

IN THE HIGH COURT OF LESOTHO

In the Application of :

ELIAS MOTSAMAI TSOTETSI

J U D G M E N T

Delivered by the Hon. Chief Justice Mr. Justice
T.S. Cotran on the 14th day of December 1984

This is an urgent ex-parte application which was launched at 4.40 p.m. on Thursday the 13th December 1984 by Elias Motsamai Tsotetsi, a citizen of the Republic of South Africa who describes himself as a "minor black" born in Soweto on the 1st June 1968 for permission to marry in Lesotho Mrs. Hazel Kearns a "white female" British subject and a divorcee aged 37 1/2 years living in Johannesburg to enable him and her, after the marriage is celebrated in Maseru, to travel to Great Britain, arrangements having already been made for them to depart on the 17th December 1984.

The applicant who is today aged about 16 1/2 years had, according to the papers he presented before the Court, been co-habiting with Mrs. Kearns as "husband and wife" in the Republic of South Africa since the "beginning of 1980" i.e. since he was under the age of 12. The laws of the Republic of South Africa do not allow them to marry on racial grounds but the laws of Lesotho do so allow them provided certain essential steps are first complied with.

There are three sections in the Marriage Act 1974 (Vol.XIX Laws of Lesotho p.33) that are relevant to the situation, viz, ss.25, 26 and 27. These provide:-

S.25

"(1) No marriage officer shall solemnize a marriage between parties of whom one or both are minors unless the consent of the party or parties which is legally required for the purpose of contracting the marriage has been granted and furnished to him in writing:

Provided that for purposes of this subsection a minor does not include a person who is under the age of twenty-one years and who has previously contracted a valid marriage which has been dissolved by death or divorce.

(2) Subject to other provisions of this Act relating to the giving of consent in respect of a marriage of a minor, the consent of the parents or guardian of that minor shall be furnished to the marriage officer in writing:

Provided that -

- (i) When the parents of a minor disagree the consent of the father shall be sufficient; and
- (ii) when a minor is illegitimate the consent of the mother or other lawful guardian only shall be required."

S.26

"(1) If a District Administrator is, after proper enquiry, satisfied that a minor who is resident in the district or area in respect of which he holds office has no parent or guardian or is for any good reason unable to obtain the consent of his parents or guardian to enter into a marriage such District Administrator may in his discretion grant written consent to such minor to marry a specified person, but such District Administrator shall not grant his consent if one or other parent of the minor whose consent is required by law or his guardian refuses to grant consent to the marriage.

(2) A District Administrator shall, before granting his consent to a marriage under subsection (1), enquire whether it is in the interests of the minor in question that the parties to the proposed marriage should enter into an antenuptial contract, and if he is satisfied that such is the case he shall not grant his consent to the proposed marriage before such contract has been entered into, and shall assist the said minor in the execution of the said contract.

(3) A contract so entered into shall be deemed to have been entered into with the assistance of the parent or guardian of the said minor.

(4) If the parent, guardian or District Administrator in question refuses to consent to a marriage of a minor, such consent may on application be granted by a judge of the High Court:

/Provided

Provided that a judge shall not grant such consent unless he is of the opinion that such refusal of consent by the parent, guardian or District Administrator is without adequate reason and contrary to the interests of such minor."

S.27

"(1) No boy under the age of eighteen years and no girl under the age of sixteen years shall be capable of contracting a valid marriage except with the written permission of the Minister, which he may grant in any particular case in which he considers such marriage desirable:

Provided that such permission shall not relieve the parties to the proposed marriage from the obligation to comply with all other requirements prescribed by law:

Provided further that such permission shall not be necessary if by reason of any such other requirement the consent of a judge in the matter is necessary and has been granted.

(2) If any person referred to in subsection (1) who was not capable of contracting a valid marriage without the written permission of the Minister in terms of this Act, or a prior law, contracted a marriage without such permission and the Minister considers such marriage to be desirable and in the interests of the parties in question, he may, provided such marriage was in every other respect solemnized in accordance with the provisions of this Act or, as the case may be, any prior law, and there was no other lawful impediment thereto, direct in writing that it shall for all purposes be a valid marriage.

(3) If the Minister directs that a marriage referred to in subsection (2) shall for all purposes be a valid marriage he shall be deemed to have granted written permission to such marriage prior to the solemnization thereof."

In his affidavit the applicant avers that Mr. Erasmus his attorney wrote to the Minister of the Interior a letter (which is appended to the papers as annexure D) seeking written permission as required by s.27(1), supra, but the Minister was "not available", and that a Judge of the High Court, under the second proviso, is empowered to grant such permission.

/The letter

The letter annexure D is addressed to the Minister of Justice, not to the Minister of the Interior. The "Minister responsible for the administration of the Act" is clearly the latter. I have no affidavit from the attorney as to whom the letter was actually addressed. I asked him orally and he did not seem to know as the matter was handled by a clerk. The letter is dated the 13th December 1984, the same day the Court was moved. If the Minister who was actually approached was indeed the Interior Minister and he was not in his office for some reason or the other, the applicant has to await his return. A Minister of the Government is not expected to be constantly on standby. A High Court Judge is not a substitute for the Minister. Even if the Minister of the Interior did give the applicant permission to marry, that per se, does not absolve the parties to the proposed marriage from complying with all other requirements prescribed by the law. These cannot be granted until there is compliance with the provisions of s.25 and, in the case of the applicant, also s.26, supra. It is only when the authorities refuse consent to the marriage that an application can be made to the Judge of the High Court who will then decide whether or not that decision should be set aside. A Judge of the High Court will not easily overrule the authority concerned by reversing its decision and may well order the minor to seek the written permission of the Minister before he entertains the application.

The second proviso of s.27(1) simply means that if a minor proceeded to get the impediment to his or her marriage removed by a Judge under s.26(4) there will be no need to approach the Minister if the minor was at the date of that decision still under the age of 18. The legislature appears to have intended to divide minors into two categories: those under the age of 18 and those between the ages of 18 and 21. Either of these two

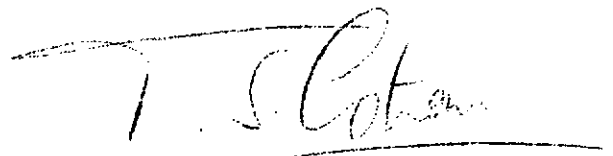
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categories may proceed in the first instance to remove the impediment by resorting to the provisions of s.25 and s.26. The chances are that if the minor is well under the age of 18 the marriage officer will tell him not to lose his time unduly and go and get the Minister's permission first before he even looks at the papers. The marriage officer may however proceed with his own enquiries first. If the matter finally comes before the Judge in terms of s.26(4) and on that date the minor is still below 18 and the Judge overrules the District Administrator, the applicant need not go to the Minister for permission. In all other cases, including this case before me, the Minister's permission is necessary. (See *Hahlo Husband and Wife* 4 Ed. p.66 and p.86-101).

The application to the High Court is at this stage completely misconceived and must accordingly be dismissed.

I direct that copy of this Judgment be sent to the District Coordinator and to the Principal Secretary Interior.

I warn the two attorneys for applicant that if they do in any way assist the applicant and his lady by procuring a marriage officer to "marry" the parties under false pretences that they will be committing a contempt of this Court and the Law Society will also be notified.



CHIEF JUSTICE

14th December 1984

For Applicant : Mr. Erasmus & Mr. Mphalane

cc. Principal Secretary Interior
District Coordinator Maseru