

Coram :
KOTZÉ, C.J.
MORICE, J.
GREGO-
ROWSKI, J.

N'KWAAN

v.

THE SUPERINTENDENT OF NATIVES,
D. J. SCHOEMAN, AND J. A. ERASMUS.

1897

8 June.

CONTEMPT OF COURT—NATIVE MATTERS—JURISDICTION—
LAW No. 4 OF 1885.

Coram :
JORIS-
SEN, J.
Inchambers.

No one can be punished for contempt of Court without having had the opportunity of defending himself, except where he commits contempt in facie curiæ.

1897

24 March.
14 April.

Where a native was punished by a Native Commissioner for contempt of Court, without having had an opportunity of defending himself, and the Superintendent of Natives had confirmed the sentence, the Court set aside the sentence of the Native Commissioner, holding that the jurisdiction of the Supreme Court in such a case was not taken away by Law No. 4 of 1885.

Where a Field Cornet, without possessing the power to do so, had punished a Kaffir for a contravention of the Rinderpest Regulations, the sentence was set aside by a Judge in Chambers.

THIS was an appeal against a judgment of Jorissen, J., given in Chambers on 14th April, 1897. The appellant applied for the setting aside of two sentences by which he was condemned to pay a fine of 100*l.* and 10*l.* respectively under the following circumstances:—The appellant was a Kaffir Chief of Toremegtani's location, falling under the jurisdiction of the Native Commissioner for the district of Lydenburg, the respondent Abel Erasmus. In the month of October, 1896, during the absence of the appellant, he was fined by D. Schoeman, Field Cornet and also Chairman of the Rinderpest Commission for the ward Crocodile River, in the sum of 100*l.* for a contravention of the Rinderpest Regulations, on the ground that certain women of the appellant's kraal had carried about rinderpest meat. The appellant alleged that on his return nothing of this was communicated to him, that he received no official notice, and never appeared before D. Schoeman to answer any charge. Mr. Abel Erasmus, the Native Commissioner, thereupon received from the Landdrost of Lydenburg instruction to carry out this sentence of 100*l.* fine. He sent for the appellant,

and as the latter did not appear a further fine of 10*l.* was inflicted by this Native Commissioner upon the appellant for contempt of Court. The appellant alleged that he was too ill to appear and had never received any official notice that he was to appear before the Native Commissioner.

Subsequently, on or about the 30th November, 1896, a *Pitso* was held at Secocoeni's location, at which the Superintendent of Natives and the appellant were present. The sentences of 100*l.* and 10*l.* fine were confirmed by the Superintendent of Natives, without the appellant, as he alleged, having been allowed an opportunity of calling witnesses and defending himself. As the appellant was unable to pay the fines he was on 4th December arrested and taken to the gaol at Lydenburg. On behalf of the respondents it was denied that the appellant was unable to come in when he had been called by the Native Commissioner and that no opportunity had been given him to defend himself.

A certain Mr. Rabie thereupon approached the Native Commissioner and tendered him, on behalf of N'Kwaan, the sum of 110*l.* under protest. The Commissioner refused to receive the money, giving as his reason for his refusal that the proclamation of 21st September, 1895, prohibits any person, save the Native Commissioner, from interfering with native matters. He requested Rabie, on account of this proclamation, to show him an authority from the Superintendent of Natives giving Rabie a right to act in the matter. The Commissioner subsequently announced that by reason of the fines not having been paid he had altered the sentences to twelve months' and three months' imprisonment respectively.

Under these circumstances N'Kwaan appealed to the Supreme Court. On 1st February, 1897, a rule *nisi* was granted by Jorissen, J., calling upon the Superintendent of Natives, Field Cornet D. Schoeman, Native Commissioner J. Abel Erasmus, and the gaoler of the gaol at Lydenburg to show cause why the sentences of 100*l.* and 10*l.* fine inflicted on the applicant by the said Schoeman for a contravention of the Rinderpest Regulations, and by the said Erasmus for contempt of Court, which sentences had been confirmed by the Superintendent of Natives, and altered to twelve months' and three months' imprisonment respectively, should not be set aside, and why the applicant should not forthwith

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be released from gaol. On the 18th February, 1897, the return day of the rule, the application was postponed by Gregorowski, J., and the applicant set at liberty on payment of 110*l.* under protest. On 24th March the matter was argued before Jorissen, J., and on 14th April he delivered a written judgment, as also in the case of *September v. Van de Wal* (*ante*, p. 159). This judgment, so far as it related to the application of N'Kwaan, was as follows:—

“ I take the two cases together, inasmuch as the jurisdiction of the Court was raised in both, in view of Law No. 4, 1885, regulating the management of, and legal procedure for, natives. It was laid down in *Marechane v. The State* (*a*) by this Court in 1882, that in all matters of an administrative character and real public concern the native stands under the control of Commissioners, the Superintendent of Natives, and in the last resort of the State President, and that the Supreme Court is incompetent to interfere. The Native Commissioners may even in criminal matters award minor punishments. (See the schedule annexed to the Law.) It is not clear to me whether from such sentences an appeal will lie to the Supreme Court. [The judgment then deals with September's case, *ante*, p. 159.] In regard to N'Kwaan, the case is partly of the same nature and partly different. It is an application not for the purpose of instituting an action, but to set aside two sentences. N'Kwaan has been condemned by the Commissioner, Abel Erasmus, upon the request of the Field Cornet Schoeman, to pay two fines, and on non-payment, as it seems, to imprisonment. Nowhere with the record are there any copies of the sentence, nor of the notes of the inquiry which we must assume was held. We can arrive at a very superficial knowledge of the facts from the affidavits alone. Among these there is a full affidavit by Mr. C. F. Rabie, containing an account of an interview between him and Mr. Abel Erasmus. This affidavit confirms the facts set out in the application, which are also substantiated in an affidavit by Mr. Erasmus. The applicant was sentenced to a fine of 10*l.* for contempt of Court in the case of the Native Commissioner. The contempt consists in this: that the applicant, having been called to appear before this official, did not appear. He declares that he was too ill to appear. The Commissioner declined to believe this,

(*a*) 2 Kotzé Rep. p. 27.—TR.

and condemned the Kaffir, without having heard him or calling upon him for the second time, to a fine of 10%. In his affidavit the Commissioner says that the Superintendent investigated the matter—but in the absence, however, of the accused—and has confirmed the sentence. I must take it that such is the case, and I refrain from further considering this point according to my decision in the case of September, and I advise the applicant to approach the State President direct, with the request for a fresh investigation after having first paid the 10% fine.

With the second fine the matter stands on a different footing. Field Cornet Schoeman condemned N'Kwaan to pay a fine of 100% for a contravention of the regulations fixed by two Government proclamations against the spread of rinderpest. He pronounced this sentence without having heard the accused, and in his absence, he not having appeared before the Commissioner. In neither of these proclamations of 4th and 27th April, 1896, is there any mention of such a power given to the Field Cornet any more than in Law No. 2 of 1882 (on Pounds). Section 34 of that law prescribes very carefully how the Field Cornet in consultation with the Landdrost must invite three experts to appraise infected cattle. But in reality this section does not apply, and I have only referred to it because in the proclamation of 14th April this law and that section are mentioned. No notice even of the sentence was ever given by Mr. Schoeman to N'Kwaan. Field Cornet Schoeman sought the assistance of the Native Commissioner, Abel Erasmus, who sent some armed men to the kraal of the native. They demanded payment of the two fines, and when the native declared he had no money they arrested him together with another Kaffir, handcuffed them and dragged them to the gaol at Lydenburg, where they are now still confined. Twice thereafter the money was tendered in payment, but the Native Commissioner refused, and still refuses to accept the money, and has on his own authority altered the fines into imprisonment for twelve and three months. Beyond any doubt the Supreme Court is competent to take cognizance of this case. The crime or contravention has nothing to do with the provisions of the law relating to natives. In a case like the present the courts of the country are open to a native. There can be no doubt what my judgment ought to be. Here there is a heaping together of illegalities, especially the refusal to accept the fines, and the arbitrary imprisonment of N'Kwaan is a great wrong, and it is

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difficult to conceive how the gaoler of the prison at Lydenburg did not understand his duty better.

The applicant says, with truth: 'My tribe and family are at present suffering terribly from famine, seeing that they have lost all their cattle through rinderpest, the crops have been destroyed by locusts, and owing to the incarceration of your petitioner, he as the head of the tribe is entirely unable to afford them any assistance, or to take any trouble with the view of ameliorating the distress of the tribe, or to take any steps to diminish the famine. Your petitioner is convinced that owing to his absence many are now dying of famine, who, if he had had them under his control might perhaps have been saved.'

In the case of N'Kwaan an order must be granted for the immediate liberation of the applicant; the sentence of imprisonment and the fine of 100*l.* are set aside, and the State is ordered to pay the costs. The application for setting aside the fine of 10*l.* is refused.

After having given this judgment, I am informed that by an order of Gregorowski, J., N'Kwaan has been discharged from prison on payment of 110*l.* I therefore vary my judgment in so far that the State be ordered to repay the 100*l.* paid by N'Kwaan."

An appeal was brought against the last portion of this judgment in regard to the 10*l.* fine for contempt of Court.

Wessels (with him *Curlewis*), for the appellant: The 100*l.* fine has been set aside, and we now only appeal with regard to the 10*l.* fine for contempt of Court. The Judge *a quo* held that the Court had no jurisdiction. The native has been punished without having had the opportunity of explaining why he did not appear. The Court has jurisdiction.

Jacobs, for the respondent: The native N'Kwaan had the opportunity of defending himself and explaining why he was unable or did not appear. His affidavit is contradicted by that of Mr. Erasmus.

Korzé, C. J.: The Court is of opinion that, assuming that a Native Commissioner can punish anyone for contempt of Court committed *ex facie curiæ*, then the person who is alleged to be in contempt must first be called upon to show cause why he

shall not be punished for such contempt. That has not been done. The appeal must accordingly be allowed, and the fine of 10*l.* which has been imposed must be set aside. The money must be returned to the appellant, who is further entitled to the costs of this appeal.

Attorney for appellant: *J. H. L. Findlay.*

Attorney for respondents: *C. Uckermann, sen.*

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DICKSON v. LEE.

NOVATION.

Coram:
KOTZÉ, C.J.
JORIS-
SEN, J.
ESSER, J.

Where a defendant is sued on a contract and pleads a novation thereof, the onus lies on him to prove such novation satisfactorily.

1897
5 June.
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THIS was an appeal from a decision of Gregorowski, J., pronounced in the Circuit Court at Johannesburg on 14th August, 1896. The respondent, Lee, as plaintiff in the court below, claimed a statement and an account from the defendants, Dickson and McColl, in regard to a certain transaction, the particulars of which will fully appear from the following considered judgment of Gregorowski, J., and also from the letters which passed between the parties.

The judgment of Gregorowski, J., was as follows: "This is an action in which the defendants are sued by the plaintiff for a statement and account. The first defendant McColl had, before the institution of this action, ceded all his interest to the second defendant, and as the summons had not been properly served upon him, the case is only proceeded with against Dickson. On the 4th March, 1893, the plaintiff entered into a contract with the Red Reef Syndicate (formerly consisting of the two defendants as members, but now of Dickson only), by which he sold 21 claims on the farm Vogelstruisfontein for 20*l.*, reserving to himself certain rights, under which should be specially mentioned the right of, on a payment of 50*l.*, deriving for himself a third share of the profits on an eventual sale of the claims by the syndicate. Already, in February, 1894, Dickson found that the continuance of the con-