

CONTRACT IN TSWANA CASE LAW

BY I. SCHAPER A

The material presented in this paper has been selected from records of nearly 1,950 cases tried by Tswana tribal courts in the Bechuanaland Protectorate, mainly during the period 1935-1940. The Protectorate Administration in 1935 made the keeping of written case records obligatory in all the courts officially recognized in that year as "tribunals"¹; previously only the Ngwaketse had done so systematically, for 1910-1916 and 1928-1934. As opportunity arose while I was doing anthropological fieldwork among the Tswana (intermittently, in 1929-1943), I made an abstract, and occasionally a complete copy, of every case recorded by the chiefs' courts ("senior tribunals") and a few district courts ("junior tribunals") in the nine tribes I was able to visit.²

Of those cases, 310 related directly to breach or alleged breach of contract. I have already described in some detail elsewhere the main features of the Tswana law of contract.³ This paper should therefore be regarded primarily as a collection of case material illustrating those features; it does not profess to cover the topic fully. I hope, nevertheless, that it will serve to convey some idea of the kinds of legal issues relating to contract with which Tswana courts usually have to deal. I state briefly, in each section, the rules normally recognized by the courts, and then cite a few cases that seem to be relevant.

Formation

A contract in Tswana law is, basically, a voluntary agreement (*tumalano*) between two parties, imposing obligations upon one (or both), and reciprocally conferring rights upon the other (or both). Both the obligation and the reciprocal right are called by the same term, *tshwanelo*, of which the most suitable English translation is "due" (*cf.* "due by A", "due to B").

(a) A bare promise is sufficient to make an agreement legally binding.

1. A (Lekwee) promised his wife B, when they got married, that he would not become a polygamist. He afterwards wanted to marry someone else. B (Goitumelang) thereupon complained at court that he was "putting her away" by breaking his promise, since she would

¹ Bechuanaland Protectorate Native Tribunals Proclamation, No. 75 of 1934 (promulgated 4th January, 1935), s. 16.

² There is a preliminary analysis of this material (excluding some subsequently gathered among Khurutshé, Maleté, Seleka-Rolong, and Tlokwa) in my paper, "The work of tribal courts in the Bechuanaland Protectorate" (1943) *African Studies* 27-40. This also describes briefly the records themselves.

³ "Contract in Tswana law" (paper prepared for the International African Institute seminar on customary law, to be held at Addis Ababa, January 1966). For an earlier account, based chiefly on Kgatla and Ngwato sources, *cf.* my *Handbook of Tswana Law and Custom* (1938, new edn. 1955), Chap. XIV.

not live with a co-wife. A said he wanted B to remain his wife, but he wanted to marry the other woman also. Asked by the judge if it was true he had promised not to marry polygamously, he replied, yes. Held: "In that case you must carry out your promise." (*Goitumelang v. Lekwee*, Ngwaketse, 74/1913¹.)

2. A (Mosele) hired B (Frank) to build a hut for him, and said he would supply the bricks needed. B later complained in court that he could not start work, because A had not yet kept his promise. A said he had told B there were no bricks, but that he would make them. Held: B should look for other work in the meantime, A was to call him when the bricks were ready, and two men were appointed "to watch the progress of the hut". (*Frank Curtin v. Mosele Kelefile*, Ngwaketse, 9/1930.)

(b) Contractual obligations are occasionally one-sided, as when A donates goods or services to B. He cannot subsequently revoke his gift (unless made to his child or other dependant), nor can he claim any form of payment, etc., in return.

3. A (Monnaagomo) claimed payment for ploughing B's field. B (Johannes) said A "had offered to plough for him out of friendship only, and not for pay"; in any case, no crops had been reaped in the field. The case was dismissed. (*Monnaagomo v. Johannes*, Tawana, 8/1939-40.)

4. A (Motsholapheko) gave his son-in-law B (Gaborekwe) a patch of uncleared land on which to make a field. B did so; then, on going away temporarily, he lent the field to his wife's younger sister. Annoyed at not having been consulted, A ploughed the field for himself. Taken to court, he maintained that he had merely lent B the land; but witnesses proved that it had been a donation (*mpho*). Held: the field belonged to B, and A was fined 10s. "for his conduct". (*Gaborekwe Tsethane v. Motsholapheko Matsoga*, Kgatla, Mathubudukwane district court, 3/1938.)

See also: No. 7.

(c) An agreement must normally be made directly between the parties themselves.

5. A (Baitse) sued B (Maramakwane) for a plough, saying two men had told him they heard B say he was going to give it to him. The evidence showed that "all this happened seven years ago". Held: B was not liable, "because he had not himself told A that he would give him the plough". (*Baitse v. Maramakwane*, Ngwaketse, 84/1913.)

6. On going abroad, A (Olefile) told B's wife that his herdsman B (Mmutle) should take care of some rafters he had cut and left in the veld. On returning, he found the rafters had been stolen. He claimed them from B, "since they had been left with him to look after". B said he knew nothing about the rafters; if his wife had been told, she had not mentioned them to him. Held: A had no claim on B, "because he did not agree with him (personally) that he should look after the rafters". (*Olefile v. Mmutle*, Ngwaketse, 27/1915.)

7. A (Tlhokonyane) claimed an ox as payment for "doctoring" B (Keepehile). B admitted having been treated by A, but said he had

¹ *I.e.*, Case No. 74 of 1913. Unless otherwise specified, all the cases cited were tried in the chief's court ("senior tribunal") of the tribe named.

not sent for him; A had volunteered to do the "doctoring", because B was his maternal uncle. Held: B was not liable, "because he had not summoned (*i.e.*, hired) A." (*Tlhokonyane v. Keepehile*, Ngwaketse, 29/1915.)

See also: No. 14.

(d) An agreement is sometimes made for the benefit of a third party (as when A sells something to B on behalf of C, or A gives B something to transmit to C); in such cases C, although not a party to the original agreement, can himself sue B if it is not carried out.

8. A (Mmamanyana, a woman) went to Johannesburg, leaving some cattle with B (Mosielele) to sell for her. On returning, she sued three men who had bought some of the cattle but not yet paid for them. C (Phatshwana) had taken a cow, but said he had no money with which to pay for it; he was ordered to give A three head of cattle (to represent the cow and its offspring). D (Nkwe) had taken a bullock, but said he had paid A 15s. and B 45s.; as he had no witnesses to prove he had given A anything, he was ordered to pay her 15s., and B was likewise ordered to pay her 25s. (which was what he said he had received). E (Ntumisang) had also taken a bullock, but said he had paid B, in the presence of witnesses; he was ordered to go and find them. (*Mmamanyana v. Phatshwana, Nkwe, and Ntumisang*, Ngwaketse, 18/1934.)

9. A, while working in Johannesburg, gave B (Sekgwe) 63s. to take home and hand over to C (Koole, A's father). B spent the money, and was sued by C. His defence was that A had agreed to let him use the money and repay it in due course. Held: "The law forbids people to give others money to bring home for them", but because of the agreement between A and B, B should now repay the loan by giving C an ox. (*Koole v. Sekgwe*, Ngwaketse, 24/1914.)—The "law" referred to here was a decree, issued by the chief in 1910, that "No one working abroad should hand money to someone else to bring home for him; he must send it by post; and if a man to whom money has been handed to bring home appropriates it, there will be no case against him." It is no longer in force.

See also: No. 31.

(e) Similarly, a person may sue for debts due to a near kinsman (*e.g.*, father or brother), whether dead or alive; in the latter instance, he acts on behalf of his kinsman. Conversely, he can also be held liable for the debts of such a kinsman, but apparently only if (i) he is the dead man's heir, or (ii) he was previously aware of the debt, or (iii) the debtor himself, if alive, is not available.

10. A (Nkge) sued B (Monametsi) for an ox due to A's father for "doctoring" B. (B had previously paid an ox, but it was found to have been stolen, and had been recovered by the owner.) As B had no cattle of his own, the court awarded A his plough "as compensation". (*Nkge v. Monametsi, Malete*, 23/1938.)

11. In 1937 A (Mojaphoko) sued B (Mogakolodi) for payment of a debt incurred some forty years previously ("about 1897") by B's uncle. Held: "According to custom, the heir to an estate is responsible for the dead man's debts; as B was not his uncle's heir, he is not liable." (*Mojaphoko Seritshane v. Mogakolodi Batsile*, Ngwaketse, 14/1937.)

12. A (Thomas, a foreigner) sued B (Keatweng) for delivery of an ox he had bought for £6 from B's younger brother. B admitted knowledge of the transaction, and was told to give A the ox. (*Thomas Moothedi v. Keatweng Mpitsang, Ngwaketse, 41/1934.*)

13. A (Khumoetsile) bought goods on credit from two foreigners, B (Ramelodi) and C (Gaorapelwe). On coming to collect what was due to them, they found A absent, and therefore claimed payment from his elder brother D (Olefile). D said he knew nothing about those debts. Held: B and C were to find and sue A; D was not liable, "because he knew nothing about the matter". (*Ramelodi and Gaorapelwe v. Olefile, Ngwaketse, 48/1913.*)

14. A (Mabywale, a foreigner) had "doctored" B's wife at B's request, the fee agreed upon being £7 10s. Now, since B (Chonko) was working abroad, A claimed payment from the wife's father C (Keaikanya). Held: A "cannot claim from someone with whom he had not made the agreement; he should rather wait for B to return home". (*Mabywale v. Keaikanya, Ngwaketse, 47/1913.*)

See also: Nos. 15, 17, 25, 36.

(f) Although contracts are nowadays very occasionally made in writing, the vast majority are still concluded by oral agreement. Witnesses are not essential to make them legally binding, but failure to produce any may prejudice a claim or defence.

15. A (Isang) advanced £60 towards the cost of B's education, on condition that the loan was repaid in three annual instalments of £20 each; he had received £35, and now sued B (Molefe, a teacher) for the balance. B said he had in fact paid back £38 10s., and that A also owed him £7 10s. for work done. As there were "no witnesses or documents on either side", the court accepted B's counterclaim, and deducted it from the £25 claimed by A; this left a balance of £17 10s., which B and his father (Mamapilo) were ordered to pay; the court ruled also that B's salary as a tribal teacher should be diverted towards the payment. (*Isang Pilane v. Mamapilo Molefe and Molefe Molefe, Kgatla, 3/1935.*)

16. A (Mmasefiwa, a widow) claimed a field ploughed by B (Thomas), saying it had been lent to him long ago by her late husband. B denied this, and said he had made the field himself. Neither statement was supported by witnesses, but other people ploughing in the same area said that as far back as they could remember B had always used the field. Held: the field belonged to B, and A was fined £1 for bringing an unfounded case. (*Mmasefiwa v. Thomas Phiri, Kgatla, Mathubudukwane district court, 10/1935.*)

17. A (Keboeletse) sued B (Raharise) for £1, payment due for "doctoring" done by A's younger brother. B said the "doctoring" had been done for 5s. (not £1); he had already given A 1s., and was still trying to find the balance. Held: B was to pay 4s. only; "there was no witness about an agreement for £1, as A had not brought his younger brother to testify". (*Keboeletse Tabe v. Raharise Carrel, Ngwaketse, 28/1929.*)

18. A (Mmolawa) said that B (Joseph) had agreed to pay him an ox for damage done to the crops in his field by B's cattle, and that B was now "trying to get out of his agreement". A had no witnesses, and B denied having agreed to pay as alleged. Held: A has no case, "because there are no witnesses". (*Mmolawa Phuramarapo v. Joseph Ratsie, Ngwaketse, 19/1932.*)

See also: Nos. 8, 44.

Capacity to contract

(a) In principle, women and unmarried children cannot make valid contracts without the consent of their male guardian (husband, father, etc.); nor can parents betroth their children without the consent of other senior relatives. In practice, women nowadays engage independently in many kinds of transaction, and in the event of dispute may conduct their own cases at court (*cf.* Nos. 8, 16, 21, 33, 40); in one instance, too, a court upheld an agreement made by a dependent youth (No. 20).

19. The daughter of A (Wakgomo) became engaged, with his consent, to B (Kefathilwe). B then refused to marry her, "because she was sick", and was sued by A as her guardian. B admitted having lived with the girl, and said his younger brother knew of the engagement. But his headman (a senior relative) stated in court: "We did not 'seek' the girl (*i.e.*, carry out the customary betrothal negotiations), and it is only now, in this case, that we hear they were engaged." Held: A "was wrong to join the children together without the agreement of all their people, this is not marriage"; and B was to forfeit whatever he had given the girl, *i.e.*, she was held to have been his concubine, not his fiancée. (*Wakgomo Koole v. Kefathilwe Otlogetswe, Ngwaketse, 34/1934.*)

20. A (Solomon) bought a suit of clothes from a youth B (Maribane), promising to pay him a sheep. This was confirmed by a witness. B's people sent him to get the suit back. A refused to part with it, and was sued by B. Held: "an agreement had been made", but A's price was too low; if he wanted to keep the suit, he must give B three sheep or 25s. He paid the 25s. (*Maribane v. Solomon Mphuwe, Ngwaketse, 60/1915.*) This case, incidentally, shows that the Tswana recognize the principle of "fair price".

(b) There were only three cases, in all, suggesting that persons of certain other categories either cannot make contracts, or cannot make contracts of certain kinds. These related to: (i) a herding agreement between two women (No. 21), (ii) an agreement made by a "sick" man (No. 22), and (iii) an alleged agreement between close relatives (No. 23). The last may be a local variation; in other tribes agreements between such very close relatives as spouses or brothers have been accepted as valid (*cf.* Nos. 1, 29, 32).

21. A (Segole) said B (Mrs. Bent, a European) had hired him to herd her cattle, promising to pay him a cow after a year's work; in the eleventh month she took the cattle from him and gave them to C (another woman), whom she also paid the cow due to him. B said she had in fact originally hired C, not A; and this was confirmed by C. Held: "one woman does not give another woman cattle to herd"; B was therefore ordered to pay A his cow, and did so. (*Segole v. Mrs. Bent, Ngwaketse, 39/1930.*)

22. A (Ramorupi) held some of B's cattle, and "without permission" sold one of them to C (Ramphiri). B (Letebele) sued A. C admitted buying the ox, though "he did not know for certain that it belonged to A". Held: the ox belonged to B; C was to give it back, and seek a refund of his money (30s.) from A; "your purchase (*theko*) was theft (*bogodu*); you knew that Ramorupi was sick (*ele molwetse*), and that you had no right (*tshwanelo*) to buy cattle from

him; you have done wrongly (*omolato*); pay £1 [as fine], and pay quickly". (*Letebele v. Ramorupi Madimabe*, Maletse, 27/1941.)

23. A (Madinao) gave B (Ngombe) a cow to herd, promising him a calf in return. B afterwards refused to hand back the cow, because he had not yet been paid. A sued. Held: "because they are closely related, there can be no question of contract; the cow must be restored to its owner." (*Madinao v. Ngombe*, Tawana, 1/1939-40.) My abstract of the case does not indicate the nature of the relationship between A and B.

Standard obligations

In contracts for sale or loan of goods (including money), or employment of service, the parties must agree on the nature and amount of the payment due, including the sex and age of any animals involved in the transaction; they may also, but need not, agree on the time of payment or delivery of goods purchased, or when a loan should be repaid (*cf.* Nos. 10, 12, 14, 15, 17, 20, 21, 22, 23, 24, 25, 26, 27, 30, 33, 34, 36, 43, 48, 50, 51, 52).

In addition to such variable details, contracts of these kinds (and they constituted nearly 80 per cent of all those about which there was litigation) normally entail certain "standard" or "customary" obligations. These do not have to be stipulated whenever an agreement is made, and (unless they have been specially modified by the parties themselves) the courts in case of dispute will always assume that they apply. The standard obligations featuring most prominently in the case records are as follows:

(a) The parties must have valid title to what they give; animals or other goods involved must also be delivered in sound condition (and according to the specifications agreed upon). The question of title arises chiefly when someone sells, or pays a debt with, animals he has stolen or otherwise misappropriated; the purchaser or recipient must then restore them to the true owner, and recovers whatever he himself may have given for them (*i.e.*, the contract is cancelled).

24. A (Ramorupi) sold B (Lelatlhego) an ox belonging to C (Letebele), which he said was his own; B, who "knew nothing about A", paid him 50s. for it. C sued A (*cf.* No. 22 for a similar case between the same parties). A agreed in court that if he gave someone an ox as *tiso* (to herd), or a field on loan (*kadimo*), and the latter "ate" it without telling him, he would ask for it back; therefore C was not acting wrongly in taking action against him. Held: B had bought a stolen ox from A; he must restore it to C, and seek a refund of his money from A. (*Letebele v. Ramorupi Madimabe*, Maletse, 28/1941.)

25. A (Lepodisi) gave two head of cattle to B to buy a gun for him. B died before doing so, and A sought a refund of his cattle, or their equivalent, from C (Motsaakgang, B's younger brother). C gave him two oxen, but these really belonged to D (Mothala), who took them back from A. A sued D. Held: A has no case against D; he must sue C for his cattle. (*Lepodisi Sabone v. Motlhala Legothwana*, Ngwaketse, 24/1938.)

26. In 1910, A (Rankatu) took £5 from B (Kgampu), promising to pay him two weaned calves (*maalolelo*) in April, 1911. In 1913 he offered B two young oxen just old enough to be driven (*magatelo*).

B rejected them, saying his own cattle of the age originally promised already had calves of their own. The people in court agreed with him, and said A should add two newly-weaned calves (*marunishwane*) to those he had offered. He was ordered to do so. (*Kgampu v. Rankatu*, Ngwaketse, 43/1913.)

27. A (Ramorwa) gave B (Tomo) a rifle, in exchange for a magician's whisk (*boditse*) allegedly able "to produce water and milk". A tried it at home, and, when he found the claim "was not true", sued B. The whisk was tested in court, where it also failed. B was ordered to restore A's rifle "or its equivalent". (*Ramorwa v. Tomo*, Ngwaketse, 41/1914.) There is nothing in the record to show that B was otherwise penalized for his fraud.

28. A (Dishaitane) lent his headman B (Radikoro) a horse for use on official service. It died while in B's possession, and A claimed twelve head of cattle compensation. B said that on receiving the horse he had asked A for another, "as this one is not fit"; and a witness said that A had deliberately given the horse, though he had a good mule. Held: A has no claim, "he could have given a sound animal". (*Dishaitane Mokgwathheng v. Radikoro Moletsane*, Ngwaketse, 3/1934.)

See also: Nos. 10, 22, 51.

(b) In either sale or purchase on credit, ownership, but not risk, passes as soon as (but not until) something has been given in return for a promise to deliver or pay.

29. A's wife wanted to buy cattle with corn. Her brother B (Molefe) acted as her agent, and gave some of the corn to C in exchange for a heifer. The animal died while still in C's possession. Thereupon A (Manale), on behalf of his wife (B's sister), sued B. Held: B should give A a cow, and could then claim another from C. (*Manale Mmale v. Molefe Nkwe*, Ngatla, 19/1938.)

30. A (Gababonwe) took a cow from B (Setlhomolo), promising to give him another in exchange or to pay for it in money. "Before he had done his share", he sold the cow to C for 10s. B sued him. Held: B "should go and get his cow back" from C; and A, in addition to giving C £1 (*i.e.*, double the price paid), was to receive four cuts of the cane "for taking [stealing] A's cow without [fulfilling his part of the] agreement". (*Setlhomolo v. Gababonwe*, Tawana, chief's court, 187/1939.)

See also: Nos. 34, 36.

(c) If A owes B a female animal (*e.g.*, a cow), or is looking after such animals for him, B is entitled also to their offspring.

31. In 1937 A gave B (Moshokwe) a cow to deliver to C (Moanaphoti). Despite several requests, C failed to get the cow from B, whom he at last sued, in 1939. Held: B was to give C four head of cattle, "one to represent the cow he should have given, and the balance to represent its offspring". (*Moanaphoti v. Moshokwe*, Tawana, 194/1939.)

32. On going to work in Johannesburg, A (Ngomare) left a cow with his brother B (Ramotsumi). He heard it had five calves in all, but on his return B offered him only one animal. He sued B for the balance. B said the calves had been "eaten" (sold or slaughtered) by A's wife, though she had told her husband she knew nothing about them; and the wife admitted in court that she had concealed her use of the calves from A. Thereupon A withdrew his claim, and

the court formally ruled that B was not liable. (*Ngomare Khobe v. Ramotsumi Khobe*, Ngwaketse, 47/1940.)

33. In 1937 A (*Mmabasekisi*, a woman) sold B (*Nnanyane*) a pair of shoes, for which he promised to pay a goat; in 1940 she sued him for five goats (the animal originally due, and its increase). B said he would give one goat only, as he had previously told A the goat was there for her to take, but it had died before she came to fetch it. Held: B was to give A five goats, "because he had delayed to hand over the original animal". (*Mmabasekisi Mmolayatshephe v. Nnanyane Gothaang*, Ngwaketse, 51/1940.)

See also: Nos. 8, 26, 42, 43.

(d) A man looking after another's livestock must inform him promptly of losses due to death, straying, theft, etc., and must give him the hides of those that have died. Failing this, he can be held liable for the loss; he is also liable for losses or injury due to his own negligence.

34. A (*Phaleng*) gave B (*Mmutle*) three sheep for a calf, which he left in B's care as it was still young. The calf died, and A sued for the return of his sheep. B repudiated liability; he said that when the calf died he had told A to skin it, but A "just left it", and as it was not his any longer he also "left it to rot". Held: B was not liable; "the calf had died for A" (*eswetse Phaleng*). (*Phaleng v. Mmutle*, Ngwaketse, 54/1915.)

35. A (*Tshikantwa*) was herding B's cattle. The calves became lean, and B (*Digothong*) claimed compensation, saying their condition was due to excessive milking of the cows. A replied that they were suffering from "liver disease", and that he had duly reported this to B. Held: "there is no reason why A should pay; he did not injure the calves by hand." (*Digothong v. Tshikantwa*, Ngwaketse, 35/1911.)

36. A (*Ramogolo*) gave B (*Mooki*) an ox for services rendered. B went abroad to work, and left the ox with A. It died, and when C (*Moring*, B's brother) later came to fetch it, A offered him another. C rejected it as too small, and sued A. In court A said that when the ox died he did not know to whom to give the hide, as B was abroad; he had therefore sold it for 9s. The people present reproved C for his action, "because A had not killed the ox". Held: A was not to blame, because he did not know where B was; but he should give C the money he had received for the hide. (*Moring v. Ramogolo*, Ngwato, Madinare district court, 50/1940.)

37. A (*Kaketso*) gave B (*Lepodisi*) two donkeys to herd. B, without permission, lent them to C (*Balasang*), from whom they strayed. C agreed to pay A an ox as compensation, but A also wanted an ox from B; B had offered him two goats, which he refused, "because he had sought for the donkeys in vain". B maintained in court that his offer was fair, as the donkeys had strayed not from him, but from C. Held: B must pay A an ox, "because he had lent the donkeys without permission, and then they got lost". (*Kaketso v. Lepodisi Mmolawa*, Ngwaketse, 58/1915.)

See also: No. 59.

(e) A man hired for some special task is not entitled to payment until he has satisfactorily completed that task.

38. A (*Dikgang*) claimed payment from B (*Semeri*), by whom he had been hired to drive a wagon to a village some forty miles away.

B said there was no reason why he should pay, as A had not taken the route specified; in consequence, the oxen had suffered from lack of water, "and one of them was still being treated". This was found to be true. Held: A was not entitled to payment. (*Dikgang v. Semeri*, Ngwaketse, 91/1915.)

39. A (Motoka) claimed payment from B (Furupa) for work on a well. Held: he must finish digging the well, and could then have a case if he considered it necessary. (*Motoka v. Furupa*, Tawana, 90/1938.)

40. A (Kennekang) claimed his fee for "doctoring" B (Mmadichaba, an elderly widow). Held: he should first cure his patient, and could then claim his fee. (*Kennekang Molongwane v. Mmadichaba Mapogo*, Tlokwa, 44/1938.)

41. A (Mokotswa) claimed payment of his fee for "doctoring" B's cattle. B (Basima) said he was willing to pay, but the "doctoring" had been incomplete, since it was done when the bull was not there. A agreed to do it again "now that the bull has come". Held: A was to receive a cow after the "doctoring" had been completed. (*Mokotswa v. Basima*, Ngwaketse, 80/1932.)

(f) A debt must be paid on demand (or at the time agreed upon), and is always due, no matter how long ago it was incurred. But if the creditor delays greatly in seeking payment, or refuses a reasonable tender, he may prejudice his chances of being awarded his claim, either in full or even at all.

42. "Before the rinderpest" (1896), A (Modise) sold a horse to B (Tshugane). He was paid all the cattle due but one, which died in the rinderpest. In 1912 he sued B for eighteen head of cattle, "the offspring of the one about whose death he had been told". Held: B was to give A one cow, "but nothing more", "because he had previously offered A one, which had been refused". (*Modise v. Tshugane*, Ngwaketse, 30/1912.)

43. In 1893 A (Baitse) sold B (Kelebalekgosi) a pair of sandals for a goat, and in 1896 he sold C (Tsalayakgosi) a hat, also for a goat. In 1913 he sued for "goats" (to represent the animals originally due, together with their increase). Held: "because of his delay", he was in each case to receive one goat only. (*Baitse v. Kelebalekgosi and Tsalayakgosi*, Ngwaketse, 85/1913.)

44. A (Polokaeng) borrowed from his elder brother B two trek oxen belonging to C (Letshwenyo). They died because of drought. Subsequently, after B's death, C claimed compensation from A. A said no such claim had been made during B's lifetime; C also admitted in court that he had no witnesses to any earlier request for payment. The case was dismissed, "because C has no evidence to prove that he has ever before claimed payment from A". (*Letshwenyo v. Polokaeng*, Tawana, 100/1938.)

Remedies for breach

(a) If payment of a debt is refused or withheld, the debtor can be sued and will be made to pay (*cf.* Nos. 12, 13, 15, 17, 21, 42, 43); and if there was no excuse for delay (*e.g.*, reasons like those reflected in Nos. 42-44), he may have to pay more than was in fact due.

45. A (Sekgaritse) gave B (Kesupilwe) an ox to herd, and when he claimed it back was refused. Held: B must return the ox, "and

pay another for his delay". (*Sekgaritse v. Kesupilwe*, Ngwaketse, 16/1912.)

46. A (Phutimpe) owed B (Kgwabi) an ox, but refused to pay, "and delayed greatly despite requests". He was therefore ordered to give B three head of cattle. (*Kgwabi v. Phutimpe*, Tawana, 40/1937.)

47. A (Motlhala) sued B (Rakongwe) for payment of debt (£2 or an ox). He was awarded 45s., the extra 5s. "because B had delayed to pay". B paid the 45s. (*Motlhala v. Rakongwe*, Khurutshe, 1/1941.)

(b) A defaulter may similarly be ordered to do work he has promised, or to finish a task he has abandoned or done badly; but he may be excused if he can prove that performance was impossible.

48. A (Maswe) lent B (Seiphethlo) an ox with which to plough, on condition that B then ploughed for him; he now complained that B refused to do so. Held: B "must carry out his agreement". (*Maswe v. Seiphethlo*, Ngwaketse, 28/1910.)

49. A (Tiroyamodimo) hired B (Montsho) to "doctor" his wife. B removed some *dibeela* (bewitching charms) that were found in her hut, but then refused to "doctor" the woman herself. A sued him. In court B said he had refused "because they spoke badly about him". Held: B must "go and cure the woman". (*Tiroyamodimo v. Montsho*, Ngwaketse, 77/1913.)

50. A (Xedano) borrowed a donkey from B (Kethopilwe) with which to plough, promising to plough for him in return. B sued him for not doing so. A said he had been unable to plough while the field was still under water, and that B had in the meantime taken back the donkey. Held: B had no case. (*Kethopilwe v. Xedano*, Tawana, 233/1940.)

See also: Nos. 1, 2.

(c) However, if any payment has already been made, the court may order its refund, and thus cancel the contract. This applies also to cases in which a girl refuses to marry her fiancé; he is then entitled to recover the value of his betrothal gifts.

51. A (Mosweu) gave B (Openshaw, a European blacksmith) his wagon to repair, paying him an ox in advance. B took the wagon from Lehututu to Kanye (the tribal capital, 260 miles away), but instead of working on it "went to cut wood for sale". A sued for, and was awarded, the return of his ox, "because B had not yet repaired the wagon". (*Mosweu v. Openshaw*, Ngwaketse, 13/1910.)

52. A (Mokgabisi) gave B (Ricketts, a European) his rifle to repair, and also paid him for the parts (trigger and band) that had to be replaced or added. After he had used it only three times, the trigger broke again. He sued for the refund of his money (19s. 6d.), saying he would return the trigger and band. B agreed to this, and the court ruled accordingly. (*Mokgabisi v. R. Ricketts*, Ngwaketse, 65/1914.)

53. A (Koti) became engaged to and started living with B's daughter; she then left him, and he found her associating with other men. At a family meeting held to discuss his complaint, she said she did not want him. Her family sided with her. A therefore sued B (Matsau) for the return of his betrothal gifts (two bags of corn and other goods valued at £5 16s.). The court rejected a defence that he had driven the girl away, and not only ordered B to pay the

claim, but fined him "an ox or £3, for trying to cheat A out of the marriage". (*Koti Tsele v. Matsau Ntwagae*, Kgatla, 29/1938.)

See also: Nos. 25, 27.

(d) A person who has suffered actual loss through breach of contract may be awarded special damages. This applies also in cases where a girl is jilted by her fiancé, especially after she has borne him a child; in addition, he has to forfeit his betrothal gifts.

54. A (Kekganehile) promised to plough for B (Gosalamang). He did not do so "at the time agreed upon", and was sued. Held: the corn he had reaped from his own fields should be threshed "and divided between him and A by the court, according to law". (*Gosalamang v. Kekganehile*, Tawana, 21/1937.)

55. A (Molapisi) hired B (Diaramoka) to cut and bring him a supply of reeds (used for building huts). B did not deliver the reeds, and as A had to go and fetch them himself he sued B "for his expenses" (*ditshenyegelo*). Held: B must pay A 11s. 6d. or 23 bundles of reeds "for breaking his contract". (*Molapisi v. Diaramoka*, Tawana, 125/1938.)

56. A (Ngwai) was looking after some cattle for B (Kgamanthane), and in 1934 of his own accord returned them all, except the bull. In 1936, after several earlier requests, B again sent for the bull, and this time claimed also its progeny (five calves) by A's cows, "damages for the loss he had sustained because his own cattle had long been without their bull". In 1937 A brought the bull alone. B refused to accept it without the calves, and took the matter to court. There A was ordered to pay what B demanded; he was also fined an ox, "because he was a very obstinate and elderly man, who ought to know the law". (*Kgamanthane S. Pilane v. Ngwai Moeng*, Kgatla, 22/1938.)

57. A (Mojamorago) seduced B (Marata), promising to marry her. He then changed his mind, saying he wanted neither her nor the child, and she sued him. Held: he should pay eight head of cattle, "because he has spoiled her chances of getting married to someone else". He brought six animals, which the chief accepted, giving B four and keeping the two others himself. (*Marata Pite v. Mojamorago*, Kwena, 16/1936.)

58. In 1928 A (Ramosukwana) seduced B (Mmamothusi), and, "because he had no cattle with which to pay" (the usual damages, in this tribe, being four head), he promised to marry her. His father set in train the customary betrothal negotiations, and, soon after the engagement was concluded, the child was born; another followed in 1930. A then went to work in Johannesburg, and while there heard that B had been unfaithful to him. He consequently refused to marry her, and was sued. In the course of the hearing it transpired that he had been acting on the advice of B's maternal uncle, who after agreeing to the marriage now wanted him to marry another niece instead. Held: A was to pay six head of cattle "before he married the other woman", and B's uncle, "who was the cause of the trouble", was fined an ox. (*Mmamothusi Lebotse v. Ramosukwana Molefe*, Kgatla, 1/1937.)

(e) If a case for breach of contract is due primarily to the defendant's obstinacy or other misconduct, the court, in addition to any other award, may inflict special punishment upon him.

59. A (Ntiria) borrowed two oxen from B (Matlhoakgosi) for use in ploughing. They went astray, and he neither reported this to B nor looked for them; in court he tried to excuse himself by saying he thought B had already fetched them. Held: he must restore the animals (*i.e.*, their equivalent) to A, and also pay an ox as fine, "for letting the matter come to court unnecessarily". (*Matlhoakgosi Tshukudu v. Ntiria Pule*, Kgatla, Mathubudukwane district court, 3/1936.)

60. A (Dick) borrowed £1 from B (Gaoretelelwe). He repaid 10s., "but took a very long time about the balance, and became insulting when B wrote to him for it". Held: he must pay B 25s., "10s. as the balance due, and 15s. for the insult". (*Gaoretelelwe v. Dick Marambo*, Tawana, 192/1939.)

See also: Nos. 4, 16, 22, 30, 53, 58.