IN THE HIGH COURT OF LESOTHO

In re Tlalane Rasoeu

and

In the matter of Adoption Order dated 9th May, 1984 made by the Subordinate Court for the District of Mohale's Hoek.

REASONS FOR ORDER ON REVIEW

Filed by the Hon. Chief Justice, Mr. Justice T.S Cotran on 21st day of May, 1984

The file in this case has been put on my desk on the 10th May 1984 to obtain my signature authorising the removal of a child from the country of its birth in terms of s.9 of the Adoption of Children Proclamation No 62 of 1952 which requires a High Court Judge's consent if removal is sought within 12 months of the adoption The file contained, inter alia, an adoption order in favour of the applicants Joseph and Lubertha Rief signed by a magistrate in Mohale's Hoek the day before, in respect of a child, Tlalane, said to be illigitimate, aged seven months, who is said to have been deserted by its own mother The child was allegedly looked after by her "natural" grandmother Malucia Rasoeu The grandmother and her son are purported to have "consented" to the child being adopted by the applicants Mr Rief is an auditor and management consultant and gave his address as Arhemse Street Road 352,6881 NK P O Box 248 6800 AE ARNHEM, Netherlands, and Mrs. Rief is a housewife and gave her address as 2e Hervendreef 32 5232 JC's Hertogenbosch, Netherlands

The proceedings before the magistrate will be reproduced

/verbatim.

verbatim

On the 9th day of May 1984

"Mr Matlhare We are moving this Court to authorise an adoption of a child Tlalane. We have made proper arrangements with the natural guardians of the child and they are both willing that the child should be adopted. We therefore move the Court to grant our application

Court to 1st Respondent

Q Have you agreed that the child should be adopted by applicants

A Yes

Q. But she is not your child but that of your daughter

A Yes the daughter is not married so the child becomes mine or that of 2nd respondent by our custom

Q Does 2nd respondent also agree

A. Yes

Court to 2nd Respondent

Q. You know the child is yours by custom

A. Yes

Q. You agree she should be adopted

A Yes

Court ruling - The adoption of the child Tlalane is hereby authorised in terms of Sec.3 of Procl. 62 of 1952"

It is quite clear that, on the face of things, the applicants and adoptive parents Mr. and Mrs. Rief are a decent Dutch couple, both aged around 38, unable to have children of their own, who have already adopted a child some seven years ago in Tanzania, were

/desirous

desirous of adopting another child, and on being told by one or more learned members of the Lesotho diplomatic officers in Brussels that we have lenient laws and plenty of babies around here, arrived for this purpose some two or three weeks ago and proceeded to Mohale's Hoek. The applicants' papers show that they have already procurred the permission of the Ministry of Justice at the Hague vide Permit No. BPK 812/358 dated 5th April 1984, to adopt and "import" such a child into the Netherlands after what appears a thorough investigation The Lesotho authorities including the Ministry of Justice according to Mr. Rief, who came to see me in my office with Mr. Matlhare his learned attorney, "cooperated" and I was simply being asked to issue, stamp, and sign an "export" permit for the child.

The problem with this application is not that the potential adoptive parents are unsuitable but that Lesotho law is not as easy, or as clear, or as lenient, as our diplomats apparently lead people in Europe or elsewhere to believe. The Ministry of Justice in Lesotho has no role to play in the matter of adoption which is purely judicial. Some of our magistrates unfortunately hold only a rudimentary legal education and readily grant orders without making an effort to understand the law. This case is one of them I would like to refer to a Review Order dated the 27th April 1982 made by Rooney J in re Remaketse Meriam Mochochoko copy of which, for ease of reference, I attach to this order In that case the learned Judge quashed the adoption order on two grounds -

1. Non compliance with the provisions of the Proclamation, and
2. Its non applicability, if either the potential

/adoptive

> adoptive parent or parents are Africans or if the child to be adopted is an African. This was the learned Judge's interpretation of s.14

This section provides -

> "This Proclamation shall not apply to Africans, and nothing in this Proclamation contained shall be construed as preventing or affecting the adoption of an African child by an African or Africans in accordance with Basotho law and custom."

There has been no universal practice among the High Court Judges on the meaning of s.14 of the Proclamation. I am not unsympathetic with Rooney J's interpretation but the law has been in force for 32 years and many High Court Judges in the past assumed that the words used excluded adoption by prospective African parent or parents but did not exclude non Africans who wanted to adopt a Mosotho child and permission was granted, if everything else was in order, for the child to be taken away I do recollect a case before me when a Scandinavian couple sought to adopt a foundling. There was an application for the appointment of a guardian in terms of s.4 of the Proclamation, and after such appointment, a thorough enquiry was conducted by the magistrate, who granted the adoption order Later after satisfying myself about the best interests of the foundling child, I allowed the child to be removed by following previous practice. This section has worried me and other Judges of the High Court even before Rooney J's judgment and its strictures on s.14 I referred to the matter during my address on the occasion of the official High Court opening in February, 1978. When dealing with family law I posed the following questions -

> "In family law we lag behind We are free, thank /goodness,

> goodness, from racial prejudices, but the prevelance of inter-marriages has created problems that were not dreamt of when jurists and lawyers propounded the law relating to domicile four hundred years ago. Why, it may be asked, should a Mosotho woman married by civil rites in Maseru and resident with a home here, whose marriage has failed, go to New York, St Francisco or Hong Kong to obtain a divorce simply because her husband is domiciled there? Section 14 of the Adoption of Children Proclamation 1952 is not only difficult of interpretation, but excludes from its provisions 99.9% of the inhabitants of Lesotho, it is archaic and discriminatory to couples from other parts of this continent who may wish to adopt".

Unfortunately whilst there was an amendment to our marriage law, there was no amendment to our adoption law. In this case the natural mother of the child is said to have deserted the child This, however, has not been established with any degree of certainty because the mother has placed the child with her own mother to look after. The child is only seven months old The mother may have gone to seek a livelihood elsewhere and may come back to claim her child. There was no enquiry conducted by a social worker or anybody else that the mother was untraceable The proceedings before the magistrate were shamefully short and hasty. But even assuming that the mother deserted her child, her mother and uncle (cited as respondents) are not guardians and are incapable by law of giving their consent in terms of the Proclamation because s.4 (1)(b) requires that for the purpose of adoption a special guardian be appointed by the Court, that is to say, an independent person to investigate and make recommendations and give consent on behalf of the mother, not an old woman and an uncle, who seem quite willing and anxious to get rid of somebody else's child, possibly for a

/consideration

consideration without the knowledge of the mother Mr Matlhare the attorney may well have misled the magistrate into believing that a close relative can give consent A relative cannot Under powers conferred upon me by s.7 of the High Court Act 1978 I hereby set aside the adoption order from which it follows that the child may not be removed It is unnecessary for me to interpret s 14 and I propose to rerrain from doing so in the absence of counsel's argument or submissions,

Finally Mr Matlhare and one of applicants (Mr. Rief) appeared before me in my chambers on Friday 11th May 1984 in connection with the adoption and removal of the child. I told both of them that I would like to consider the matter over the weekend and I will give a decision on Monday 14th May 1984. I did not conceal from either my initial reaction, viz, that the adoption order granted by the magistrate, was invalid quite apart from Rooney J's misgivings about s.14 of the Proclamation.

No one appeared on Monday 14th May to hear my decision It may be the child has already been taken outside the jurisdiction. I direct that a copy of this Review Order (together with Mr Justice Rooney's Review Order above referred to) be sent to the Director of Public Prosecutions and Solicitor General to initiate a police investigation into what happened to this child. In case the child has been taken out of the country illegally I direct that a copy of this Review be sent to the Ministry of Foreign Affairs who should inform the Netherlands Ministry of Foreign Affairs to apprise the Ministry of Justice in that country that the adoption of the child by Mr and Mrs. Rief was obtained contrary to the law of Lesotho and the adoption order therefore is not only invalid but the couple

/have

have committed an offence under s.9 as read with s 13 of the Proclamation.

Will the Registrar also cable the Subordinate Court in Mohale's Hoek that this adoption order has been quashed and that their Registers be altered accordingly.

CHIEF JUSTICE
21st May 1984

For Applicants Mr Matlhare

cc D.P.P
Solicitor General
Ministry of Foreign Affairs
Ministry of Justice

IN THE HIGH COURT OF LESOTHO

In re Remaketse Meriam Mochochoko

and

In the matter of Adoption Order dated 27th April, 1982, made by the Subordinate Court for the District of Maseru.

REASONS FOR ORDER ON REVIEW

On the 29th April, 1982, in the exceptional exercise of the powers conferred upon this Court by Section 7 of the High Court Act 1978, I set aside an adoption order made on the 27th April, 1982 by Mr. S.L. Mapetla in which he purported to authorise the adoption by one Fahmeeda Muhammad of a child Meriam in terms of Section 3 of the Adoption of Children Proclamation 1952 The matter came to my attention in the following circumstances

The original adoption order was forwarded to the Registrar with the following endorsement thereon

"In terms of section 9 of the Adoption of Children Proclamation 62 of 1952 as amended, I hereby consent and authorise the removal of the adopted child from the country of its birth, Lesotho, by the adoptive parent.

JUDGE OF THE HIGH COURT OF LESOTHO."

Apparently it was considered that a Judge, on reading the papers placed before the magistrate, would, without further inquiry or information consent in writing to the removal of the child from Lesotho before the expiration of a period of 12 months from the date of the adoption order. Such an endorsement would free from criminal liability any person who might so remove the

/child.

child. It is not to be supposed that any Judge of this Court would sign such an endorsement unless he was first satisfied that it was proper so to do

An adoption order is not a final act. Such an order may be rescinded as provided for by Section 7 It is clear that what was intended in the present instance was to remove the child to the United States of America Such a move would, in the circumstances of this case, be irrevocable. Once the child and the adoptive parent arrived in the United States of America. they would be beyond the jurisdiction of this Court and for all practical purposes would no longer be amenable to any proceedings which might subsequently be instituted either in this Court or in the subordinate court which made the adoption order

I have ascertained that before he made the adoption order, the magistrate did not take any additional evidence on oath as is contemplated by section 3 (5) of the Proclamation. He acted entirely upon the affidavits attached to the application for the adoption.

The principal difficulty attending upon this matter arises from the provision of Section 14 of the Proclamation which reads

> "This Proclamation shall not apply to Africans, and nothing in this Proclamation contained shall be construed as preventing or affecting the adoption of an African child by an African or Africans in accordance with Basotho law and custom"

In the recent case of Winston Nkuke Nchee v Medical Superintendent, Scott Hospital, Morija (CIV/APN/305/79 unreported)

/I made

I made the following comments about Section 14

> "At first sight, it might appear that the .. . . section, enacted 30 years ago, is a relic of the discrimination once practised in this country. That would not be a corrective view. If Section 14 of the Proclamation were repealed, the application of the remaining provisions of the statute would have a profound and disturbing effect on Basotho Family Law which might be unacceptable"

The child Meriam is a Mosotho and as such is an African I have learned that a few years ago a married couple from the Netherlands, adopted a number of Basotho children under the provisions of the Proclamation. It appears to have been assumed that section 14 was designed to prevent Africans becoming adoptive parents and that it did not extend to African children who could be adopted by anyone I cannot accept that this is the case.

Under Basotho custom every child is a member of the extended family of its father, and if the child is not legitimate, of the family of its mother. Customary law does not recognise a child as the exclusive property of its natural parents. The mother of the infant Meriam, as an unmarried person, is herself a minor and subject to the control of her father or another male relative. It is clear from a perusal of Section 3(2)(d) of the Proclamation, which requires the consent of the parents or guardians of children before adoption, that the Proclamation only applies to persons not subject to Basotho law. The consent of Meriam's mother to the adoption of her child is wholly irrelevant, as it is not her exclusive right to place her child

/in adoption.

in adoption.

The Proclamation does not apply to Africans and cannot therefore apply to the child Meriam The subordinate court exceeded its jurisdiction in making the adoption order For that reason alone it would not be possible for a Judge of this Court to give his consent to the removal of Meriam from Lesotho The adoption order was invalid

Apart from the above there were other defects in the procedure followed in the subordinate court which would have vitiated the proceedings even if the child was not an African

The adoption of a child shall be effected by the order of the subordinate court of the district in which the adopted child resides (Section 3 (1)) It was not stated in the supporting affidavits that Meriam was in fact residing in the Maseru district Her sister Mavis said that she resided in Maseru and she was the bread-winner of the whole family That was not a sufficient averment to satisfy the Maseru subordinate court that it had jurisdiction in the matter.

Section 3(2) provides that the court to which application for an order of adoption is made shall not grant the application unless it is satisfied about certain facts. The first of these (set out in (a)) is that the applicant is qualified to adopt the child Section 2(1) describes the people who are so qualified The proposed adoptive parent Fahmeeda Muhammad in her affidavit, which was sworn at Jacksonville, Florida in the United States of America, gave no particulars which might establish that she was qualified to adopt the child She did not say whether she was married or unmarried, a widow or a divorced or that she was married

/person

person whose husband has been for a continuous period of not less than seven (7) years mentally disordered or defective or, that she was a married person separated from her spouse by judicial decree

The applicant is also required to satisfy the Court under 3(1)(b) that she is of good repute and a person fit and proper to be entrusted with the custody of the child and possessed of adequate means to maintain and educate the child. The applicant exhibited two unsworn certificates of good character from John W Lewis Junior a dentist of Jacksonville, Florida and Viola Roberts, the Secretary of a concern called Imperial Estates, also of Florida. I do not regard these testmonials as being sufficient of themselves to satisfy the requirements of the section. No information was given as to the means of the applicant or her occupation, apart from the fact that she was formerly a member of the United States of America Peace Corps

There is also the requirement that it must be shown that the proposed adoption will serve the interests and conduce to the welfare of the child under 3(1)(c) This was not adequately dealt with. The name of the applicant, Fahmeeda Muhammad, suggests that she is a Moslem Meriam's mother gives her address as St Patrick's Mission. There is reason to believe that Meriam may be a Christian. It is open to question whether a change of religion is contemplated and that if it is it will be in the best interests of this young girl. I would have expected the magistrate to have been particularly concerned with this aspect of the matter as it raises a difficult moral problem. Furthermore, it is not obvious that the removal of a Mosotho child at a tender age to unknown conditions of life

/in the

in the United States would be conducive to her welfare

Finally, I may say that before a Judge of the High Court would authorise the removal of a child to a foreign country on a permanent basis, he would have to be satisfied that the Government of the country concerned was prepared to admit the child

I am informed that the applicant has made a special journey from the U S A to Lesotho in order to bring back Meriam with her to her home in Florida I appreciate that the setting aside of the order of adoption will be a disappointment to her, but, it was a presumption on her part and on the part of her attorneys to imagine that she would encounter no difficulties This Court has a responsibility to all children living under its jurisdiction as it is the upper guardian of all minors It cannot permit the life of a child to be changed without due and proper enquiry This Court has to have regard to the law as it stands and the essential welfare of the child.

When the Adoption of Children Proclamation was first enacted certain important duties were conferred upon the Resident Commissioner as the representative of the then Government. These included a right to apply to the court by which the adoption order was made for its recission on the grounds specified in section 7. By the Adaption of Existing Law (No 2) Order 1964, the rights conferred upon the Resident Commissioner were removed and nothing was substituted therefor. I regret this development as it deprived the Government of Lesotho of a power to act in the interests of its own citizens and of aliens resident in this country. This Court does not have the necessary machinary to

/exercise

exercise supervision over all adoption orders made. If is desirable that the State should have the power to intervene in such matters if it believes that the provisions of the Proclamation are being in anyway abused to the detriment of the children of the nation

Signed F.X. Rooney
F.X. ROONEY
JUDGE

12th May, 1982