CIV/APN/82/98

IN THE HIGH COURT OF LESOTHO

In the matter between:

MOTSOMI MOTSOMI	**APPLICANT**
and	
TSEPA NKUATSANA	**1ST RESPONDENT**
'MAMOTSOMI MOTSOMI	**2ND RESPONDENT**
NATHAN NKUATSANA	**3RD RESPONDENT**
NKHOLISE LESHOTA	**4TH RESPONDENT**
ATTORNEY GENERAL	**5TH RESPONDENT**
REGISTRAR GENERAL	**6TH RESPONDENT**

REASONS FOR JUDGMENT

For Applicant : Mrs Majeng Mpopo

For Respondents : Mr. Nathane

Delivered by the Honourable Mr. Justice T. Monapathi on the 18th day of December 1998

On the 6th March 1998 the Applicant approached this Court by way of an urgent application. His prayers included, *inter alia*, the following:

(a) "Dispensation of the rules as to periods of service and times of appearances and granting of a *rule nisi.*

(b) An order that the Fourth Respondent should dispatch a marriage certificate No. 29/97 between the First and Second Respondents to Applicant to be exhibited before Court - vide 2(a) of notice of motion.

(c) That the marriage entered to between First and Second Respondent shown in the certificate No. 29/97 be declared null and void - vide 2(b) of notice of motion.

(d) That the First and Third Respondent be ordered to return the Second Respondent to her maiden home - vide 2(c) of the notice of motion.

The craved for *rule nisi* was granted in which the first prayer and prayer 2(a) operated with immediate effect and all parties were served with the copies of the interim Order. The other prayers especially prayer 2(b) in the notice of motion were based on the premises that the marriage could not constitute a valid civil marriage, where it lacked parental consent and, where Second Respondent had been under the age of twenty one (21) at the time of the contracting of the marriage and had therefore not attained majority when the marriage was entered into.

On the 21st August 1998 when the matter first appeared before me Mr. Nathane had filed a notice in terms of rule 10 (c). This meant that he had raised certain points of law. He said he had not been able to get hold of his client to consult fully and settle an answering affidavit. I noted the fact that there had been delay in settling of the affidavit in answer and in fact there had been no answering

affidavit at all. Mrs Majeng - Mpopo for the Applicant moved that there should be an order for the Applicant alternatively there be argument on the points raised by Mr. Nathane. I however refused to give any order for the Applicant. I set aside and ignored the points raised by Mr. Nathane because they were plainly cursory technicalities in this serious matter which involved status. I said to Counsel it would be interesting to receive submissions about certain important issues.

Firstly, whether the marriage was *void ab initio* or merely voidable. Secondly, what effect the attitude of the First Respondent would have now that she was prepared to accept the married state, which latter aspect the Court ought on reasonable grounds to investigate. Thirdly, what would be the situation as to the *locus standi* of the Applicant if the Second Respondent accepted the marriage state. Fourthly, what the situation would be if there would be no appearance by the First and Second Respondents. By appearance I meant response to by way of factual statements in opposition or some indication of attitude against the granting of the application.

I ruled that despite the absence of opposing facts there was still need to investigate the matters I had raised. In order to do so there must be an attempt firstly, to file answering affidavits if possible or alternatively for the parties to appear in Court themselves. I ended up making the following orders:

1. That the District Secretary produce a duplicate of the said marriage certificate between the First and the Second Respondent and transmit same to the Sixth Respondent in order for her to issue a certified copy of the marriage certificate.

2. That the First and Second Respondents should file answering affidavits before the 8th October 1998 and should appear in Court on the 8th October 1998. The Applicant was also ordered to appear.

I made the last order in the event that I would later require the Applicant's response. The matter was then postponed to the 8th October 1998 for hearing. I awarded the costs of the postponement to the Applicant.

On the 28th October 1998 when this Court sat again and following my ruling of the 21st August 1998 prayer in 2(c) of the notice of motion had been complied with expeditiously by courtesy of personal intervention of the Fourth and the Sixth Respondents. The required documents and copies had accordingly been put into possession of the Assistant Registrar and Attorneys for the Applicant. These were among those later exhibited in the next sitting of this Court which were the documents shown below.

"Exhibit A" was a declaration by the First Respondent that there were no existing legal impediments to his being joined in wedlock with the Second Respondent. This declaration was made on the 3rd September 1997. It must be such declaration that gave rise to the marriage ceremony. "Exhibit B" was a declaration similar to "Exhibit A" in which the Second Respondent declared that there were no impediments to marriage. That she was a spinster and she was above the age of twenty one years. That she was above the age of twenty one was stated in terms of paragraph 1 thereof. Incidentally this declaration took the form an affidavit and it is in fact what it was because it was clear that there has been some swearing on done by some officer of the District Secretary's office.

The next exhibit was Exhibit "C", being a copy of the marriage certificate in which the bridegroom (the First Respondent) declared that his age was twenty five(25) years and there was the bride (the Second Respondent) who declared as recorded; that her age was twenty two (22) years and declared herself a scholar. This was a marriage certificate that was made pursuant to my previous order to the District Secretary of Mokhotlong.

The fourth exhibit was "Exhibit D" which was a photostat copy of the first page of the Second Respondent's local passport No. N 158634 in which the date of birth of the bearer is shown as the 13th February 1976. This was a copy which was made to the District Secretary to vouch for the alleged correct date of birth of the Second Respondent. There was a strange thickness from the top of the figure "6" which was unusually vertical from the top to the base. The pen stroke was clearly much thicker than in other figures. It would obviously give rise to a doubt that the figure had been tampered with.

On the 28th October of this year the First and Second Respondents had still failed to file any answering affidavits contrary to the order I made of the 21st August 1998. However they did, together with the Applicant, appear before me. The two Respondents were ready to give a *viva voce* evidence in view of their failure to file the said affidavits. The Applicant's Counsel indicated that the Applicant would also be ready if required.

I had previously referred Counsel to the Court of Appeal case of MASUPHA v 'MOTA LAC 1985-1989, 58 in which the attitude of the bride who was alleged to have been married while under age was thought by that Court to have been significant because at the time of the hearing of that application for annulment she

had already reached majority. The absence of the bride's attitude and the fact that she was not cited in that case was held to be vital to the application. Most particularly the decisive point in the case seemed to revolve around issue of joinder. But I thought the case was more insightful in another important respect which was shown by Mr. Nathane for the Respondents, which was confirmed later as shown in the quotation from pages 219-220 of CONTEMPORARY FAMILY LAW OF LESOTHO by WCM Maqutu (as he then was).

The question of the bride's attitude to the proceedings led me to find out from her and the bridegroom whether their wish was to have the marriage maintained. This investigation I made with consent from Counsel from the two parties who were before Court. The finding out of the questioning was not made under oath and Counsel did not object to that line of action. The said bride and bridegroom said they had indicated that their wish was that the marriage state be sustained and the marriage was to persist because they still loved each other very much.

In view of the declaration by the bride and bridegroom as to their marriage the question that remained was the question whether the marriage was void or voidable in the event that the bride had been married while under age. Secondly if it was either void or voidable what in law what would be a correct conclusion having regard to the fact that the parties wished the marriage to persist despite that the bride may have by mistake or intentionally misrepresented her age to the Fourth Respondent. If the marriage was merely voidable what was the effect of the deliberate misrepresentation by the bride as to her correct age? Was there a need for *viva voce* evidence if despite the lie the marriage could not be dissolved? If the marriage was voidable could it be ratified by operation of the law as after the bride had achieved majority? If the marriage was *void ab initio* and if there was that error

as to the date of birth what then would be the status of the marriage? Counsel were invited to address the Court on the mentioned issues in future and still decide if need be on any aspect necessary to reach a conclusion whether there was still a need to lead *viva voce* evidence. All these seemed to hinge on the discretion of the Court based on the continued cohabitation of the parties (presumably as man and wife), their attitude and the question of estoppel. Counsel would address this on a date to be appointed by Court which was the 17th November 1998.

On the date of hearing Counsel had duly prepared their heads of argument. They were to argue on the restricted compass of the points that I have just raised which flowed from the question of voidness and validity of the marriage. That was in the premises that the Second Respondent could have told a lie which give rise to the marriage officer concluding that it was safe to marry the parties because there was no requirement for parental consent because the Second Respondent was above the age of twenty one. I asked Counsel if it was safe to proceed on this premise. They agreed that that would be a shortening of proceedings but if during argument there would be need to lead *viva voce* evidence on any aspect that would arise and the Court would be requested accordingly. What was important therefore was that we had the founding affidavit of the Applicant which contained a good deal of factual background which was necessary to record in the judgment before finally resolving the all important questions of law.

The Applicant was an adult Mosotho male of Pitseng Ha Motsomi in the district of Thaba Tseka. He currently resided at Linakeng ha Mphosi in the same district where he was employed as teacher at Linakeng Primary School. The First Respondent was a Mosotho male adult of Litsoetse in the district of Mokhotlong, he was a member of a Lesotho Mounted Police who was stationed at Mokhotlong. The

Second Respondent was the Applicant's daughter whose whereabouts were presently unknown as the Applicant stated. The Third Respondent was a male Mosotho adult of Litsoetse who resided in the same place in Mokhotlong district. He was the father of the First Respondent. The Fourth Respondent was a Mosotho male adult and a District Secretary for the district of Mokhotlong. He was sued in his capacity as the marriage officer in that district. The Fifth Respondent was the Attorney General who was being sued in his capacity as the representative of Lesotho Government in all civil proceedings.

The Applicant stated that he had a daughter of twenty years of age and he mentioned her name as the Second Respondent in this matter. He said the girl was born on the 13th February 1977. This was the date reflected in the birth certificate which was attached to the proceedings and was marked "Annexure A". Prior to the events of the 25th August 1997 the Second Respondent was a student at St. James High School in Mokhotlong district. On the 25th August 1997 while the Applicant was at his work at the school he received a message from one Mampho Makeka, a clinician at Linakeng Health Centre. The lady told him that she had been instructed to give the Applicant a message that the Second Respondent had been abducted by the First Respondent. She further told the Applicant that for further information the Applicant must contact the Third Respondent who resides at Litsoetse in the district of Mokhotlong.

On the following day the Applicant went to the place of the Third Respondent where he found the Second Respondent present. The Third Respondent told him that the Second Respondent had been abducted by his son, the First Respondent. He was therefore ready to make marriage settlement with the Applicant. The Applicant said he pleaded with him that he must give back the girl to him as he did not appreciate

the marriage on two grounds. The first was that his daughter was still young and a student. Secondly, that the girl was already engaged to one Phethahatso Leotla of Mokhotlong. The Third Respondent did not object to this request and he allowed the Applicant to take the girl back to the Applicant's home.

When he arrived at home the Second Respondent told the Applicant that she was forced to alight to the vehicle by the First Respondent while at the premises of St. James High School. This presumably is the school at which she had attended. The First Respondent led her to which place somewhere in Mokhotlong township where he raped her. Having heard that the girl was raped the Applicant said he ordered her mother to take her to Paray Hospital for consultation and the Thaba Tseka police as well. His wife told him that this was done. Consequently while the two were from their journey they were attacked by three men the men pointed a gun at the Applicant's wife. They aimed but missed. When the Applicant's wife collapsed they took the girl away and Applicant's wife informed Applicant that he identified one assailant as the First Respondent.

After the incident Applicant once more reported this to Thaba Tseka police. Despite endeavours the girl could not be found. After sometime the Thaba Tseka police referred Applicant's wife to Mabote police in Maseru. The police informed that they had heard a rumour that the girl was at the place of one Thabo Nkuatsana in Maseru. Without any delay Applicant's wife rushed to Maseru to that Thabo Nkuatsana's place. Still the girl could not be found. She approached the Commissioner of Police he informed Applicant's wife that the girl was in Mokhotlong at the First Respondent's place and he went further to say that he had ordered police in that district to send both the First and Second Respondent to Maseru for discussion on the issue pertaining to their marriage. Before this the

officer had told the Applicant that the two Respondents had already been married by civil rites to each other on the 3rd September 1997 and that had been done before the District Secretary of Mokhotlong.

The Applicant was informed by his wife of the attendance of the First and the Second Respondent before the Commissioner of Police. The Commissioner had asked the two how they got married. The Second Respondent indicated that the First Respondent ordered her to erase her date of birth as reflected in the passport because it was discovered that she was under age. This he asked to be done because the marriage officer would not go ahead with the marriage without an indication of parents' prior consent. She therefore erased 1977 for 1976. The Commissioner of Police condemned the two for that wrongful act and he requested Second Respondent to return to her home with her mother.

On the 16th September 1997 the Second Respondent disappeared from her maiden home. The Applicant again heard from the First Respondent that the girl had come to his home on her own. Applicant went to the First Respondent's father's place. He found the girl (his daughter) present. The Applicant said he once more requested the Third Respondent to give him back his child. He was told that the girl would be sent back on the 24th September 1997. It was common cause that the girl never went back. The girl and the First Respondent has since been staying together as man and wife.

It was after all these events that the Applicant then approached his attorneys of record for advice. He said he was advised and verily believed same to be true and correct that the marriage entered into between the First and Second Respondent was null and void for want of parental consent. This was so because by the time the

marriage was entered into the girl had not attained majority. The girl was under twenty one years then and this was evidenced by "Annexure A" which is a birth certificate dated the 4th May 1977 which clearly shows that the Second Respondent was born on the 13th February 1977. It therefore meant that on the date of the marriage that is the 3rd September 1997 the Second Respondent was short by five months before becoming twenty one years of age. The Applicant finally stated that he could not live comfortably with his wife when he continued to entertain the belief that his child was being abused by being in unlawful cohabitation with the First Respondent.

The learned author of CONTEMPORARY FAMILY LAW IN LESOTHO (supra) made a distinction between nullity of marriages (at paragraph 15.12) and voidable marriages and made what I have regarded as a salutary guide to the problem at hand. The factors that I have considered to be vital were the question of capacity of the Applicant to make this application of a stage when the bride and bridegroom have both reached majority. And that the parties at the time they got married they were of a marrying age that is above sixteen (16) for the girl and above eighteen (18) years for the boy. The learned authors said at page 218 sub paragraph (iv).

> " The annulment of a void marriage is a discretional matter for the Court. In PRETORIUS v PRETORIUS 1948(4) SA 144 Van den Hever held that where a marriage was a nullity for lack of parental consent, if the parties continued to live together after they had become majors the estoppel might be invoked in respect of that invalid marriage In MASUPHA v MOTA C of A No. 14 of 1988 (unreported) the father attempted to have his daughter's marriage entered into at the time she was a minor annulled when she was a major. The Court found that he

could not do this. In the case of MORRISON v MORRISON 1972(3) SA it was held that the Court can condone the guilt of a guilty party to a null and void marriage. Furthermore Vos AJ felt the paragraph of estoppel which was developed in PRETORIUS v PRETORIUS should not apply to such marrages."

The case of PRETORIUS v PRETORIUS (above) was a case where a wife instituted an action for a declaration of nullity of a marriage where she had been a minor at the time when the marriage ceremony had been performed. It had been without her guardian's consent. The parties had continued to live together as man and wife after reaching majority. That clearly was the basis for the learned judge's holding that the wife was estopped from later filing for the declaration. It was considered that children had even been born out of the marriage. Although the report is in the Afrikaans language it appears that the marriage had been regarded as *void ab initio*. This explains why the learned author of CONTEMPORARY FAMILY LAW characterized the case as having dealt with a void as against a voidable marriage. It would have not mattered to this Court whether the marriage was held to be voidable or void *ab initio* as long as the parties had attained majority and continued to live as man and wife under the colour of the marriage. If not the results can be devastating. I felt that it could not even be consistent with public policy of the Marriage Act 1974 if there was that kind of a wholesale declarations.

The Court was once again held to have had a discretion is the case of MORRISON v MORRISON where the action concerned a declaration that a bigamous marriage was void. As in the case of PRETORIUS it was one of the parties who had brought an action. The present case is in the almost similar mould with that of MASUPHA v MOTA (supra) in that it was the father of the bride who

contested the validity of the marriage where he had not given consent to his daughter who was at the time of the marriage a minor. This means that the Applicant lodged the application when the Second Respondent had already attained majority.

I have once again received guidance from the learned author of CONTEMPORARY FAMILY LAW OF LESOTHO at page 219 220 para 15.13 voidable marriages - in that "A voidable marriage is for all purpose valid until it is declared annulled by a decree of a Court." And the author continued to say that -

> Grounds of which the marriage can be voidable according to HAHLO in his HUSBAND AND WIFE are:
>
> (I) minority.
>
> When a marriage to a minor was contracted without parental consent either parent of the minor can have it set aside.
>
> (ii) Duress .....
> .....
>
> (iii) Mistakes as to the qualities of the other party .....
> .....
>
> As already stated in cases such as minority there is always the question ratification is possible where a minor reaches majority. It is possible for the parent of a minor to be estopped from challenging the marriage if he waited until the minor was a major. See the case of D

MASUPHA v P MOTA C of A (CIV) No.14 of 1988." (My emphasis)

Ordinarily it is a requirement of the law that parental consent is a pre-requisite for the marriage of a girl below the age of twenty one (21) as stipulated in section 25(1) of the Marriage Act No. 10 of 1974. This despite the use of the word "shall" cannot make it void *ab initio*. That any marriage officer shall not solemnize any marriage when one of both of the marrying partners is a minor who had not had the consent of a parent or parents presupposes that such marriage officer shall have had knowledge of the state of affairs (the age). That the terms are mandatory in the section does not necessarily fate the marriage as void *ab initio*. It means there was a breach of something akin to an administrative directive. I would rest with the characterization of a marriage such as the instant one as being merely voidable, by the authors of FAMILY LAW OF LESOTHO citing the learned Hahlo in his SOUTH AFRICAN LAW OF HUSBAND AND WIFE at pages 486-7 of the latter.

When speaking about the problem of nullity where one of the parties had entered into a bigamous marriage, the learned author of CONTEMPORARY FAMILY LAW OF LESOTHO has this important comment at page 221 and he says:

> "The problem of nullity (as Hahlo in his HUSBAND WIFE has correctly stated) may crop up in various shades and contexts. Therefore whether a person can always be estopped from asserting the nullity of a marriage is a question which cannot be regarded as settled in our law. Quite apparent from the different contacts in which this problem of nullity might arise, we have to bear in mind the cultural changes and views or morality that typify our society." (My underlining)

This important remark which seems clearly to underscore the question of public policy is one that cannot be ignored as being one of the bases of the Court's discretion.

The learned author Hahlo in his work SOUTH AFRICAN LAW OF HUSBAND AND WIFE (5th Edition) when commenting about the consequences of lack of consent of the parents or guardian to minor intending to marry and then referring to the South African Marriage Act had this to say at page 93:

> "A marriage between persons of whom one or both are minors which has been contracted without the requisite consent of the parents or guardians of the minors ..... where consent is required, is not void but voidable it may be dissolved by Order of Court or application for dissolution of the marriage by:
>
> (1) a parent or guardian of the minor, made before the minor attains majority and within six weeks of the date on which the parent or guardian became aware of the existence of the marriage or
>
> (2) The minor himself, before he attains majority or within three months." (My underlining)

The capacity of the bride or bridegroom to seek to annul a marriage is of course not limitless. So is the capacity of the dissatisfied guardian or parent to apply for annulment of a marriage.

The statement of Hahlo quoted above at (1) gives a clue to what the Court of

Appeal had in mind when it stated in MASUPHA v MOTA case (supra) at page 59 where Wentzel JA said:

> "I feel it appropriate to add that if the application had taken its full course it would have raised very difficult matters such as *locus standi* of a father in such proceedings after his daughter attains majority, the status of such a marriage whether it is void or voidable and the consequences of any child born of such a marriage, if it should be set aside or declared void."

It should be clear that not only did I find that the Applicant did not have the competence to seek the declaration after his daughter had attained majority, the parties' marriage had been ratified by the fact of the bride having reached majority by this time when the application was made. See also Hahlo's work at page 92.

I dismissed the application. I decided that there would be no order as to costs.

T. Monapathi
Judge

Judgment noted by : Mr. Mpopo