

No fences: Bad neighbours

A glimpse of rural relationships and the law in early colonial Natal

by Robin Lamplough

IT was the dogmatic dictum of a conservative neighbour that led American poet Robert Frost to reflect upon the dynamics of getting along with the fellow next door.¹ A long-forgotten series of incidents on the banks of the Mooi River in central Natal in the 1850s, however, suggests that Frost's neighbour had a point.

The source of this information is the now extremely rare first volume of *Natal Law Reports*,² compiled by Thomas Phipson, who was Sheriff of Natal in the third quarter of the nineteenth century. It throws light on community relations in the Weenen district, as well as on the legal framework against which some of these relationships played out in the earliest years of the British administration of Natal. The matter in

question arose out of a quarrel between Boer neighbours farming on the Mooi River and involved an action to recover the sum of £23/15/-, with interest, on a promissory note dated 17 March 1857.

One of the disputants had the surname Boshof. Clearly the more prosperous neighbour, Boshof owned two properties, one on either side of the farm belonging to his adversary, whose name was Lotter. In the year 1856, Boshof decided to move some of his livestock from one of his farms to the other. This movement involved crossing Lotter's land, across which there was an authorised road, which passed within sight of Lotter's residence. But, at the time, the region was in the grip of a highly infectious pleuro-pneumonia affecting cattle and known in South

Africa as *longsiekte*. When Boshof discovered that the road crossing Lotter's land was littered with Lotter's dead and dying beasts, he elected to use another route across his neighbour's farm. While this new drive was in progress, he was stopped by Lotter and an altercation ensued. Eventually, Boshof turned back but this did not prevent Lotter from bringing an action against him in the District Court on a charge of trespass. The court found in favour of Lotter, awarding him damages of £1 as well as the costs of the hearing which totalled some £70.

Not long afterwards, the aggrieved Boshof brought a criminal action against Lotter in the Weenen Magistrate's Court for his failure to bury the diseased carcasses of his dead cattle. Lotter was fined £10 and his attorney's fees amounted to more than £20. This was tantamount to a declaration of war in the community. Both men were members of the same Dutch Reformed congregation and eventually the elders of the *gemeente* felt moved to intervene in the quarrel. The *dominee*, Dr Faure, called a *kerkraad* or church council at the home of Lotter, on 17 March 1857, and the farmer's grievances were aired and discussed. Clearly the bad blood between the neighbours had been accumulating for some time. Lotter asserted that a dam built by Boshof on the Mooi had adversely affected the supply of water to Lotter's irrigation system. Lotter further claimed that Boshof had stolen a mare from him. The alleged horse thief, however, explained that a number of Lotter's stray horses had to be driven from Boshof's farm and one of Boshof's mares had accidentally been sent off with the strays. Lotter should, Boshof claimed, have returned the horse to him

and not made it necessary for him to recover the beast himself.

The *kerkraad* appears to have bent over backwards to be scrupulously fair. It concluded that Lotter had no real cause for complaint about Boshof's dam and judged that the incident of the missing mare had been satisfactorily explained. The members then turned to the financial losses suffered by both men in consequence of their litigation. They totalled the amounts paid out in legal costs by each disputant, then subtracted one sum from the other. The resultant balance, they proposed, should be equally shared between the disputants. The conclusion of this arithmetical adjudication was that the less prosperous Lotter then owed the wealthier Boshof a sum of £23/15/-. Once this debt had been settled, then the pair should live peaceably together in Christian amity.

Broer Lotter, however, saw himself as the loser in the proposed arrangement and refused to comply. It was plainly time for the *ouderlinge* to crack the ecclesiastical whip. The *raad* warned Lotter that failure to comply with their decision would compel them to order his excommunication for a period of six months. This threat however failed to change Lotter's mind and the council prepared to disperse. Lotter's wife and tearful children then intervened, begging him not to bring disgrace upon the family. Eventually he relented. He signed a note in which he undertook to pay to Boshof the stipulated amount within a month. Before long, however, he had had second thoughts. The business of Boshof's dam still rankled and the removal of the mare had not been resolved to his satisfaction. Lotter therefore wrote a letter declining to pay the debt he had earlier accepted

and, furthermore, initiated an action in the District Court to show that his note had been irregularly obtained and that Dr Faure had acted not impartially but clearly in Boshof's interest. In the meantime, however, Boshof had taken to the Supreme Court Lotter's failure to honour his debt.

The matter appeared on the roll for 24 July 1858. On the bench were the colonial Chief Justice, Walter Harding, and two Puisne or lower judges, Henry Connor and Lushington Phillips. Boshof's attorney, Mr Buchanan, argued that the note represented Lotter's promise to pay and therefore he should be ordered to stump up forthwith. The Attorney General, Michael Gallwey, acting on behalf of Lotter, argued that the recommendation of the *kerkraad* was one-sided and unenforceable. He requested therefore that his client be allowed to leave the court scot-free.

Judgment was handed down five days later, on 29 July. It was not a unanimous decision but the Chief Justice was outvoted by his two Puisne judges in favour of the defendant, Lotter. The court further ordered, however, that both parties in the dispute should bear their own costs. The opinions of those on the bench differed quite markedly. Walter Harding believed that Boshof should win his case. There was no question of Lotter being forced to pay the debt and, in any case, Lotter was himself in the wrong for driving away Boshof's mare, although Boshof might have made some concession over his dam on the river.

Henry Connor, *per contra*, argued that the court should not become involved in a dispute that involved a moral rather than a legal obligation. The *kerkraad* was an ecclesiastical body, not an arbitration court and its decision was

bad in that it was one-sided. The second Puisne judge, Lushington Phillips, did not agree that the *kerkraad* was biased. He believed the *raad* had acted within its powers as a quasi-arbitrator. Lotter, however, was under no legal obligation to pay the amount decreed by the *raad* and therefore the court could not help Boshof recover what could only be a voluntary gift.

In this manner, the *broedertwis* on the Mooi River passed from the purview of the law. Whether the under-resourced Lotter and his more prosperous neighbour ever saw eye to eye, we have no idea, but in the process of meeting them we have been brought into the distinguished company of Natal's nascent judiciary. In the courtroom that day were assembled a large proportion of the cream of local jurisprudence. Both Henry Connor and Michael Gallwey became Chief Justices in their turn and both men ended their careers with honorific knighthoods, as did Lushington Phillips and, rather surprisingly, even Walter Harding, whose background was against him. Barbara Buchanan knew Gallwey as a family friend and wrote warmly about him.³ Indeed the Buchanan who represented Boshof in the case was probably her uncle, David Dale, better known as the editor of the *Natal Witness*, although it may have been her father, because both men took on legal work whenever it presented itself.⁴

The truth of the matter was that the entire legal system of Natal was in transition and some turmoil. After the British annexation of the Voortrekker republic Natalia in 1843, the transfer of power to Whitehall was supervised by Henry Cloete, a member of the Cape Legislative Assembly. Cloete was himself a man of law, a graduate of Leyden

who had studied Roman-Dutch law at Utrecht and had been called to the bar at Lincoln's Inn before returning to practise in Cape Town.⁵

Cloete travelled to Natal, made contact with the Volksraad and began a flurry of reorganization, registering land claims, discussing the establishment of locations for the black population and persuading Mpande to give Britain control of St Lucia Bay. In addition, he recommended that judicial matters should be handled by a supreme court consisting of a single judge, while he himself later took on the role of recorder or magistrate.⁶

To make such decisions *in vacuo*, however, or even in committee was no guarantee that they would be easily implemented. There were at the time few men with sufficient legal training or experience to fill the newly created offices.⁷ Because the salaries offered were so low, no senior official in the Cape administration could be persuaded to migrate and, in fact, Cloete accepted the position of recorder only because he was in serious debt.⁸ He nevertheless set about laying the foundation of a new legal system for Natal. He insisted on the retention of Roman-Dutch law, something that soon led him into conflict with several senior officials.⁹ He also introduced both written and *viva voce* examinations before a candidate could be admitted as an advocate.¹⁰ Nevertheless, because he was operating in an essentially frontier society, many of these requirements had in the interim to be dropped or at least stretched beyond imaginable limit.

Fortuitously, there were among the new British settlers in the colony several men who had some basic legal training. A combination of judicial re-organisation and economic downturn

in Britain in the 1840s had, for young men who intended to earn a living as lawyers, made it difficult in the extreme.¹¹ Many of them chose, as a result, to emigrate. Not a few found at least part-time places in Cloete's structures. Henry Cope, solicitor and attorney at Westminster, was admitted as attorney and advocate in Natal and brought, as Alan Hattersley put it, "to the rather shabby precincts of the law in Natal, something of the sedate air of the Inns of Court".¹² Even more dramatically, the man who was Chief Justice in 1857 and presided over the Boshof-Lotter case, Walter Harding, started his Natal career as an experienced legal clerk but not a trained lawyer, and had to be admitted to act as an attorney by special amendment.¹³ Considered by those "in the know" to lack the requisite social refinements for his office, he was reported to compensate for any deficiency in his training by appearing on the bench "in flowing robes of pink and blue".¹⁴ In another place, Hattersley describes the garment as a species of pinafore.¹⁵

In time several highly competent Irish lawyers settled in Natal, to make their respective marks on the developing judiciary. But these valuable contributions lay in the uncertain future. The story of this legal contest on the Mooi, however, has led the present writer better to understand a throw-away comment offered as a learned opinion by an undergraduate law student son almost two decades ago (and now an advocate in whose chambers I discovered this priceless story) that, before 1910, Natal "had no real law to speak of".

NOTES

- 1 Frost, Robert, "Mending Wall", in *North of Boston* (1914).
- 2 The publishers of the 1987 reprint, Digma Publications, state on the introductory page

that, at the time of re-publication, the only copy extant was in the library of Adv. P.M. Hunt. The case itself is dealt with between pages 7 and 10 of this first volume.

- 3 Buchanan, Barbara L., *Natal Memories* (Pietermaritzburg, Shuter & Shooter, 1941), p. 216.
- 4 *ibid.*, p. 12.
- 5 Hattersley, Alan, *The British Settlement of Natal* (Cambridge, Cambridge University Press, 1950), p. 60.
- 6 *ibid.*, p. 295.
- 7 *ibid.*, p. 70.
- 8 *ibid.*, p. 71.
- 9 *ibid.*, p. 296.
- 10 *ibid.*, p. 295.
- 11 *ibid.*, p. 294.
- 12 *ibid.*
- 13 *ibid.*, p. 72.
- 14 *ibid.*, p. 295.
- 15 Hattersley, Alan, *Portrait of a Colony* (Cambridge, Cambridge University Press, 1940), p. 130.