17280/02-CT 1 JUDGMENT

Sneller Verbatim/CT

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA CASE NO: 17280/02

2002-10-18

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED NO

DATE: 6/12/02 SIGNATURE

In the matter between

M A FOURIE 1st Applicant

C J BONTHUYS 2nd Applicant

and

MINISTER VAN BINNELANDSE SAKE 1st Respondent

DIREKTEUR-GENERAAL VAN

BINNELANDSE SAKE 2nd Respondent

THE LESBIAN AND GAY EQUALITY

PROJECT (Amicus Curiae)

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J U D G M E N T

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ROUX J: The Applicants, females, have been living together since June 1994. Their's appears to be a sincere and abiding relationship. Indeed they claim to be married. The relief they seek is first a declaratory order and secondly a *mandamus* against the first and

second Respondents. I quote the relevant prayers in the notice of motion.

"2. Dat 'n verklarende bevel verleen word dat die huwelik tussen eerste en tweede Applikante erken word as 'n regsgeldige huwelik in terme van die bepalings van die Huwelikswet 25 van 1961 op voorwaarde dat sodanige huwelik voldoen aan die formaliteite soos uiteengesit in die Huwelikswet 25 van 1961.

3. Dat die eerste en tweede Verweerders gelas word om die huwelik van eerste en tweede respondente te registreer in terme van die bepalings van die Huwelikswet 25 van 1061 en die Wet op Identifikasie 1968 van 97."

I must emphasize that no attempt was made to amend these prayers. This despite airing my view on how appropriate this relief could be in the light of the facts and the Statute to which I will refer later.

Purporting to the act in terms of Uniform Rule 16A a voluntary society, "The Lesbian and Gay Equality Project", intervenes as *amicus curiae* and addressed me at length. The relevant provisions of the rule are:

"16A(1)(a) Any person raising a constitutional issue in an application or action, shall give notice thereof to the Registrar at the time of filing the relevant affidavit or pleading. Such notice shall contain a clear and succinct description of the constitutional issue concerned."

I do not quote the balance of the rule but record that it was hardly

complied with by the Applicants.

Being within my power I am prepared to overlook the shortcomings. What I did attempt to wring out of the parties was "a clear and succinct description of the constitutional issue" concerned. What they produced was the following, which was dated about a month after the filing of the founding papers, namely:

> ".. of die gemenereg sodanig ontwikkel is dat dit gewysig kan word deur huwelike van persone van dieselfde geslag te erken as regsgeldige huwelike in terme van die Huwelikswet 25 van 1961 op voorwaarde dat sodanige huwelik voldoen aan die formaliteitsvereistes soos uiteengesit in die Huwelikswet 25 van 1961."

Making what must be considered as a generous assumption that this is a constitutional issue I permitted the *amicus curiae* to address me. This he did and so doing exceeded the bounds as discussed and described in In *Re* certain *amicus curiae* applications, *Minister of Health and Others v The Transport Action Campaign and Others* 2002 (5) SA 713 (CC). He even attempted to amend the Applicants' notice of motion.

I can now turn to prayer 2 of the notice of motion quoted above. The Applicants seek a declaratory order. Such an order is catered for by section 19(1)(a)(iii) of the Supreme Court Act, 59 of 1959. This Court has the power ..:

"(iii) In its discretion and at the instance of any interested person, to enquire into and determine any existing, future or contingent right or obligation, not withstanding that such person cannot

claim any relief consequential upon the determination."

The "right" in question must be the Applicants' assumption that they are married. Again I refer to prayer 2 of the notice of motion. In Roman Law marriage is the full legal union of man and woman for the purpose of lifelong mutual companionship. I refer for example to Sohm: Institutes and Roman Law 3rd Edition at page 452. Nothing I am aware of has changed since. Indeed the Marriage Act 25 of 1961 mirrors the age old concept of what a marriage is. I refer to the peremptory provisions of section 30(1) of the Act:

> "1. In solemnising any marriage any marriage officer designated under section 3 may follow the marriage formula usually observed by religious denomination or organisation if such marriage formula has been approved by the Minister, but if such marriage formula has not been approved by the Minister or, in the case of any other marriage officer, the marriage officer concerned shall put the following questions to each of the parties separately, each of whom shall reply thereto in the affirmative: "Do you, A.B., declare that as far as you know there is no lawful impediment to your proposed marriage with C.D. here present, and that you call all here present to witness that you take C.D. as your lawful wife (or husband)?"

This section which, as I have already pointed out, is peremptory. It contemplates a marriage between a male and a female and no other.

Section 11(1) of the same act provides as follows:

"11(1) A marriage may be solemnised by a marriage officer only."

It must follow that the Applicants are not married as required by the law. I am not prepared to exercise the discretion vested in me by section 19 of Act 59 of 1959 to enquire into a non-existing right. Prayer 3 of the notice of motion requires me to compel the Respondents to do what is unlawful. Obviously I will not make such an order.

There is no attack on the provisions of Act 25 of 1961 on the basis that they offend the Constitution. No more need therefore be said. This application is obviously still born.

The issue of cost now arises. Clearly the Applicants are liable for costs. The *amicus curiae*, as pointed out by counsel for the Respondents, entered the lists with great gusto and emotion. It made common cause with the Applicants. Its conduct went well beyond what is mentioned as proper in the constitutional judgment I have referred to above. I believe it is proper that it be ordered to pay costs.

In the result:

1. The application is dismissed.
2. The Applicants and the Lesbian and Gay Equality Project are ordered to pay the Respondent's cost jointly and severally. Such costs to include those consequent upon the employment of two counsel.

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