IN THE HIGH COURT OF LESOTHO

In the matter of:

TANKISO HLAOLI Applicant

and

KARABO TOMOTHY HLAOLI **Respondent**

CIV/ADOPTION/1/98 **CC. 5/97**
In Maseru District

JUDGMENT

This is an application for adoption of a child. It was moved before the learned Chief Magistrate in the Subordinate Court for the district of Maseru.

The applicant is the grandfather and guardian of his daughter's son Karabo Timothy Hlaoli whom she begot before her marriage to one Victor Letsie. The name of his daughter is Mpho. He is now desirous of formally adopting his grandson Karabo to ensure his rights within his family.

The Applicant avers that he has three other children, namely Mpho, Phahla and 'Matoka, all of whom are over the age of twenty -one years. He states that he

has the means to look after Karabo if adopted inasmuch as he is running a private law firm known as T. Hlaoli & Co.

The learned Chief Magistrate "dismissed the application for want of jurisdiction." It seems to me that he was wrong to dismiss the application on the ground that he has no jurisdiction to give interpretation to the provisions of the Constitution.

Section 22 (3) and (4) of The Constitution read as follows:

"(3) If in any proceedings in any subordinate court any question arises as to the contravention of any of the provisions of sections 4 to 21 (inclusive) of this Constitution, the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous or vexatious.

(4) Where any question is referred to the High Court in pursuance of subsection (3), the High Court shall give

> its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision or, if that decision is the subject of an appeal under section 129 of this Constitution to the Court of Appeal, in accordance with the decision of the Court of Appeal."

In his letter referring this matter to the High Court in terms of section 22 (3) the learned Chief Magistrate has expressed his reservations about the validity of section 14 of Adoption of Children Proclamation 62 of 1952. Section 14 reads as follows:

> "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."

The main complaint about section 14 is that it is a discriminatory legislation. Its discrimination is based on race, colour or national or social origin,

depending on how you define African. A lot of debate has been going on for a very long time about the discriminatory nature of section 14. One of the commentators on section 14 of the Proclamation is the Honourable Mr. Justice Maqutu in his book entitled Contemporary Family Law of Lesotho (1992 edition). He deals with this subject in Chapter XXV of his book. I wish to quote at length from pages 350-351 where the learned Honourable Judge criticizes two decisions of this Court . He says:

> "Cullinan, C.J. in **Ditlev Krause and another v. The Resident Magistrate Maseru and another** refused an adoption application of an African child basing himself on Section 14 (4) (b) of the suspended 1966 Constitution. As already stated he must be wrong.
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> Denying any baby a family merely because it is abandoned and has accidentally picked up a language and a name is to violate the provisions of Section 11 of the Human Rights Act of 1983 for the following reasons:

(a) It is subjecting the child to inhuman and other treatment because the child is denied the right to a legitimate name, to a family and admission to society as this is done through a family unit. Such a child may not even have lawfully be given a first name. Certainly an abandoned child will not be able to have a surname because he has no parents, no family, no clan, no tribe and probably no nationality except that which is conferred upon it by being in a particular country. An abandoned baby has no known country of birth because he might have been carried from the state where he was born and abandoned in the state where he is found.

(b) Feeding the child, not assaulting it might perhaps not do for an animal, it is submitted that even as an animal that is kept away from other animals and kept in

a solitary state is ill-treated. To condemn a baby to a centre for abandoned children for life is definitely not a proper and judicial exercise of the courts powers as guardian of all minors.

(c) A human being cannot have an integrity as a person in terms of Section 2(a) and (b) of the Human Rights Act unless he has a family to give him a name, a language, an identity and personal security during minority.

(d) A right to education and cultural life is not possible for a human being in terms of Section 2(p) of the Human Rights Act of 1983 unless the baby has a family that will teach it what is expected of a human being as an individual in Society.

(e) Cullinan CJ clearly stated that he had ignored the best interest of the minor child in the hope that he might induce the state to legislate and remove Section 14 of the Adoption Proclamation of 1952 which states it shall not apply to Africans. It is submitted the learned Chief Justice ignored his upper guardianship duties to the baby who as an individual minor is a ward of the High Court which is the upper guardian of all minors. Rooney J in **Nchee v. Medical Superintendent Scott Hospital** - CIV/AND/305/81 adoption case after holding Africans cannot adopt under the Adoption Proclamation of 1952 nevertheless still found the baby a home by giving it to the applicant. Before doing this, he caused an advertisement inviting the possible heirs of the adoptive parents to object to the proposed adoption. When

the potential heirs failed to object the court granted the adoption order. Despite this existing precedent before Cullinan CJ, the adoption application was dismissed and the abandoned baby was left homeless. Although Rooney J in Nchee's case was wrong in his finding, he discharged his duty to the child as upper guardian of all minors. Rooney J. ought to have investigated the mode of life of the adoptive parents to determine whether their mode of life was tribal. If it was not tribal, they could adopt the child. As for the child, it was just a human being (in a biological sense) because it was neither European or African. Whatever African culture that the three year old child had absorbed, had been absorbed accidentally. The degree of the child's acculturation was never investigated or determined."

I share the same views with my learned Brother. However my task is to interpret section 14 of the Proclamation in the light of the current Constitution of Lesotho. In section 2 it provides that -

> "The Constitution is the supreme law of Lesotho and if any other law is inconsistent with this Constitution, that other law shall, to the extent of the inconsistency, be void."

Section 18 of The Constitution of Lesotho deals with freedom from discrimination and reads as follows:

> "(1) Subject to the provisions of subsection (4) and (5) no law shall make any provision that is discriminatory either of itself or in its effect.
>
> (2) Subject to the provisions of subsection (6), no person shall be treated in a discriminatory manner by any person by virtue of any written law or in the performance of the functions of any public office or any

public authority.

(3) In this section, the expression "discriminatory" means affording different treatment to different persons attributable wholly or mainly to their respective descriptions by race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

(4) Subsection (1) shall not apply to any law to the extent that that law makes provision -

(a) with respect to persons who are not citizens of Lesotho; or

(b) for the application, in the case of persons of any such description as is mentioned in subsection (3) (or of persons connected with such persons), of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description; or

(c) for he application of the customary law of Lesotho with respect to any matter in the case of persons who, under that law, are subject to that law; or

(d) for the appropriation of public revenues or other public funds; or

(e) whereby persons of any such description as is mentioned in subsection (3) may be made to any disability or restriction or may

> be accorded any privilege or advantage which, having regard to its nature and to special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.
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> Nothing in this subsection shall prevent the making of laws in pursuance of the principle of State Policy of promoting a society based on equality and justice for all the citizens of Lesotho and thereby removing any discriminatory law."

Section 14 of Adoption of Children Proclamation 16 of 1952 reads as follows:

> 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 Basuto law and custom.

It is important to find in the Statute Books of Lesotho the definition of African. In that way we can know what we are talking about when we say an African child. When an African person wants to adopt a child under the provisions of the Proclamation that cannot be done. When a Non-African person such as a European, an Asian or an Indian wants to adopt an African child that cannot be done. In the General Interpretation Proclamation 12 of 1942 section 2 (17) "native" or "African" means and includes any aboriginal African belonging to any tribe of Africa, and all persons of mixed race living as members of any African community, tribe, kraal, village or location in the Territory."

In The Shorter Oxford English Dictionary "African" is defined as belonging to, or characteristic of, a native or inhabitant of, Africa.

Following the above definitions I have come to the conclusion that African person or child means a black person born of a Mosotho, Zulu or any of the black races of Africa. A Mosotho child or person is an African. There is no doubt in my mind that the word "African" used in section 14 of the Proclamation is a racial description. It is also based on colour - the black people of Africa. It is therefore

clear that section 14 of the Proclamation is discriminatory of itself and in its effect. It makes it impossible for any Mosotho person or a Basotho couple to adopt any child under the Proclamation. There are many abandoned children (babies) whose mothers do not want them. They abandon such babies immediately they are born and then vanish in thin air. Such mothers are very often never found and such children end up in an institution/orphanage in which they remain for many years.

The lucky ones get foster parents and eventually take the surname of their foster parents. The real question of law before me is whether the Adoption of Children Proclamation (section 14) is not inconsistent with section 18 of The Constitution of Lesotho. The cases of **Ditlev Krause and Another v. The Resident Magistrate Maseru and Another** and **Nchee v. Medical Superintendent of Scott Hospital CIV/AND/305/81,** are not very helpful to me because they were decided many years ago before The Constitution of Lesotho came into operation.

Subsection (1) of section 18 of The Constitution of Lesotho makes it quite clear that no law shall be discriminatory. However, exceptions are made in subsections (4), (5) and (6). In the instant case we are concerned with subsection (4) (b) of section 18 which I wish to reproduce again for the sake of emphasis. It

reads:

> "Subsection (1) shall not apply to any law to the extent that that law makes provision -
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> (b) for the application.....of the law with respect to adoption, marriage, divorce, burial, devolution of property on death or other like matters which is the personal law of persons of that description."

In a simple language what subsection (4) (b) of section 18 means is that in matters of adoption and others mentioned therein it shall not be regarded as discriminatory when Basotho people apply their personal law which is the customary law. It seems to me that this subsection attempts to protect the application of customary law which is the personal law of most Basotho people. If about ninety per cent of Basotho are still practising customary law in matters of adoption then it would not make sense to say that the Adoption of Children Proclamation should apply to all adoptions. Basotho people are still free to adopt children under the Sesotho customary law.

There is no provision under the Constitution of Lesotho which prohibits Basotho people from exercising their rights of adoption under the Adoption of Children Proclamation. It is only section 14 of that Proclamation which provides that it shall not apply to Africans and Basotho happen to be Africans. There was absolutely no need to put such words in the Proclamation. As I have already stated above the words "it shall not apply to Africans" are discriminatory. They ought not to have been put in that Proclamation. The last few words of section 14 provide that "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." These words serve the purpose of protecting the customary law of Basotho, but they do not discriminate Basotho from enjoying the provisions of adoption under the Proclamation.

It is clear to me that the Legislature which enacted The Adoption of Children Proclamation 62 of 1952 were not aware of the limitations of adoption under the Sesotho customary law. Under that law a child from outside a particular family cannot be adopted into that particular family; adoption under Sesotho customary law is always in the nature of the transfer of a child from one branch of a family to another branch of the same family. In other words, a Mosotho man cannot adopt a strange child into his family. If he has no heir he must look for a

child within his own family, that is to say, his brothers' children, his uncles' children, his grandfather's children and so on within his own family.

He cannot adopt an abandoned children whose parents are unknown because that would amount to bringing a stranger into his family. A stranger cannot be made an heir in the family when there are already other members of the family who can claim that status even if the man has no male children.

Section 14 of the Proclamation makes it a useless piece of legislation and it is not clear what it was intended to achieve. Under it even a European or Asians cannot adopt a Mosotho (African) child. We hardly ever have European and Asian children who have been abandoned who need to be adopted. The Proclamation prohibits an African man who is able and has means to adopt and decently care for an abandoned child who is in need of care and needs a proper home and a family name, from exercising his right under the Proclamation. That is the worst form of discrimination based on race and colour.

The Constitution of Lesotho does not allow for such kind of discrimination. What it does is to protect the application of customary law as the personal law of Basotho. Those of Basotho who are still living under the tenets of customary law

should be respect ed by giving then unqualified recognition of that system of law. This is what The Constitution does in section 18 (4) (b). What subsection (4)(b) means is that in application of the law of adoption etc. or other like matters which is the personal law of persons of that description subsection (1) shall not apply. That is to say that when the personal laws of Basotho is applied that shall not be regarded as discriminatory. It does not entitle the Legislature to pass a law in which it is provided that that particular law shall not apply to Africans. Section 14 of the Proclamation does not make provision for the application of the personal law of Basotho with respect to adoption etc. What it does is to discriminate Basotho by saying that the Proclamation shall not apply to them because they are Africans. It was never the intention of the Legislature of the Lesotho Constitution that a law as discriminatory as section 14 of the Proclamation should be applied under the obviously wrong interpretation of section 18 (4) (b) of the Constitution of Lesotho.

The absurd results which occur when the Proclamation is applied, especially section 14, clearly shows that it could not have been the intention of the Legislature that such an absurdity should occur. The Adoption of Children Proclamation was intended for application in Lesotho. It is absurd to note that in actual fact it could not be applied to any Mosotho because he or she is an African.

The Colonial Officials of the British Government who were stationed in Lesotho could also not apply it if they intended to adopt an African child. Surely this absurdity could not have been intended by the Legislature. A statute which is intended 'to provide for the adoption of children in Basutoland (Lesotho), and to provide for matters incidental thereto', could not suddenly provide that it shall not apply to Africans. (See the preamble of the Adoption of Children Proclamation 1952).

In **S. v. Mpofu** (2) S.A. 255(RB), Gubbay J. (as he then was) noted that section 50(2) of the 1969 Rhodesian Constitution provided the 'a law of the Legislature may provide that a revised edition of the laws in force ..... shall be compiled and published and that, upon publication, the laws therein printed shall in all courts of justice and for all purposes whatever be the sole and authentic version of such laws and be conclusive proof thereof.' He observed (at 257) that 'the language of this provision is clear and unambiguous, and **prima facie** disables a court from curing a **lapsus calami** in the drafting or printing of a statute.

Nonetheless it must be construed according to the dictates of common sense and a glaring absurdity avoided, even if to do so necessitates the interpolation of words ..... I am satisfied that in enacting section 50 (2) it must have been in the

contemplation of the lawmaker that the courts of the land would not be bound by a mere draftsman's or printer's error, which, depending on the nature of the statute and the context in which it appears, could compel a court to mete out manifest injustice either to the individual or the state.'

However, 'Courts are extremely loath to read into an Act words which are not there. They will only do so when not to do so will lead to an absurdity so glaring that it could never have been contemplated by the legislature' - Beadly, CJ. In **Van Heerden v. Queen's Hotel (Pty) Ltd** 1973 (2) (S.A. 14 (RAD) at 26.

I am convinced that the glaring absurdity in section 14 of the Proclamation could not have been contemplated by the Legislature. How can the Legislature enact a statute for an African country but state that such a statute shall not apply to Africans. Such a statute does not only cause a glaring absurdity but it is also inconsistent with the provisions of the Lesotho Constitution which is the supreme law of the land.

In **Ditlev Krause and another v. Resident Magistrate of Maseru and another** - CIV/APN/2/91, Cullinan, C.J. held that an abandoned three year old girl could not be adopted by foster parents because she was an African girl. With due

respect to my learned Brother I do not know how he arrived at that decision because I have not been able to trace his judgment and read it. I have no doubt that he was of the view that section 14 of the Proclamations discriminatory. I say this because in his book, Mr. Justice Maqutu says that (at 351) Cullinan, C.J. clearly stated that he had ignored the best interests of the minor child in the hope that he might induce the state to legislate and remove section 14 of the Adoption of Children Proclamation of 1952 which states it shall not apply to Africans.

I have interpreted section 18 (4) (b) of The Constitution of Lesotho and have come to the conclusion that it does not allow the legislature to pass discriminatory laws. It merely safeguards the application of certain personal laws of Basotho. It does not use the word "Africans".

I have come to the conclusion that section 14 to the Adoption of Children Proclamation No.62 of 1952 is unconstitutional and I declare it as void.

In terms of sections 22 (3) and (4) and 128 (1) (2) of the Constitution this file must be returned to the learned Chief Magistrate who shall deal with this case in terms of this decision.

The Registrar is instructed to give this judgment the widest publication possible by providing all lawyers with it in the usual manner. The Honourable Attorney-General must be given a copy of this judgment.

J.L. KHEOLA
CHIEF JUSTICE

17th June, 1998