The Native Marriage Act

Act No. 38 of 1927 – Marriage
& Succession

Cases – Native Law – Appellate
Division
Natal Decision

2.5.2.3

THE NATIVE MARRIAGES ACT.

Two Indigenous Natives, Kwanisai and Matese desired to marry by Christian rites. On November 27,1940, they obtained an Enabling Certificate from the Native Commissioner at Umtali. On April 26,1941, the marriage between them was solemnised at St.James' Church, Zongoro, in St. Augustine's Mission District, the minister being the Rev.S.Hatendi. He signed a notification of Marriage, which was sent to the Native Commissioner's Office. The Assistant Native Commissioner thereupon informed the Priest-in-charge of St.Augustine's Mission, that as the enabling certificate was out of date and had not been renewed the marriage was invalid.

A legal opinion was then sought from Mr.B.D.Goldberg,LL.B.of Umtali says:-

"Although it is not expressly stated, I consider it to be the duty of any Minister of religion who performs the ceremony to ask for the production of the enabling certificate, otherwise a grave injury may be done to the parties. In this case the parties were married by the Rev.S.Hatendi, and the marriage was void ab initio because the enabling certificate was of no force and effect as three months had expired."

The Rev.S.Hatendi informed the priest-in-charge in writing:---

"I told Kwanisai to go to the N.C. and have his enabling certificate renewed. Kwanisai went to see the N.C. with my note saying "Please will you renew this enabling certificate" and Kwanisai interviewed the N.C. about the renewing of the certificate, and he was told that you can be married without your enabling certificate renewed. So Kwanisai came and told me what the N.C. had said, and I married him".

It seems clear to me that Kwanisai must have been lying.

The legal opinion continues:--

"It follows that the parties who contracted the marriage now find themselves in a very difficult position, particularly as they no doubt have been living together as man and wife. There is no doubt that the parties to the marriage have committed a wrongful act in getting married, because it is presumed that the Native Commissioner informed them that the certificate was valid for only three months.

" They can however rectify their error by again proceeding with their witnesses to the Native Commissioner, and getting their enabling certificate renewed for a further period, during which they can again get married. Having done so they will suffer no prejudice whatever, nor will their children if any.

" It seems to me howver that the Minister has been more negligent than the contracting parties, because he should have asked for the certificate..............

" The Marriage Act should be amended and duties and responsibility placed upon the Minister of Religion. If this is not done there will be constant repetitions of this case. Where the contracting parties are natives, further safeguards are essential..

" The Mission should direct its efforts to having the present legislation amended."

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As far as I remember this is the second case which has come to my notice since the coming into force of the Native Marriages Act. On April 1st,1931 Iwrote to the C.N.C. on the subject of the marriage of Isaac Duri in somewhat similar circumstances, to see if I could get him to take any action in the matter. He replied on May 6th, stating that the marriage was not merely <u>irregular</u>, as I held, but also <u>invalid</u>. His successor Mr.C.Bullock, however, said to me in a conversation in 1932 (I am not sure whether he had then been appointed C.N.C.) that it was an arguable point, and that a judicial decision would be necessary to make it perfectly clear.

This is the first case since then that has come to my notice.

The publication of the Revised Edition of the Statute Law of S.Rhodesia in 1939 makes it more easy to scrutinise the Law on the subject of marriage, and the following points emerge:----

1. Chapter 79, The Native Marriages Act only deals with marriages by Christian rites in sections 12 and 13.
2. Section 13 does not affect the problem under review, as it deals with native laws as to property which are not to be affected by a marriage under the Marriage Act. (Chapter 150).
   It should be noted, however, that it describes a marriage "contracted in accordance with the terms and provisions of the Marriage Act (Chapter 150). It does not describe it as a marriage in in accordance with the previous section (No.12) of the Native Marriages Act (Chapter 79.) There is no reference in the Marriage Act to the provisions of section 12 of Chapter 79.
3. It is by the terms of the Marriages Act (Cap.150) section 19 (3) that ministers of religion are recognised as Marriage Officers to "publish banns and celebrate marriage, under and by virtue of this "Act, in any part or district within which any such marriage Officer "has power or jurisdiction to celebrate marriage."
4. The power or jurisdiction of a marriage officer derives from this Marriages Act, and his responsibility is to the Department of Internal Affairs. This is shewn by Cap.150. Section 29.(3) and Section 32.a.
5. There does not appear to be any statement in either Cap.150. The Marriages Act, or in Cap.79, the Native Marriages Act, to indicate that the minister of religion in his capacity as a Marriage Officer derives any sort of jurisdiction from the provisions of Cap.79. the Native Marriages Act. Nor is there any statement which lays any legal responsibility on him to have any dealings with the Department of Native Affairs in regard to any marriage which he may desire to solemnise or which he may have ~~any dealings~~ solemnised.
6. The Marriages Act. Cap 150. Section 6 makes provision that the parties desiring to marry, if they do not both reside in the same place, and wish to marry in the place where one resides, should obtain a certificate of publication of banns from the minister of one place. "On the production of such certificate to the officiating minister of the other place" "., it shall be lawful for such minister....to solemnise matrimony".
7. Cap.150. section 11. provides that marriage shall be within three months of publication of banns. Banns become void after three months if the marriage has not been solemnised, and the law provides that the banns shall be republished anew.

BUT 8. Section 41 provides for certain matters not necessary to be proved in regard to a marriage duly solemnised:--"After the solemnisation of any marriage under or by virtue of this Act it shall not be necessary in support of such marriage or in any action, suit or proceeding, when the same may come into question, to give any proof.. that the banns were published......, nor shall any evidence be received to prove the contrary.

AND ALSO 9. Section 44 provides for translations of this Act to be made in languages commonly used in the Colony expressing the true intent and meaning thereof.
   The purpose of which obviously is that non-English speaking persons may have a clear understanding of all essential requirements and provisions of the law.

Having thus investigated the provisions of the Marriages Act (Chapter 150) it is now possible to turn to the Native Marriages Act, (Chapter 79).

10. From what is pointed out in paragraphs 1,2 and 3 above, it is to be noticed that Section 12 of the Native Marriages Act rests on the provisions of the Marriages Act, (Chapter 150) and needs to be interpreted in accordance with that Act.
11. Section 12 of the Native Marriages Act does not deal with marriage, but with the preliminaries of marriage. The parties appearing before the registering officer do not appear before him for a marriage, but because they "desire to contract a marriage in accordance with the terms and conditions of the Marriage Act". They can only do this before a minister of religion or other marriage officer.
12. It appears that no official of the Native Affairs Department can be held to be a marriage officer. No provision is made in the Native Marriages Act (Chapter 79) for any marriage between natives to be contracted or solemnised at the Office.

The duties of the officials of the Native Affairs Department are not in this regard parallel to those of Magistrates as laid down in the Marriages Act (Chapter 150), Sections 26 and 27, and the Third Schedule appended to that Act.

13. The officer of the Native Affairs Department is a registering officer and not a marriage officer. The marriage of natives "according to native custom" is considered to have taken place in the kraal of the parties contracting the marriage.

14. When the marriage has been contracted, the parties are to appear before a registering officer to register the marriage. He then registers a marriage which has already taken place.

15. The relation of the registering officer to those desiring to contract a marriage by Christian rites(or before a magistrate)is quite different. In such a case he no longer has to deal with registration as a consequence of marriage,but with the issuing of a certificate as a preliminary to marriage.

16. The sole relation of the registering officer in regard to marriage by Christian rites is in regard to a preliminary,viz.,the issuing of an enabling certificate.

17. The requirements of the law regarding the issuing of the certificate are as follows:---

a. The registering officer shall cause the parties to the proposed marriage to make a declaration.
Presumably this is in accordance with the Oaths and Declarations Act (Chapter 17).

b. He is to satisfy himself by enquiry

i. that there is no bar to such marriage by reason of consanguinity,affinity,lack of consent of parents or guardians,or the subsistence of any marriage previously contracted by either of the parties,and that

ii. they freely consent to the marriage;and further

iii. he is to explain to them that the marriage which it is proposed to contract shall, during its subsistence,be a bar to either party thereto entering into any other marriage.

18. It is to be noted that the registering officer is to satisfy himself "by means of such enquiry as he may deem expedient".
This is a clause that is open to abuse. The conditions required of the natives should be clearly and definitely stated,and the penalty for making a false or untrue statement should be a sufficient safeguard in this as in any other matter, which may vary from official to official
The details of the enquiry,where what is considered "expedient" may be left to the discretion of a junior officer of the Native Affairs Department ought to be clearly and definitely defined.

19. The natives who apply for such certificate,are understood by the wording of the Act to be *ipso facto* desirous of contracting a marriage in accordance with the terms and conditions of the Marriage Act (Chapter 150). The explanations to be given are solely that the parties may understand that such a marriage shall be a bar to either party during its subsistence entering into any other marriage.

There is no provision authorising the registering officer to give an explanation of the difference between Christian marriage and a marriage by native custom.He is solely to explain what is stated. Any further explanation or comment on his part is *ultra vires* on his part and should not be allowed.

20. The certificate authorises the minister of religion or other marriage officer to celebrate a marriage in accordance with the terms of the Marriage Act.

But the minister of religion is already authorised to do this by the terms of the Marriage Act.19.(3).There is no statement in the Native Marriages Act (Chapter 79)that he (the minister)needs any further authorisation than that which he already has.

21. Nor is there any provision that the parties receiving the enabling certificate from the registering officer shall deliver it to the minister of religion.In the Marriage Act there is a definite provision for the certificate of banns in a parallel case being produced. The Native Marriages Act 12 (1) makes no provision for such production.It may therefore be presumed to be unnecessary.

22. It appears from the Native Marriages Act 12 (1) that the mere fact of the natives appearing before the registering officer and obtaining an enabling certificate from him is sufficient authorisation.

23. The whole of the business provided for in the Act is between the said natives and the registering officer.The minister of religion

........religion has no duties or obligations laid upon him beyond those which are explicitly and definitely laid upon him by the Marriages Act(Chapter 150).

24. As evidence of this we may notice that there is no penalty laid upon the minister. The only penalties ~~provided in the Act~~ provided in the Act are for the Natives. No penalties are provided either for the minister of religion or the registering officer.

25. The penalty for the natives referred to in paragraph 24 above is invalidity. "Any marriage celebrated in terms of the Marriage Act (Chapter 150) between natives who have not obtained the certificate aforesaid shall be invalid".

Equity is defined in the Concise Oxford Dictionary as "recourse "to principles of justice to correct or supplement law". It is surely against principles of equity that the contracting parties (i.e. the natives) should be penalised for the action of another person (i.e. the minister of religion). He is the person to whom the act refers (Cap.79. 12.(1.) lines 5 and 6) as the celebrant of the marriage. The natives therefore are penalised for the Act of the minister.

26. In this connection it must also be noted carefully that "Any marriage celebrated in terms of the Marriages Act(Chapter 150) between natives who have not obtained the certificate aforesaid shall be invalid." This being so, no minister of religion is likely to perpetrate such an act of injustice as knowingly to cause two innocent persons to be penalised for his irregularity.

27. It may be said that they commit a wrongful act by presenting themselves for such a marriage. No doubt such a point might be upheld.

28. But the conditions would be different if they had already obtained an enabling certificate, if they had allowed such a certificate to become out-of-date, and then presented themselves to the minister of religion for him to celebrate the marriage. There is no provision for them to produce the certificate, there is no provision for him to demand it. He may be conscious that they "have obtained the certificate aforesaid", and no legal responsibility can be put upon him, nor can any penalty be enforced.

29. Further, the schedule appended to the Act gives the authorised form in which the enabling certificate is to be issued. There is no provision in this certificate stating that it authorises a minister of religion to celebrate a marriage between the parties. Section 12 does indeed state that this is the purpose of making it obligatory on natives who desire to marry to obtain this certificate. But surely if this is the case, the certificate should be worded in some such form as follows:-"This is to certify.... ....&c, and any minister of religion to whom this is produced is hereby authorised to celebrate marriage between the parties named herein". Yet nothing of this sort is done. The certificate is merely a paper given by the registering officer to the applicants.

30. In view of the fact that a large number of African natives in this Colony are still illiterate, provision should be made for such certificates (if the law continues to require them) ~~should~~ to be issued in the vernacular languages of the Colony. It should be carefully noted that the certificates are by the law issued to the natives and not to the minister of religion.
The fact that the Form N.A.31594--H.2040--D.2835--100B--25.7.39. Item No.--B.--23.A.--N.A. has on it dotted lines on which are written e.g. To the Superintendent, St.James'Mission, Makwiro--does not mean that legal provision is made for sending it in this way. The interpolation at the top of the page is not provided for by the Act, and there is no justification for interpolating a space for such an address.

31. In the same way a custom has grown up whereby with the Enabling Certificate a form of "Notification of Marriage" worded in the following terms is issued:--

"To the Native Commissioner.
---------------------------- A8912.
"With reference to your Certificate No.......dated.........19...
"the marriage between.................of......................
"and.....................of...........was celebrated
"on this..............day.of......................19.....

Date.................. ....
Minister of religion or other marriage officer.

32. If such provision is required it ought to be made obligatory by law. Ten years ago a Native Commissioner informed a minister of religion that there was no legal obligation. But he regarded it as a gracious act of courtesy, to enable him to keep his records.
   Surely the keeping of records of an official character by a Government Official ought not to depend on "Acts of courtesy", but on legal enactment, And
33. What are the records which such an official desires to keep? There is no provision for the Native Affairs Department to keep any records at all in relation to the marriage of natives by Christian rites, beyond the record of the enabling certificate, which is a preliminary document. The registers are under the Control of the Minister of Internal Affairs, to whom the Native Affairs Department should apply for particulars if such are required.
34. There is definite legal provision ~~made~~ requiring ministers of religion who solemnise marriages to send the Duplicate Original Registers to the Secretary, Department of Internal Affairs, Salisbury. To that Department ministers of religion are responsible, but they have no responsibility to the Department of Native Affairs for their action in solemnising marriages. It is therefore an ~~unlawful~~ imposition not sanctioned by law to expect them to supply the Native Affairs Department with information which is not provided for in the Statute law of the Colony.

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