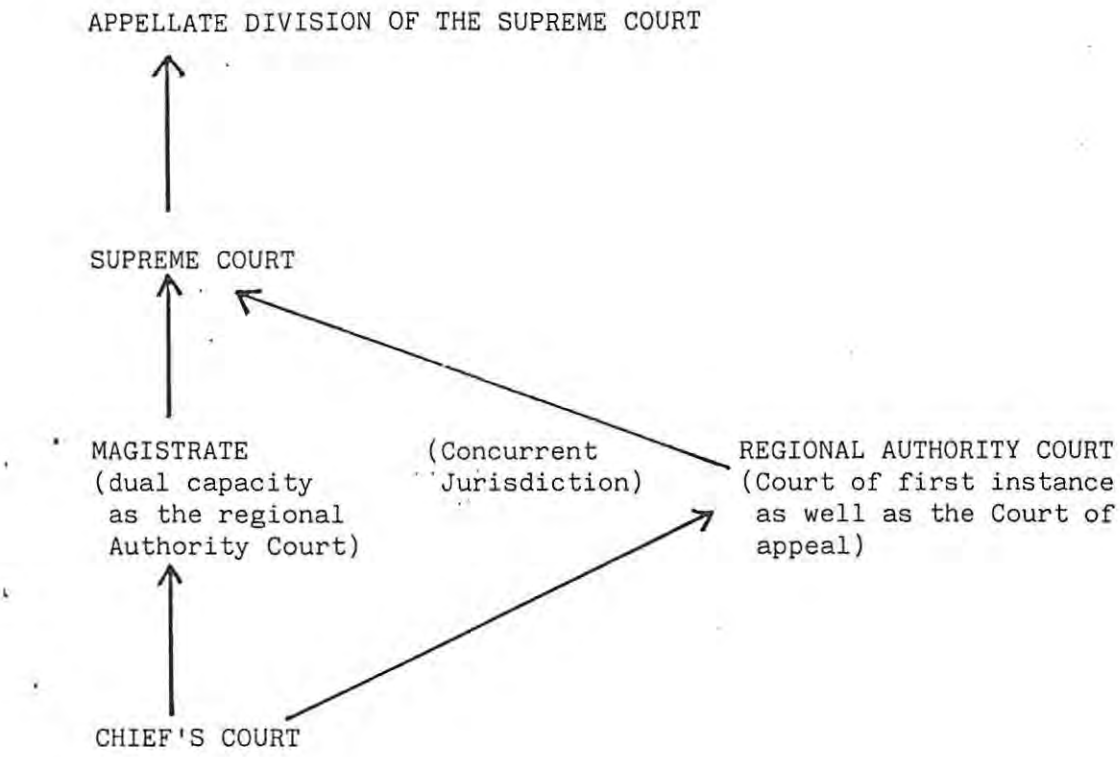
227) op cit at 41. See also Beck 396-8. The learned author points out problems which these courts are likely to encounter in the day to day administration of justice.

228) See Schedule I of the Administrative Authorities Act 1984

One could still allocate membership on a regional basis with sittings in each region once a month or as the need arises. Appeals from such court would lie either to the Supreme court or magistrate's court. The magistrate would assist in the preparation of the record. It would be necessary that such a court be a court of record. From the interviews the present writer had with some chiefs of the Ciskei it would seem that they (Chiefs) do not take kindly to the procedure whereby cases on appeal are heard afresh at the magistrate's court. They do not appreciate that such a procedure is resorted to because the Chief's Courts are not courts of record. Therefore making such a court a court of record would serve to eliminate the necessity of retrial. It is worth noting that the Transkeian Regional Authority Court is also a court of record. The obvious advantage of the suggested system would lie in the fact that administration of justice particularly on customary law matters would be in the hands of the people themselves with comparatively little expense. This would also have the effect of cutting down the case load of the magistrate's courts.

In suggesting proposals for the reform of the Ciskeian court structure it seems that a paramount consideration should be whether to introduce reforms within the existing framework, that is, the integrated court system with the Chief's Court at the lowest tier as is the position in Bophuthatswana or along the lines of the Transkeian model, that is, a court structure with four levels of appeal in customary law matters.

The Transkeian model can be illustrated by means of the following diagram:



In terms of the Transkeian model a complainant in both criminal and civil matters has the choice of forum. If he does not want to be brow-beaten by the cross examination of attorneys in a magistrate's court, he would prefer to lay criminal charges at the Regional Authority Court.

Another important matter to remember is that the procedure in the Regional Authority Court will be in accordance with the recognised traditional laws and customs applicable to the region.[229] The latter would be substantially the same as the procedure described in chapter two above. This would mean, in effect, that Transkeian citizens, at the level of the magistrate's or Regional Authority Court would be exposed to two unequal systems of justice in that in the magistrate's court legal representation is allowed whereas it is not allowed in the Regional Authority Court. It is because of this

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229) S 10 of Act 13 of 1982

disparity that one would be inclined to suggest, in the Ciskei, that jurisdiction of the envisaged court be limited to customary law until such time that the personnel of the court have been given sufficient training so that legal representation may eventually be possible. If one limits the jurisdiction of tribal courts to customary matters, people would be slow to clamour for legal representation as the latter was unknown in tribal courts in any way.

The Transkeian model has re-introduced the dual court structure that was abolished on independence albeit in a different form.[230] Unlike in East Africa where the three East African Governments,[231] that is, Kenya, Tanzania and Uganda, chose the path to full unification, i.e. abolishing the dual or parallel system, most countries in Southern Africa have retained the dual court structure.[232] From the cases discussed in Annexure A below particularly case numbers 13/80; 23/81; 5/82 and 15/79 it would appear that there is a great deal of criminal matters which are recognised as crimes in the tribal courts of Ciskei and therefore viewed in a serious light whereas they would probably be regarded as unimportant in the magistrates courts in the light of the de minis non curat lex rule. In the writer's opinion this divergence of approach justifies the operation of a dual court structure along the lines suggested above. In the Ciskei such a step would also have the effect of removing an apparent anomaly in the Country's Administrative Authorites Act 1984 whereby the Paramount Chief is subject to the same limitations, in the exercise of criminal and civil jurisdiction, as an ordinary Chief or Headman

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230) Schedule 11 of the Transkei Constitution Act No.15 of 1976 contains a list of the repealed laws. Amongst these SS 9, 10 and 13 of the Black Administration Act No.38 of 1927, as amended, are included.

231) See Cotran 1969 : 142

232) See Allott 1970 : 310; 311 and 312, Chimango 1977 : 54-55

who is a chairman of a Tribal Authority. [233] This is rather strange in view of the constitutional position of the Paramount Chief, for example, S 37(1) of the Republic of Ciskei Constitution Act 1981 [234] provides that the National Assembly shall be constituted as follows :

"(a) The President;

(b) The Paramount Chief;

(c) Such chiefs as have or deemed to have been appointed or recognised in terms of Chapter X". Even at ceremonial occasions a Paramount Chief is accorded the traditional customary law status - he is given the traditional salute.

For purposes of effective control one would recommend the establishment of some kind of supervisory body similar to the Zimbabwean system of inspectorate. According to Ladley [235] the latter consists of a Senior Inspector and such other inspectors as the Minister may determine. The institution stands at the centre of the new court structure. The duties of the inspectorate include referring civil or criminal matters to the district court for review as well as the training of the incumbents of both Village and Community Courts. [236]

There is much to be said in favour of the introduction of a system of supervision over the functioning of the tribal courts in the Ciskei. Supervision would make it possible for the shortcomings of the system to be properly identified. The advantage here would be that the inspectorate, in its training programme would, per-force concentrate on the areas that need attention.

It is equally important that a statute creating the envisaged court should contain a specific choice of law rule detailing the list of matters

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233) See S S 39 and 40 r/WS42 of the Act

234) Act No 20 of 1981

235) See Ladley 108

236) ibid

triable by the tribal courts. Such a measure would avoid the unfavourable situation inherent in the Transkeian Regional Authorities Act whereby choice of court and law is left to the parties. The Zimbabwean choice of law rule is commendable. The Primary Court Act provides that Primary Courts have jurisdiction to "hear, try and determine any civil case in which customary law is applicable". The Act defines customary law as "the customary law of the indigenous people of Zimbabwe or any section or community thereof". Section 3 provides that "unless the justice of the case otherwise requires -

(a) customary law shall be applicable in any civil case where -

(i) the parties have expressly agreed that it should apply; or

(ii) having regard to the nature of the case and the surrounding circumstances, it appears that the parties have agreed it should apply; or

(iii) having regard to the nature of the case and the surrounding circumstances, it appears just and proper that it should apply". Surrounding circumstances are said to include -

"(a) the mode of life of the parties;

(b) the subject matter of the case;

(c) the understanding by the parties (as to which law applies);

(d) the relative closeness of the case and the parties to customary law or the general law".

The emphasis on substantial justice, whatever that may mean, is commendable. Unsophisticated rural people often complain that the administration of justice in the western type courts is beyond their comprehension - the fact that a witness is sometimes prevented from saying certain things in a court of law is unacceptable as far as they are concerned.

CHAPTER 7

INTERNAL CONFLICT RULES IN THE CISKEI

Internal conflict rules [237] refer to the conflict that arises between different legal systems or laws that are not territorially - distinctive but which co-exist within one country. Professor Allott claims to be the author of the term 'internal conflict of laws'. [238]

As the thesis deals with the Chief's courts it is intended to canvass here only the inter-tribal conflict of laws. [239] In the Ciskei the legal position with regard to inter-tribal conflicts is governed by S 61(2) of the Republic of Ciskei Constitution Act 1981 (Act No 20 of 1981). This sub-section reads : "The court shall not, in the absence of any agreement between the parties regarding the system of law to be applied in any such proceedings, apply any system of indigenous law other than that -

(a) which is observed at the place in Ciskei, where the defendant or respondent resides, carries on business, or is employed; or

(b) if more than one system of indigenous law is in operation at that place, which is observed by the tribe to which the defendant or respondent belongs".

The Ciskeian choice of law measure is modelled on S 11(2) of the Black Administration Act No.38 of 1927, as amended although it differs with it in the following ways :

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237) See in this regard Allott 1970: 111-112; Spiro 1981 : 232-235; Forsyth 1981 : 23; Mqeke 1983 (2) : 2IN1, Bennett 1981 : 60

238) ibid

239) In this context this means the conflict that exists between the laws of the different tribes of the Ciskei

(a) The wording of the two sections differ; for example, S 11(2) contains a limiting factor of race : "in any suit or proceedings between Blacks who do not belong to the same tribe" [240] (my own emphasis). Forsyth [241] also points out another material difference, namely, that no provision is made for two or more systems of law being in operation within a tribal area. "Presumably the section requires the mechanistic application of the law of the chief who has jurisdiction over the place of the defendant's residence in such cases. If this is the correct meaning of S 11(2) it impliedly suggests that a chief settling a dispute under S 12 must always apply the lex fori, and is not involved in choice of law.

Secondly, one wonders why the legislature did not dispense with the artificial requirement of the difendant's residence, and deal with his tribe from the beginning". [242] It may be that the legislature wanted to give effect to the primitive indigenous choice of law rule whereby the plaintiff would sue the defendant in the latter's own tribal court which would apply no other law apart from that which prevailed in its area. [243] This is what the Chief's Courts do in practice. In Beneshe v Sikweyiya [244] Chief Jeremiah Moshesh, who was one of the assessors, stated that the chief would apply the law prevailing in his area even if the parties made an agreement to the contrary. Olivier et al are of the opinion that in most cases lex fori should apply. [245]

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240) Bekker and Coertze at 66

241) Forsyth 1979 : 420 N 10

242) ibid. See also Bekker and Coertze at 66

243) Bekker and Coertze at 65; Mqeke 1983 (2) : 31, Olivier et al at 617

244) 1942 N A C (C&O) 1

245) ibid

(b) Another major difference in the wording of the two sections lies in the fact that the second part of S 11(2) concerns inter-tribal conflict outside a tribal area such as an urban Black township.[246] If two or more different systems are in operation at that place, the court shall apply the law of the tribe to which the defendant or respondent belongs.

The major criticism levelled at S 11(2) is that "it confuses two concepts basic to a conflict of laws. It appears that the legislature has conceived of inter-tribal conflicts in both personal and territorial terms".[247] It has also been said that the section provides a choice of law rule which combines both the rules of choice of law and the rules of jurisdiction.[248] In jurisdictional questions one considers, inter alia, the effectiveness principle whereas in conflict of laws the modern tendency is to favour proper law.

In the law of contract the concept refers to the law that creates and governs the contract. It may either be the law chosen by the parties (party autonomy) or if they fail to make a choice "the law with which the contract is most closely connected".[249]

There may be other connecting factors which the Court may use to determine the proper law.[250] In Jacobs v Credit Lyonnais[251] the court held that the first duty of the court was to try

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246) The case in point is David and Matinisi v Sawuka 1939 NAC (C&O) 101 at 102

247) Bennett 1980: 33; Forsyth 1979 : 419

248) Forsyth op cit 442, for example, the fact that a choice is made on the basis of residence and also on the agreement of the parties (express choice of law).

249) Forsyth 1981 : 257; Schmidt para 557-560.

250) North at 202-218; Graveson at 404-432. Spiro 1973 : 29-30-

251) (1884) 12 Q B D 589. This case is quoted by Graveson op cit at 413

to ascertain from the contract itself the intention of the parties, read in the light of the subject matter and the surrounding circumstances." The latest formulation in the absence of expression of intention by the parties is, with which system of law did the transaction have its closest and most real connection?". [252]

LAW OF DELICT

The doctrine of proper law has been extended to the law of delict

U.S.A.

According to North [253] in the United States of America, dissatisfaction with lex loci delicti commissi and lex fori has provoked doubt as to whether either of the above can be regarded as the most appropriate law to govern the conduct of the defendant and the rights of the plaintiff. "It has therefore been suggested that a principle better calculated to solve every variety of case would emerge if the judges, adopting the more flexible approach to the subject that has succeeded so well in the case of contract, were to develop a doctrine of the proper law of a tort". [254] Support for the proper law approach has been gained in the decision of the New York Court of Appeals [255] where plaintiff, an gratuitous passenger in the defendant's motor car, was injured in an accident that occurred in Ontario. At the time of the accident the parties, residents of New York were on a week trip to Canada. An Ontario statute absolved drivers from liability in the case of gratuitous passengers.

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252) ibid

253) North at 264

254) ibid

255) Babcock v Jackson 12 N G 2d 473 quoted in Cheshire at 265

On the other hand, New York law contained no similar provision. The plaintiff successfully instituted an action against the defendant in New York.

Mr Justice Fuld, giving the majority jdugement of the New York Court of Appeals, stated : "The question presented is simply drawn. Shall the place of the tort invariably govern the availability of relief for the tort or shall the applicable choice of law rule also reflect a consideration of other factors which are relevant to the purposes served by the enforcement or denial of the remedy?". [256]

Accepting the view expressed in the Conflict of Laws Restatement to the effect that the local law of the State which has the most significant relationship with the occurrence and with the parties determines their rights and liabilities in tort the learned judge applied New York law rather than the Ontario lex loci delicti commissi. [257]

The doctrine of proper law has not received judicial acceptance in England [258] in delict despite overwhelming academic support [259] for it. It is said that the doctrine [260] of proper law in delict "owes its existence to J H C Morris who first raised the theory in a note to M' Elroy v M' Allister 1949 SC 110 (Torts in the conflict of laws' (1949) 12 M L R 248)".

It seems that the proper law would be determined by the use of connecting factors. [261]

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256) 12 N Y 2d 473 at 477

257) North at 265

258) See North at 267-295

259) Graveson at 577-585

260) See Forsyth 1981 : 282

261) Forsyth 1981 at 284

SOUTH AFRICA

According to Forsyth there seems to be no South African law on the question of choice of law in delict although some old authorities such as Van der Keesel and Van Bijnkershoek's Observationes Tumultuariae favour the lex loci delicti commissi. [262]

Forsyth [263] also criticizes the section in the following terms : "An interesting conceptual aspect of S 11(2) is that it authorizes the parties by implication, to choose the particular system of Black law they wish to govern their dispute. Now such party autonomy in contract is widely recognized in most legal systems. Today there are straws in the wind that indicate a measure of rethinking in some legal systems. Against such a background one wonders whether party autonomy is an appropriate principle to govern the applicability of different tribal laws that have totally different ideological backgrounds".

It is difficult to follow the learned author's reasoning with regard to the use of party autonomy as a choice of law rule in inter-tribal conflicts. Elsewhere in another context the learned author sees the chief advantage of party autonomy as manifesting itself in lending certainty to contract. [264] Some leading scholars on African Customary law advocate the use of the techniques of Conflict of laws in the solution of internal conflicts problems. [265] Bennett is of the view that "the more developed systems of European private international law would appear to be better equipped to provide solutions for the conflicts situations encountered in modern Africa". [266] More importantly the learned author seems to favour the principle of party autonomy for he says : "If we recognize, however, that the purpose of conflict of laws is to guide the discretion

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262) Forsyth op cit 279; Schmidt para 568

263) 1979 : 420

264) See Forsyth 1981 : 259

265) See Allott 1970 : 117-119; Bennett 1979 : 406-417, Bennett 1981 : 67-68

266) ibid

vested in the forum to select the legal system which would be in accordance with the parties' reasonable expectations, we need have no qualms in giving the parties choice-of-law autonomy ".[267] Although the learned author made this statement in the light of S 11(1) of the Black Administration Act No.38 of 1927, as amended, it also applies with equal force in the context of inter-tribal conflicts because these choice of law problems normally arise in non-tribal courts. In the present writer's knowledge in at least three cases the question of special agreement between the parties as to the applicable tribal law fell to be decided by the Native Appeal Court.[268] In Govuzela and Beneshe cases the parties belonged to different tribes whilst in Thomson's case the parties belonged to the same tribe but resided in different tribal areas.

In the first case plaintiff was a Pondomise and the defendant a Hlubi. Defendant had eloped with plaintiff's daughter and married her. In an action for payment of the balance of a full dowry fixed according to Hlubi custom, he denied that he had married plaintiff's daughter according to Hlubi custom or that he became liable to pay the customary Hlubi dowry. The defendant was saying, in effect, that lobolo contract had been concluded according to Pondomise custom where there is no fixed dowry. The court rejected defendant's plea on the ground that he failed to establish a special agreement and held him liable in accordance with the Hlubi custom.

The same applied in Beneshe's case where the plaintiff was a Pondomise and defendants were Tembus. The claim was also for an outstanding balance of lobolo. The facts of the case are interesting because the law of defendant's place of residence coincided with that of the plaintiff's tribe.

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267) Bennett op cit at 409

268) See Thomson v Zeka 1930 N A C (C & O) 38; Beneshe v Sikweyiya and Another 1942 N A C (C & O) 1; Govuzela v Ngavu 1949 (S) 156.

At the time of the marriage, plaintiff was living on a farm in the Matatiele district which was mainly populated by members of the Basuto and Hlubi tribes. At the time of the action the plaintiff was living in Mount Fletcher district and defendants were living in Basutoland (Lesotho) but later removed to Mount Fletcher district and lived in a Basuto location. In their plea the defendants admitted the marriage and payment of eight head of cattle and two horses as dowry and further pleaded that the parties were Tembus whose customs they practised and which were applicable to the said marriage; that a dowry of ten head of cattle in accordance with Tembu custom had been arranged and paid and that, as Tembus practised the custom of ukutheleka, plaintiff was not entitled to sue for the balance of dowry. The case was decided on the basis of S 11(2) of the Black Administration Act. Scott (Acting President) who delivered the judgment of the court stated the law as follows : "It has been laid down by the Native Appeal Court in a series of decisions that where the law of plaintiff's domicile differs from that of the defendant and when no special agreement has been made, the law to be applied is that prevailing in the area in which the defendant resides, but that there is nothing to prevent the parties from entering into an agreement to pay the dowry fixed by the custom obtaining in the plaintiff's place of abode, nor anything to preclude the parties from agreeing that the custom of the tribe of which they are members should apply.... Section 11(2) of Act No 38 of 1927 provides that 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 applies to cases where the parties reside in different areas, but it would apply with greater force where both parties reside in an area where a particular custom prevails differing from that of their own tribe, unless a special agreement is made that their own customs should apply". In the reuslt, the court found that the defendants failed to prove a definite agreement that ten head of cattle was the full dowry to be paid.

In this case it appears that the court applied the law of the place of residence, which was Sesotho law, as the defendants resided in a Basuto location. If the court had applied the law prevailing in the plaintiff's area, which is the lex loci contractus, as the defendants would normally agree to pay the amount of dowry required by the bride's people which is usually in accordance with the amount payable in that area, that would have made no difference in this case as these systems of tribal laws coincided in.this particular case. However, in cases of this kind it is suggested that in the absence of an agreement between the parties the better approach would be to apply the law prevailing in the plaintiff's area which is the law the parties must be presumed to have agreed upon.

In Thomson's case the parties were Tembus and the case concerned an outstanding balance of dowry. The plaintiff resided in a Basuto location and the defendant in a Hlubi location in the district of Matatiele. The Basuto dowry was fixed at 20 head of cattle, 1 horse, 10 sheep or goats and one Mqobo beast. The Hlubi dowry was fixed at 25 head of cattle, 1 horse and sheep or goats.

The second defendant who was a son of the first defendant had entered into a customary union with the plaintiff's daughter about the month of September 1928 and seven head of cattle were paid on account of dowry.

Plaintiff claimed 13 head of cattle, 1 horse and 10 small stock alleging that at the time the union was entered into, it was agreed that Basuto custom would apply. The defendant denied this and stated that the arrangements were in conformity with Tembu custom and that no fixed dowry was agreed upon.

The Assistant Native Commissioner entered judgement for plaintiff in terms of his prayer. He disregarded the evidence recorded and held that, as defendant resided in a Hlubi location, the law or custom to be applied was Hlubi and not Basuto or Tembu custom. He relied on S 104 of Proclamation No.145 of 1923 which reads : "Where parties to a suit reside in areas where different laws are in operation, the law, if any, to be applied by the court shall be that prevailing in the place of residence of the defendant".

In his reasons for judgement the Assistant Native Commissioner stated that: "the essential of the claim is balance of dowry" and further stated that it was immaterial whether the liability was one under Basuto or Hlubi custom. He went on to say that instead of being prejudiced the defendant had actually benefited to the extent of 5 head of cattle. The Native Appeal Court stated : "Now it is true that where the law of the plaintiff's domicile differs from that of the defendant's and when no special agreement has been made, the law to be applied is that prevailing in the area in which the defendant resides, but there is nothing to prevent the parties from entering into an agreement to pay the dowry fixed by the custom obtaining in plaintiff's place of abode, nor is there anything which would preclude the parties from agreeing that the custom of the tribe of which they are members should apply". The Court was of the opinion that the plaintiff had not discharged the onus which rested upon him of proving a special agreement to pay dowry in accordance with Basuto custom.

Even when the relevant statutory provision directed the court to apply the law of defendant's tribe, the court seemed to give preference to the law of the place of residence. This trend is discernible in decisions based on earlier Transkeian Proclamations dealing with inter-tribal conflicts. This was the position in

Tafeni v Booi [269] where the provisions of S 23 of Proclamation 112 of 1879 were considered, as well as the case of Patsana v Daniel. Section 23 of Proclamation 112 of 1879 reads : "in case of there being any conflict of law by reason of the parties being Natives subject to different laws, the suit or proceedings shall be dealt with according to the laws applicable to the Defendant". The position was substantially the same under the provisions of S 22 of Proclamation 140 of 1885 which superseded the 1879 Proclamation. It is, of course, appreciated that a defendant may reside in his own tribal area.

From the Govuzela, Beneshe and Thomson cases it is clear that the Native Appeal Court was prepared to uphold the party autonomy provided the parties on whom the onus rested could prove the alleged agreement. This approach is in line with the doctrine of proper law discussed above.

Although the provision dealing with party autonomy has been commended as being in line with the practice in most legal systems, [271] the Native Appeal Court described it as "undoubtedly ambiguous" in Govuzela's case, supra. In that case the court raised the following question : "Does the agreement in question refer to an agreement at the time of the transaction or to an agreement in the pleadings as to the particular system of law to be applied". The Court found that the section refers to the time the transaction is entered into. This approach is in accordance with the views of most writers on conflict of laws. [272] In the opinion of the present writer there seems to be nothing to preclude such an agreement at any time before the commencement of trial. This is similar to the professio juris [273]

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269) (1917) 3 NAC 41

270) (1895) 1 NAC 1

271) Forsyth 1979 : 420

272) See, inter alia, North (ed) 1974 : 216; Graveson 1974 : 406; Spiro 1973 : 29. The latter is not decisive for he adds "or at any other time or from time to time".

273) Further on this see Forsyth 1981 : 22-23

of Roman law in terms of which the parties could agree either at the time of transaction or afterwards when the matter came before Court.

It seems that the agreement between the parties on the applicable system of tribal law can be made either expressly or impliedly.[274] One clear instance in the law of contract in which the court can safely imply the system of tribal law the parties had in mind would be a dowry agreement. Here the law which the parties should be presumed to have agreed on is that prevaling within the area of the bride's people. If they reside at a place other than their own, the law of the place where they live should apply since they would demand the amount of dowry normally paid in that area. This is the practice in both Ciskei and Transkei.[275]

In the Ciskei inter-tribal conflicts are likely to arise in the future in seduction and pregnancy suits as well as claims in connection with adultery particularly with respect to the alternative money value of a beast. With regard to the latter each Tribal Authority in the country is competent to determine the legal position in respect of its area. Tribal Authorities are empowered to make bye-laws[276] on matters affecting tribal administration in their respective areas. The informants gave different explanations with regard to the manner in which the alternative money value of a beast is determined : some said that the value is determined on the basis of the market value of a beast in the tribal area in question while others said that the value is determined on the basis of the market value of the beast in the district.

In an interview which the present writer arranged with the heads of Tribal Authorities during the short courses for Chiefs and Headmen the following results were obtained :

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274) Bekker and Coertze 1982 : 66; Forsyth 1979 : 421; Bennett 1979 : 409; Bennett 1981 : 88. In the latter publication the learned author discusses a Zimbabwean inter-tribal conflict provision which is substantially similar to the provision under consideration.

275) See also Mqeke : 1983 : 31 N 47

276) See S 4(2)(a) of the Ciskeian Administrative Authorities Act No 37 of 1984

(a) Seduction and Pregnancy

Among the Amavundle in Hewu district under chief Bebeza the customary fine for seduction and pregnancy is six head of cattle or their value R600,00 at R100,00 a beast. Amongst the Amakuze tribe in Alice under Chief G Mqalo the fine is five head of cattle or their value R250,00 at R50,00 a beast. The position is the same with the Gaika-Mbo tribe of Amatole Basinin Middledrift under Chief Mhlambiso.

Amongst the Amagqunukhwebe tribe in Middledrift under chief S Kama the fine is six head of cattle or their value R300,00. The sixth beast is payable as the court fee. This means that the money value of a best is about R50,00.

Amongst the Ngqika tribe of Burnshill in Keiskammahoek under chief S Gaika the fine is five head of cattle or their value R250,00. The position is the same with the following tribes :

Khambashe tribe of Zwelitsha under deputy chief Mdlankomo; AmaHlathi Tribal Authority of Zwelitsha under chieftainess Nonesi; Tyefu Tribal Authority in Peddie under chieftainess E Msutu; Imiqhayi Tribal authority in Zwelitsha; Imidushane East in Mdantsane under chief Jongilanga; Imidange Tribal Authority under chief N Kubashe; Iminqalasi Tribal Authority of Zwelitsha under chief E Mtembu.

In most tribes the customary fine is five head of cattle or their value R250,00.

Amongst the Basotho of Hewu district under chief Malefane the fine is five head of cattle or their value R500,00 at R100 a beast The position is the same among the Amantinde tribe of Zwelitsha under chieftainess Nosizwe.

Although Professor Koyana [277] seems to suggest that there is uniformity in this regard in the Transkei, in the knowledge of the present writer this is not so in certain areas of the Transkei particularly in the Gcaleka region where there is a great disparity between the customary practices of the Fingoes and Xhosas. The former require R140,00 per beast while the latter demand a lesser amount which varies between R100 and R140,00 per beast. The present writer grew up in the Gcaleka region in Idutywa district.

In Moni v Ketani [278] the court held that if the wife's guardian was no longer in possession of cattle given as dowry which would, in the ordinary course, have been returnable, plaintiff would receive an amount that would enable him to buy live animals "in or near the court's area at the time of the action". [279]

(b) Adultery Cases

In the case of adultery the conflict does not only occur in respect of the alternative money value of a beast but also with regard to the amount payable.

For example among the Amavundle tribe in Hewu district under chief Bebeza the customary fine for adultery is 3 head of cattle or their value R300 at R100 a beast. Whereas among the Thembu tribe under chief Hebe the customary fine is 6 head of cattle or their value R600 at R100 a beast. Amongst the Imingcangathelo tribe in Alice under chief Mkrazuli Tyali the customary fine is 7 head of cattle or their value R350,00 at R50,00 a beast. The position is the same with the following tribes :

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277) Koyana 1980 : 7

278) 1961 N A C (S) 58 at 59

279) Kerr 1981;443; see also Mqeke 1982 De Rebus 65

Amagqunukhwebe tribe of Middledrift under Chief S Kama; Ngqika tribe of Burnshill, Keiskammahoek under Chief S Gaika; Amahlathi tribe under Chieftainess Nonesi, Imidushane East in Mdantsane district under Chief Jongilanga : Imidange under Chief N Kubashe; Imingqalasi under Chief Mtembu : Amagwalane tribe under Chief Zamuxolo Zibi; Amandlambe tribe in Mdantsane district under Chief W Makinana;

Amongst the Amantinde tribe the customary fine is 7 head of cattle or their value R700,00. Whereas amongst the Imighayi in Zwelitsha the customary fine is 3 head of cattle or their value R150,00. The position is the same with the Amakuze tribe in Alice under Chief George Mqalo.

It should be noted that some tribal authorities distinguish, in the case of adultery, the cases where adultery is followed by pregnancy whilst in most tribes the position is the same irrespective of whether pregnancy follows or not. For example amongst the Amakuze the customary fine for adultery followed by pregnancy is 5 head of cattle or their value R250,00. Amongst the Imighayi the customary fine is 7 head of cattle where adultery has been followed by pregnancy. The position is the same with the Gaika-Mbo tribe. There is only one beast payable if no pregnancy follows. According to Chief Mhlambiso this beast is slaughtered and eaten by the elders in the veld (endle).

With regard to claims for seduction and pregnancy in most tribes three beasts are payable in respect of a second pregnancy. One beast is payable in the case of third pregnancy and there is no fine in respect of the fourth and subsequent pregnancies.

It is interesting to note that some tribal authorities refer all cases of adultery irrespective of whether the marriage is in accordance with customary rites to the magistrate's office.

With regard to the whole problem of inter-tribal conflicts it should be remembered that conflict problems only arise when the case comes before the ordinary courts as the tribal courts will normally try cases in accordance with the law and custom prevailing in their respective areas of jurisdiction. 300)

However, in cases where in a tribal area there are minority tribes subject to the jurisdiction of the same chief as the majority tribe and where the minority tribes follow different customs as was the position in Bali and others v Lebenya (supra) where a minority Xhosa tribe was situated in a predominantly Sotho area the court should apply the law of the minority if the defendant belongs to it. In practice such a minority tribe would have its own headman and the case would first be brought before a Headman's Court before proceeding to the Tribal Authority of the area. However, if the latter has already enacted a bye-law on the issue affecting the whole tribe, such a bye-law should take precedence.

The possibility of there being areas with people belonging to different tribes in the independent National States does exist in the light of frequent mass removal of Blacks from South Africa to resettlement areas within the National States. If a case involving inter-tribal conflict comes before a court of the magistrate or before the Supreme Court of Ciskei, the problem would have to be resolved in the light of the provisions of S 61(2) of the Republic of Ciskei Constitution Act No.20 of 1981.

The first thing to be noticed in the Ciskeian measure is that it does not differentiate between a rural and urban area but merely refers to the indigenous law which is observed at a place in the Ciskei. In the case of an urban area, for

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300) See Mqeke 1983(2): 21 at 34

example, in townships like Mdantsane and Sada, it would be difficult to have a system of indigenous law as residents in townships do not live according to their tribal affiliation. In such a case the court would have to apply the law of the defendant tribe. It would therefore be necessary to lead evidence to establish the tribe to which the defendant belongs. Nowadays the question of tribal affiliation may be attended with other practical problems : for instance there is a question of a man who belongs to tribe X but whose kraal is in tribe Y, as in the case of an Mgqunukhwebe who has established himself amongst the Amavundle in Hewu district and is employed in Mdantsane where he is alleged to have seduced plaintiff's daughter. In practice a man would identify himself with the custom of the place where his kraal is. That is why even at an imbizo (tribal gathering) people are addressed by the name of their tribal affiliation, for example, if it is a Bhele tribe a speaker would say in Xhosa, "Mabhele" meaning people of the Bhele tribe. This means that if a court applies the tribal law of the tribe to which a man belongs without establishing whether his kraal is situated in that place there may be a real danger of applying a tribal law with which he has no connection at all. Here one does not include people who have established themselves in urban township : there the Court may apply the law of the tribe to which he belongs. If evidence can be led to show that there exists a system of tribal law at the place of employment being an urban area, the court would have to give effect to such a system. In delictual claims emanating from rural areas the court should apply the law of the defendent's tribe - if he resides, that is, has a kraal within a different tribal area, the court should apply the law of that area for reasons already advanced above.

The application of the tribal law of place of employment unconnected with residence seems quite unrealistic.

For instance there are at present many drought relief schemes operating all over Ciskei in the rural areas where you find some Ciskeians from tribe A working with people from tribe B in tribe C. Take for example people from the Bhele tribe in Gaga, Alice working with people of Jingqi tribe under Chief Maqoma at Gqumashe, Alice which is an Umngcangathelo tribe of Chief Thyali - if a delict has been committed at the place of employment, that is, Gqumashe by a defendant from Gaga, a plaintifff would have to institute his claim at Gaga Tribal Authority and not at Imingcangathelo Tribal Authority.

If the same matter goes to the magistrate's court where a choice of law is going to be made and it appears that although the defendant works at Gqumashe he sleeps at home every day as these areas are not far from each other, the magistrate would be justified in terms of S 61(2)(a) in applying either the law of Imingcangathelo tribe because it is the law of place of employment even though there is nothing that connects the defendant with that tribe at all beside the factor of employment. In a case like this one would prefer a choice to be made on the basis of proper law approach because of its flexibility. On that approach the court would consider every possible connecting factor in order to find the system of law with which the cause of action has the closest connection.

For internal conflicts between customary law and the received law Schreiner J A advocated this approach in Ex Parte Minister of Native Affairs in re Yako v Beyi. 301)

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301) 1948 (1) SA 388 (AD)

The learned judge of appeal stated that the primary desideratum was "an equitable decision between the parties" and the court's duty is to determine which system of law it would be "fairest" to apply. [302] In the present writer's view the Ciskeian Courts should interpret the provisions of section 61(2) in the light of Schreiner J A's guidelines.

Although the legislature recognised the doctrine of proper law in contract it also created confusion by coupling it with jurisdictional issues such as the law of residence, place of employment etc. The present writer finds it strange that this was the case despite criticisms levelled against the structure of the corresponding section of the Black Administration Act No.38 of 1927 as amended long before the Ciskeian measure was enacted. [303] This approach has been followed by the Native Appeal Court in both contractual [304] and delictual [305] claims. More importantly the proper law approach was recognised in Govuzela, Beneshe and Thomson cases, supra.

If a case involving a contractual obligation comes before court, the intention of the parties should be ascertained from the terms of the agreement. If it is not clear what system of law the parties had in mind the nature of the agreement might provide a solution. For example in dowry contracts as shown above, the parties could be presumed to have had in mind the law prevailing within the area of the bride's people since the dowry agents (onozakuzaku) would, in any case, pay the amount of dowry demanded by the girl's people. The latter would

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302) at 400-1

303) See Forsyth 1979 : 419-422

304) See Warosi v Zotimba 1942 N A C (C & O) 55; Sawintshi v Magidela 1944 N A C (C & O) 47; this case was a sequel to the decision reported in 1943 N A C 52

305) See Bujela v Mfeka 1953 N A C (NE) 119; Ngwane v Vakalisa 1960 N A C (S) 30; Gumede v Mbambo 1965 B A C (NE) 16

be guided by custom of their area.

The present writer along with others [306] would prefer a choice of law based on the proper law approach.

306) See Bennett 1979 : 408

ANNEXURE A

Case study illustrating both civil and criminal cases heard in the chief's courts. The present writer had access to the chief's and headmen case records. The case numbers are those appearing in the magistrate's office record books. It is important to note that what follows has not been taken verbatim from the record but the writer's construction of the record after reading the case. In this case study the following particulars will be reflected :

The district in which the case was registered; the chief and the tribal authority which tried the case; the parties, the judgement and date of judgement as well as the date on which the judgement was registered.

ALICE

Case No. 1/77 before Chief Mqalo and his tribal authority (AmaKuza tribal). The parties were : Mpundu v Koba. The accused was charged with failure to pay a customary fine for seduction and pregnancy. The accused stated that the reason why he did not pay was that the girl's father had told him that he could take the child and keep it. He also averred that nobody was sent to his people to claim damages - The court referred the case back to the family court. The case was heard on 28 July 1977 and was registered on 2 December 1977.

Case No. 2/77 before the same Chief and his tribal authority. The parties were : Manceba Nofikile v J Ndongeni - The case concerned an action for insult (ukuthukana) but no particulars relating to the charge were given. The defendant said that he did know not that he was insulting. He was found guilty and fined R10,00. The case was heard on 28 July 1977 and registered on 2nd December 1977.

Case No. 3/77 before the same hief and his tribal authority. The case was between Nomathokazi Jwambi and Nobandla Dibela. The case concerned assault G B H (knife used). The accused was charged for inciting her child to assault complainant. In her defence the accused denied that she incited her child but that she merely intervened. The complainant was not injured. She was discharged for lack of evidence. The case was heard on 23 september 1977 and registered on 2nd December 1977.

Case No. 4/77 before the same Chief. The parties were : N Beja v T Poswa. The case concerned assault and robbery. The accused admitted having assaulted her but denied robbing her of her money. She also admitted that the complainant's clothes were still with her. She was found guilty and fined R10,00 and ordered to return the clothes - The case was heard on 23 September 1977 but registered on 2nd December 1977.

Case No. 37/79 before Chief Mqalo and his tribal authority. The parties were : N Mbane v Bonakele and Mawonga Mbane. They were charged with insult - It was alleged that they called complainant a witch - They denied the charge. They were discharged. The case was heard on 3rd June 1977 but registered on June 1977.

Case No. 41/79 before Chief Mqalo and his tribal authority. The parties were : No-Amen Ndongeni v Regina Gengele. The accused was charged with theft and found guilty. He was fined R7,00. The case was heard on 23 March 1977 but registered on 7 June 1979.

Case No. 44/79 before Chief Mavuso of Gaga and his tribal authority (Gaga tribal). The parties were : Inkundla (that is) Tribal Authority v Mabula Maneli. The accused was charged with unlawful demarcation of residential sites. He was found guilty and ordered to pay R15,00 within fourteen days. The case was heard on 12 April 1979 and registered on 4 July 1979.

Case No. 53/79 before the same Chief and his tribal authority. The parties were : (Mavuso) "Inkundla" v Zwelibanzi Booi - The accused was charged with contempt of court. The case was dismmissed as it transpired that the accused had notified the headman. The case was heard on 18 August 1975 but registered on 6 July 1979.

Case No. 60/79 before Chief Mabandla and his tribal authority (Krwakrwa tribal). The parties were : Jackson Peteni v Jongile Dingela. The accused was charged for looting and was found guilty. The accused was fined R48,00 plus R2,00 court fees to be paid within two weeks from the date of judgement. The case was heard on 25 February 1977 but registered on 6 July 1979.

Case No. 85/79 before Chief Mavuso and his tribal authority. The parties were : Atwell Mkaza v Hamilton Mavuso. The case concerned animal trespass on land. The court ordered that the matter should be discussed between the parties. The case was heard on 22nd November 1979 and registered on 18 December 1979.

Case No. 86/79 before the same Chief and his tribal authority. The parties were : Headman Jwambi v Harrington Socengwa. The accused was charged with drunken noise disturbing inkundla (court). He was found guilty and fined R20,00. R10,00 of which was suspended for three years. The case was heard on 13 December 1979 and registered on 18 December 1979.

Case No. 9/77 before Chief Mqalo and his tribal authority. The parties were : Nobandla Bofile v Mzamo Mashibini. The accused was charged for assault. Complainant alleged that the accused assaulted her child. The accused denied the charge. The court found him guilty and fined him R20,00. The case was heard on 21 July 1977 and registered on 2nd December 1977.

Case No. 3/78 before Chief Mavuso and his tribal authority. The case was between Headman Ngwekazi and Kotoyi Ngwabeni. The accused was charged with using abusive language with intent to assault people including the headman at the latter's inkundla. He was fined R10,00 suspended for three months. The case was heard on 26 October 1978 and registered on 31 October 1978.

Case No. 4/79 before Chief Mavuso and his tribal authority. The parties were : Adonis Matebeni v Nombudede Goduka. It was alleged that the accused had stolen and slaughtered complainant's sheep. The accused pleaded guilty and was found guilty. The accused was fined R26,00 being the value of the sheep plus R5,00 court fees. The case was heard on 9 November 1978 and registered on 9 November 1978.

Case No.10/79 before Chief Mabandla and his tribal authority. The parties were : Jola Wasa v Sydwell Noglazi. The accused was charged with assault. From the record it appears that the complainant sustained an injury in the eye. The accused admitted guilty and was found guilty. He was fined one beast or R45,00 as compensation on or before 5 February 1979. In addition the accused was sentenced to receive six lashes suspended for a year. The case was heard on 5 January 1979 and registered on 29 February 1979.

Case No. 69/79 before Chief Mqalo and his tribal authority. The parties were : Mbulelo Mangqongqoza v Nothobile Mangqongqoza. The case concerned unlawful occupation of a site. The defendant stated that the site belonged to her husband. The court decided to divide the site equally between the parties. The case was heard on 6 April 1978 and registered on 6 July 1979.

Case No. 72/79 before Chief Mavuso and his tribal authority. The parties were : Mavuso Nkundla (Court) v Gashoni Ngcume. The accused was charged with disobedience. He apologised. He was found guilty and fined R15,00. The case was heard on 6 April 1978 and registered on 6 July 1979.

Case No. 13/80 before chief Mavuso and his tribal authority. The parties were : Sub-headman Boco v Menzi Mtimkulu. The accused was charged with drunkeness at a funeral. He was found guilty and fined R30,00 suspended for 1 year. The case was heard on 25 September 1980 and registered on 2nd October 1980.

Case No. 1/82 before Chief Mavuso and his tribal authority. The parties were : Headman Jwambi v Jackson Mkaza. The accused was charged for felling trees in the commonage without permission. The accused stated that it was his sons who felled the trees and that he did not send them. he was found guilty and fined R10,00 which was suspended for 5 years. The case was heard on 7 January 1982 and registered on 2nd June 1983.

Case No. 2/82 before Chief Mavuso and his tribal authority. The parties were : Nomonde Mdunge v Xhagu Mhlatyana. The accused was charged with indicent assault. It was alleged that he attempted to kiss a married woman in public. The accused admitted liability but said that he was under the influence of liquor on the day in question. he was found guilty and fined R20,00. He was ordered to go and apologise to the husband and the family. The case was heard on 21 January 1983 and registered on 2nd June 1983.

Case No. 6/82 before the same Chief. The parties were : Nowelile Xeke v Agnes Xeke and Johnson Xeke. The accused were charged with assaulting their daughter-in-law. Complainant also alleged that they had taken her clothes and told her to leave the matrimonial home. The court decided to postpone the case to await the arrival of the complainant's husband as he was away at labour centres. The case was heard on 22nd April 1983 and was registered on 2nd June 1983.

Case No. 17/83 before Chief Mabandla and his tribal authority. The parties were : Vukubi v Mzileni. The accused was charged for failure to take his cattle to the dipping tank. He was found guilty and ordered to pay R15,00 plus R10,00 court fees before 21 September 1982. The case was heard on 7 September 1982 and registered on 7 June 1982.

ZWELITSHA

Case No. 23/77 before Chief Mdlankomo and his tribal authority (Khambashe tribal). The parties were : Malgas v Macumela. The case concerned a claim for damages for adultery. The defendant was fined 6 head of cattle or their value R300,00. One head of cattle was levied for court fees. The case was heard on 27 April 1977 and registered on 24 May 1977.

Case No. 37/77 before Chief Toise and his tribal authority (Amagasela tribal). The parties were : Headman Sanke v Sikhotshololo Mdingi. The case concerned a claim for damages for defamation of character. No further particulars were given except that the case was dismissed. It was heard on 25 August 1977.

Case No. 44/77 before Chief Mbeki and his tribal authority (Kwelerana tribal). The parties were : Kwelerana tribal v Pieter Dyafta. The accused was charged with theft ("embezzlement") of the tribal authority funds. The case was heard on 24 August 1977 and registered on 17 October 1977.

Case No. 25/78 before Chief Mdlankomo and his tribal authority. The parties were : Khambashe tribal v Bhacela Xalisile. The accused was charged with insulting people at the installation of Chief L L Sebe. He was found guilty and fined R50,00. The case was heard on 1 March 1978 and registered on 22nd March 1978.

Case No. 25/78 before Chief Mdlankomo and his tribal authority. The parties were : Khambashe tribal v K Ntoni. The accused was charged with insult, it being alleged that he insulted deputy chief Mdlankomo and Chief Sebe saying that he cannot be ruled by them. He was found guilty and fined R50,00 or one beast to be paid within two weeks - case heard on 1st March 1978 and registered on 22nd March 1978. According to the record an appeal had been noted. The above case number should read : 26/78.

Case No. 31/78 before Chief Mdlankomo and his tribal authority. The case was between Thembele Thuthani and Mzayifani Sidelo. The case concerned a claim for seduction and pregnancy. The defendant denied paternity but the court found that the child resembled the alleged father. No particulars of resemblance were given. The defendant was declared to be the father of the child and ordered to pay R150,00 or 5 head of cattle plus one beast for the court payable within 60 days. Neither the date of hearing nor the date of registration is given.

Case No. 12/79 before Chief Mdlankomo and his tribal authority. The parties were : No-Awethi Nyangiwe v (1) Notema Magalaza
(2) Matotose August
(3) Thembile Hotsholo. The charge was stock theft. The complainant alleged that defendant's sons stole her ox and sold it. The court found Hotsholo guilty of stealing complainant's ox since it was sold with his (Hotsholo's) stock card. He was sentenced to pay R400,00 within 30 days. He was also ordered to pay R3,00 court fees. The other two accused were each fined R20,00 payable within 30 days. In addition they were to receive 8 cuts for "insolence" plus R3,00 court costs. The date of trial is not given.

Case No. 14/77 before Chief Tshatshu and his tribal authority (Amantinde tribal). The parties were : P. Tshatshu (Chief) v Nkosiyabo Gqibithole. The accused was charged for disobeying the Chief's orders and also with insulting the Chief. He was also charged for interfering with the agricultural officer while the latter was on duty. He was found guilty and ordered to pay 1 head of cattle or R50,00. The case was heard on 25 March 1977 and registered on 19 April 1977.

Case No. 16/77 before the same Chief and his tribal authority. The parties were : Headman Tsusu v John Ntantiso. The accused was charged with disobeying the Headman's orders. He was fined R20,00. The case was heard on 27 April 1977 and registered on 28 April 1977.

Case No. 25/80 before Chief Siwani and his tribal authority (Imidushane). The parties were : Benson Ngqoshe v (1) Sankeni Nxomeka (2) Nomuntu Nxomeka; (3) Nonkundla Nxomeka. The accused were charged with theft of a sheep. They were ordered to repay the sheep plus a further R10,00 being court fees. The case was heard on 28 October 1980 and registered on 5 November 1980.

Case No. 20/77 before Chief Siwani and his tribal authority. The parties were : Simon Mdodo v (1) E D Nkontso; (2) W T Ngqase; (3) E N Coto; (4) A M Peter; (5) M K Mudi. The accused were charged with showing disrespect to the Chief by refusing to attend the court case and by also refusing to discuss the enquiry held by the Chief. They were fined one head of cattle each or R20,00. In addition Mr E D Nkontso and Mr K Mudi were to pay four footed beasts each. The case was heard on 4 April 1977 and registered on 9 May 1977. According to the record an appeal had been noted.

Case No. 21/77 before Chief Toise and his tribal authority. The parties were : N Mnyamana and N Nkabi v Mbayimbayi Gambusha. The accused was charged with threatening to assault the messengers of court. He was also charged with obstructing the messengers of the court in the execution of their duties. He was fined R40,00. The case was heard on 14 April 1977 and registered on 12 May 1977.

PEDDIE

Case No. 26/81 before Chief Matomela and his tribal authority (Marele dwane tribal). The parties were : Marele dwane tribal authority v Kawini Madikane. The accused was charged with
(1) disobeying the order of the tribal authority;
(2) drinking during the court session;
(3) for failing to appear in court after being summoned to do so.
He was fined R20,00 and a further R5,00 for failure to appear in court. The case was heard on 29 september 1981 and registered on 6 November 1981.

Case No. 5/82 before Chief Ceza (his tribal authority is not given). The case was between Notsolo Dayimani and Nosingile Goni and concerned illegal impounding of 7 goats belonging to plaintiff. The court gave a judgement of absolution from the instance. The case was heard on 20 January 1982 and registered on 28 January 1982.

Case No. 7/83 before Chief Msutu and his tribal authority (Msutu tribal). The case was between Noziqhamo Moze and Lulama Matshobo and concerned a charge of assault. The accused was found guilty and sentenced to pay R100,00 within 14 days from the date of judgement. The case was heard on 2nd March 1983 and registered on 22nd April 1983.

Case No. 9/83 before Chief Msutu and his tribal authority. The parties were : Tom Msutu v Nombuqu Nkohla. The accused was charged with assault G B H. The accused pleaded self defence but was found guilty and ordered to pay R200,00 within 14 days from the date of judgement. The case was registered on 22nd April 1983 but the date of trial is not given.

Case No. 37/83 before Chief Makinana and his Tribal Authority (the name of tribal authority not given). The case was between Yenayena Bosi and Boyce Nelani. The accused was charged for refusal to go to the Chief's court when summoned to do so. He was found guilty and fined R25,00. The case was heard on 14 July 1983 and registered on 29 August 1983.

Case No. 20/83 before Chief Msutu and his Tribal Authority. The parties were : Noyedwa Matinise v Mtimkulu Myanyana. The accused was charged with entering complainant's house through the door at night. He was found guilty and fined R40,00 and a further R60,00 court fees. The date of trial as well as date of registration not given.

Case No. 23/81 before Chief Ceza and his tribal authority. The parties were : Tyalibeki Seti v Sabatha Nyila. The accused was charged for cutting the hairs of complainant's daughter without his permission. The accused was ordered to pay R20,00 within 14 days plus 5 (five) lashes. The case was heard on 29 September 1981 and registered on 5 November 1981.

Case No. 1/78 before Chief Mhlawuli and his Tribal Authority. (The name of his tribal authority not indicated). The parties were : R S Mhlomi v Mncedi Gcezengana. The accused was charged with dipping oxen on Sunday. He pleaded guilty and was found guilty and fined R5,00. The case was heard on 15 December 1978 and registered on 22nd February 1978.

Case No. 21/78 before Chief Msutu and his tribal authority. The case was between Sikawana Kolongo and Skelekete Kleinbooi and concerned a claim for damages for adultery. The defendant was ordered to pay seven head of cattle or their value R280,00. The case was heard on 16 May 1978 and registered on 14 June 1978.

Case No. 5/80 before Chief Ngwekazi and his tribal authority. The parties were : Headman Stamper v Gama Sihlahla. The charge was assault. It was alleged that the accused assaulted one Ndumiso Gwengula while he was asleep in his home. The accused claimed that Ndumiso Gwengula had had sexual intercourse with his wife. He admitted having assaulted Ndumiso and the reason was that when he approached his home Ndumiso came out and ran away. The accused was found guilty and was expelled from Durban Location. The date of judgement was 23 January 1980 and the case was registered on the same date. According to the record an appeal had been noted.

MIDDLEDRIFT

Case No. 10/76 before Chief Kama and his Tribal Authority (name of tribal authority not given). The parties were : Nokwakha Wolela v Notizana Gxokwe. The accused was charged with insult, it being alleged that she insulted the complainant in the street by calling her a witch and a bitch. The accused denied the charge but the court was satisfied that she was telling lies. She was found guilty and fined R10,00 plus R3,00 court fees. She was also warned not to insult neighbours. Should she be found guilty of the same offence again she would be moved from her dwelling place.

Case No. 16/83 before Chief Kama and his Tribal Authority. The parties were : Headman Marela v Ndzuzo Ngesi. The accused was charged with contempt of court. He was also charged for refusing to pay as ordered by the Headman's Court. He was found guilty and ordered to pay R43,00. The case was heard on 28 July 1983 and registered on 29 July 1983.

Case No. 5/83 before Chief Kama and his Tribal Authority. The parties were : Jimy Lobese and Inkundla (Court) v Jackson Jora. The accused was charged for allowing cattle to graze at closed arable allotment. He was found guilty and fined R60,00 plus R3,00 court fees. The case was heard on 15 February 1983 and registered on the following day.

Case No. 17/83 before Chief Kama and his Tribal Authority. The parties were : Sidwell Qomfo v Dyani Ncoyo. The accused was charged for obstructing the complainant when the latter was attaching stock in execution of a judgement. Accused was found guilty and fined R50,00. The case was heard on 28 July 1983 and registered on 29 July 1983.

Case No. 7/82 before Chief Zibi and his Tribal Authority. The case was between Nokwakha Siganga and Nowanisi Hlwayela and concerned malicious damage to property. It was alleged that the accused had killed a fowl belonging to the complainant. The accused was found guilty and fined R10,00. The case was heard on 20 May 1982 and registered on 21 May 1982.

Case No. 3/83 before Chief Kama and his Tribal Authority. The parties were : Nzima Khaphetshu v Fukamele Mani. The accused was charged with assault G B H. He pleaded guilty and was fined R150,00 plus R3,00 court fees and two sheep for committing assault at the Great Place. The case was registered on 28 December 1983 but the date of trial is not given.

Case No. 191/79 before Chief Kama and his Tribal Authority. The parties were : Solomon Royi v Nomilile Madlamba. The accused was charged with contempt of court. It was alleged that she failed to appear before the court of a Headman when called upon to do so thereby disobeying the Headman. He was also charged for insulting the Committee which assists the Headman. The accused was found guilty and fined R20,00 payable within 14 days. The case was heard on 10 April 1979 and registered on 22nd October 1979.

Case No. 14/80 before Chief Kama and his Tribal Authority. The parties were : Headman Gilili v Danile Tsewu. The accused was charged for insulting the Headman while holding a meeting thereby forcing him to close the meeting before time. The accused was found guilty and fined R20,00 plus R3,00 court fees. The case was heard on 15 July 1980 and registered on 22 July 1980.

Case No. 22/80 before Chief Kama and his Tribal Authority. The parties were : Elliot Namba v Nonezile Sontshi. The accused was charged with contempt of court. It was alleged that she failed to appear at the Headman's court. She was found guilty and fined R20,00 plus R3,00 court fees. The case was registered on 7 January 1981 but the date of trial is not given.

Case No. 5/82 before Chief Zibi and his Tribal Authority. The parties were : D M George v Khopha Shiba. The accused was charged for ploughing land whilst there was a funeral at his location. He was found guilty and fined R10,00. The case was heard on 20 May 1982 and registered on the following day.

Case No. 15/79 before Chief Kama and his Tribal Authority. The parties were : Solomon Mabadi v Griffiths Sijako. The accused was charged for holding circumcission ceremony on a Sunday. The conduct complained of was said to be contrary to the custom of the tribe in question. The accused was found guilty and ordered to pay R50,00. The case was heard on 10 April 1979 and registered on 20 April 1979.

Case No. 21/78 before Chief Kama and his Tribal Authority. The parties were : Nowandile Siphango and Mtose Mtoloyi v Thomas Mountain. The accused was charged with stock theft. It was alleged that the accused stole and slaughtered a sheep belonging to the complainants. The carcase was found in one of the accused's huts. The accused was found guilty and ordered to pay a sum of R30,00 with costs. The case was heard on 4 October 1978 and registered on 20 October 1978.

Case No. 17/78 before Chief Kama and his tribal Authority. The parties were : Headman J Mtyeku v Kekana Tyeni. The accused was charged for disturbance of the peace. It was alleged that the accused disturbed peace at a lawful meeting and the meeting had to be closed due to the unruly behaviour of the accused. The accused admitted having caused disturbance but said that the meeting had already been closed. He was found guilty and ordered to pay R50,00. The case was heard on 18 April 1978 but registered on 3rd July 1978.

The commonest types of cases heard at the Chiefs' courts were assault, theft and contempt of court cases. More than 100 cases of contempt of court were heard in Chief Zibi's Court between 14 September 1979 and 12 October 1979. The accused were each fined R2,00 plus 25c court fees.

ANNEXURE B

1. I, DAVID MACEBO TAKANE, Minister of JUSTICE, in terms of the provisions of section 12(1) (6) of the Black Administration Act, 1927 (Act 38 of of 1927), as amended by section 64 of the Ciskeian Authorities, Chiefs and Headmen Act, 1978 (Act 4 of 1978) read with section 72(2) and 76(2) of the Republic of Ciskei Constitution Act, 1981 (Act 20 of 1981) authorise

..... with effect from 19

(a) To hear and determine civil claims arising out of customary law brought before him/her by a person contemplated in the said section 12 against any other such person who is resident within the area of his/her Authority / or .....

and

(b) confer upon him/her jurisdiction to try and punish any person contemplated in the said section 64, who has committed, in the area under his/her customary law, other than the offences specified in the Schedule hereto.

2. He/she, however, may not try

(a) any offence committed by two or more persons,

any one of whom is not a person contemplated in the said section 20;

and

(b) any offence committed in relation to such a person as is contemplated in the said section 64, or property belonging to any person who is not such a person, other than property, movable or immovable, belonging to the Government or held in trust for a tribe or a community or aggregation of such persons as aforementioned.

3. In the exercise of this jurisdiction, he/she may not inflict any punishment involving death, mutilation, grievous bodily harm or imprisonment or impose a fine in excess of one hundred or (2) head of large stock or ten (10) head of small stock or impose corporal punishment save in the case of unmarried males below the apparent age of thirty (30) years.

SIGNED AT ZWELITSHA on this day of

.....1983.

MINISTER OF JUSTICE