

**IN THE COURT OF APPEAL OF THE REPUBLIC OF BOTSWANA HELD
AT GABORONE**

**COURT OF APPEAL CIVIL APPEAL CASE NO: CACGB-092-20
HIGH COURT CIVIL CASE NO: CAHFT-000050-17**

In the matter between:

MOLEBI CHEPETE

APPELLANT

and

OTAATIA TSHUKUDU

RESPONDENT

Attorney Mr T. Tshekiso for the Appellant
Attorney Mr M. Mhizha for the Respondent

J U D G M E N T

**CORAM: LESETEDI J. A.
GAONGALELWE J. A.
DAMBE J. A.**

GAONGALELWE J. A.

INTRODUCTION

1. This is one matter which has a particularly long history having fully traversed the hierarchy of Courts in this jurisdiction. It all started during the year 2014 when the Current Respondent (OTAATIA

TSHUKUDU) instituted action at Tonota Customary Court claiming damages for the wrong of adultery and marriage wrecking against the Current Appellant (MOLEBI CHEPETE).

2. At the conclusion of the trial the Tonota Customary Court ruled in favour of Appellant thus dismissing the claim.
3. Thereafter the matter moved through appeals lodged by either of the parties in turns to Serowe Senior Customary Court, Customary Court of Appeal, the High Court and ultimately to this Court.

EVIDENCE

4. The nub of Respondent's testimony before Tonota Customary Court was that on 4th March 2014 he left his wife in their matrimonial home only to come back in the evening. He testified that as he opened the door on his arrival his wife emerged out of the house in company of Appellant and that the lady was half naked as she was putting on her panty only and nothing else. He said Appellant who was fully dressed

ran off together with his wife but that he managed to grab the wife by her panty and restrained her.

He further said his wife who was still under his grip said to him "*my husband you have caught me.*"

5. It was his further testimony that he called one Sebokone and one Bame. He said on being asked by the two what was happening she replied saying her husband had caught her with another man. That she produced some used condoms explaining that she had used them with that man.

6. He proceeded to say they were later joined by Mr and Mrs Tumedu who found his wife still half naked. That when the latter couple asked what had happened she replied as follows;

"my husband has caught me with Molebi Chepete."

7. It was Respondent's further testimony that since that incident the two of them never got intimate and that in fact his wife told him that she would institute divorce proceedings which she ultimately did.
8. He concluded his testimony by saying he demanded compensation in the form of 30 beasts as Appellant had wrecked his marriage. PW2 and PW3 being Emmanuel Sabokone Molebatsi and Tebogo Tumedi confirmed Respondent's testimony in all material respects including the piece of evidence that Respondent's wife was half naked as well as the confession that she had been caught with Chepete. They also confirmed the evidence that the lady showed them some used condoms.
9. It is noteworthy that Appellant chose not to cross-examine PW2 despite his damaging testimony.
10. Appellant gave evidence as well in his defence. The nub of his testimony was that he never committed adultery with Respondent's wife nor had any intimate relationship with her. He said on the day in

question he had been requested by Respondent's wife (Mrs Tshukudu) to come to their place to attend to some electric fault which he says he did.

11. He said he duly attended to the fault and that later when he was getting out of the house to proceed to his place he met Appellant at the entrance who did not respond to his greetings and so he left. Under cross-examination he haphazardly attempted to refute the evidence that Mrs Tshukudu was half naked though he had not put that to Respondent and his witnesses when cross-examining them.
12. In the end the Customary Court of first instance sitting at Tonota ruled in favour of Appellant asserting that Respondent had failed to prove his case.
13. Respondent lodged an appeal to Senior Customary Court at Serowe. On 18th February 2015 the Senior Customary Court quashed the decision of the Tonota Customary Court. It found that the evidence adduced before the Court of first instance was sufficient to rule in

favour of the Respondent. It ordered that Appellant pay compensation towards Respondent in the form of 30 beasts or P90,000.00 as damages for wrecking the latter's marriage.

14. The Senior Customary Court came to that conclusion not only on the basis of the evidence adduced before the Court of first instance but also in view of what Appellant had said in answer to some questions put by the presiding officer at Serowe intended to seek clarity. In answer to such questions Appellant had said the following;

“... The Court believes those who saw used condoms. Nobody can disagree with Tshukudu's wife when she said she slept with me. I could not be here if I did not sleep with Tshukudu's wife...”

As for the Respondent the record reflects that in answer to questions put by the presiding officer he stuck to the testimony he had given at the Customary Court of first instance.

15. It was on the totality of all the evidence that the Senior Customary Court ruled in favour of Respondent and further awarded compensation on the basis of its finding that Appellant had not only

committed adultery with Respondent's wife but that he had in fact wrecked the latter's marriage. At the time of hearing that appeal by the Senior Customary Court Mrs Tshukudu had already instituted divorce proceedings at the High Court.

16. Appellant noted an appeal to the Customary Court of Appeal challenging the Serowe decision on the basis that the case against him had not been properly proved. Although the appeal was centred on sufficiency or otherwise of the evidence the Customary Court of Appeal did not delve into such issues. Instead it digressed and based its decision on what can only be described as a novel issue of whether a claim for delictual damages flowing from adultery still subsists in this jurisdiction. It came to the conclusion that such an action no longer subsists and on that basis upheld the appeal. More on this particular subject later in this judgment.

17. Respondent once more was not deterred. He lodged an appeal to the High Court.

18. The learned judge of the High Court heard the appeal in the year 2020. In the end the judge set aside the decision of the Customary Court of Appeal and confirmed the award of 30 beasts or P90,000=00 as compensation.
19. Thereafter consistent with the previous trend Appellant could not accept defeat hence noted an appeal to this Court.

APPEAL TO THIS COURT

20. His grounds of appeal are the following;
 - “1. The Court a quo fell into a grave error of upholding an appeal which was filed out of time without the requisite leave to appeal out of time. The appeal was a nullity and could not be upheld.
 2. The Court a quo fell into grave error of disregarding the entirety of the evidence led before the Customary Court which showed that the Appellant was not liable for the claim of marriage wrecking.
 3. The Court fell into grave error of granting damages to the Respondent without subjecting the claim to assessment under the known principles of assessment of damages.”

21. As regards the first ground of appeal it is common cause that while the appeal challenging the decision of the Customary Court of Appeal may have been filed out of time the Appellant never raised the issue at the time the appeal was before the High Court judge.

22. The point was raised much later after the appeal judgment had been delivered. He alluded to the point at the stage of seeking leave to appeal to this Court in terms of section 11 (d) of the Court of Appeal Act. In its Ruling made pursuant to that application the Court a quo stated;

“The fact that the Appellant did not raise any objection when the Respondent filed his appeal out of time as alleged means that he acquiesced to that anomaly and cannot now be heard to complain.”

23. One thing clear is that at that stage the Court was *functus officio* as far as its judgment allowing the Respondent’s appeal was concerned. In answer to the ground of appeal it is my considered view that the common law principle of waiver comes into play in relation to the issue.

24. Waiver may be express or may be evinced by conduct. In *casu* it was waiver by conduct.

See **LILLY MMOLAWA and ANOTHER v. KINGDOM FINANCE (PTY) LTD AND OTHERS – CACGB-151-19.**

Appellant chose to let the appeal proceed normally even though it was filed out of time. In such circumstances he waived his entitlement to timeously raise the requisite objection.

25. In his submissions Appellant's counsel emphasized the point that at the material time Appellant was a self actor who may have been ignorant of Court procedures relating to time limits for noting an appeal.

26. It is trite that for the defence of waiver to succeed it must be clear that the party concerned with full knowledge of his or her entitlement chose to abandon the benefit.

See **COLLEN v. RIETPONTETH ENGINEERING WORS 1948 (1) SA 413 at 436.**

CHAITAADZIMU v. UNIQUE AIR (PTY) LTD 2008 (1) BLR

3 at 5 F to G.

27. The salient question is whether it can be said indeed Appellant was ignorant of the rule of procedure that an appeal from the decision of a Customary Court has to be noted within 30 days.

28. To answer the question I can do no better than refer to the record itself. The record reflects that the presiding officer at the Customary Court of Appeal advised the parties at the end of reading the judgment as follows;

“Any aggrieved party may register their appeal with the High Court within thirty (30) days from today.”

29. And that is not all. The same record further reflects that the same advice had been given earlier by the Customary Court of first instance and the Senior Customary Court at Serowe where it was this Appellant himself who noted the appeal.

30. On the basis of the authorities cited above the first ground of appeal is unsustainable. Another common law principle to be invoked in these circumstances is the *quilibet potest renunsciare jure pro se introductio maxim*. The import of the maxim is that anyone may by conduct or otherwise renounce a right or benefit conferred by law for his own benefit.

See **MABUTHO v. MULALE 2013 (1) BLR 659 CA at 664** and authorities cited therein.

The end result of invoking the two principles referred to above is that since Appellant though having been duly advised in regard to time limits within which an appeal was to be noted raised no objection when the other party filed his appeal out of time he must necessarily be barred from raising the issue at this stage by operation of the principle of waiver or the *quilibet maxim* or both.

31. Regarding the second ground of appeal it suffices to point out that the evidence adduced by Respondent regarding adultery having been committed and marriage wrecking was overwhelming. In this type of

case Courts often rely on circumstantial evidence. This must be so because generally for acts of adultery there would be no eye witnesses.

See **MABOTE AND ANOTHER v. MABOTE 1999 (1) BLR 386 CA.**

32. As for the third ground of appeal which raises the complaint of there having been no separate consideration of quantum of damages as distinct and separate from liability the answer is twofold. First to bear in mind is that this appeal emanated from the decision of a Customary Court where there is no rule nor practice mandating a Court to deal with quantum of damages as a separate procedural exercise from the issue of liability. Secondly, it must always be borne in mind that Customary Courts by section 50 of the Customary Courts Act Cap 04:05 are not bound to follow provisions of any law in force in this jurisdiction relating to procedure other than the customary law procedures.

WHETHER THE ACTION STILL SUBSISTS IN THIS JURISDICTION

33. Next to consider is the basis on which the Customary Court of Appeal dismissed Respondent's claim. As the point is one of paramount concern it having been expressed in a judgment of the highest Customary Court in the land whose decisions would be binding on all other Customary Courts this Court did invite attorneys on either side to express their views on the subject.
34. It turned out that both are of the view that such an action still subsists in this jurisdiction.
35. It is my considered opinion that indeed the action for damages flowing from adultery still subsists in this jurisdiction. This Court is fully conversant with the views of late expressed by the Courts in South Africa holding that the action has become obsolete. The leading case in South Africa is **DE v. RH 2015 (V) SA 83 CC.**

The Constitutional Court of South Africa held in that case that in their country the morals of society no longer regard a marriage relationship as sacrosanct.

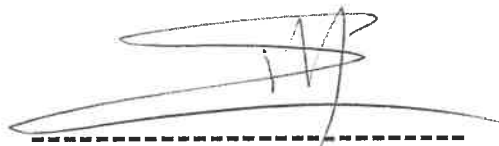
36. It must always be borne in mind that Botswana is a Sovereign country with its own culture, traditions and moral values. Our Society still regards marriage as bringing with it the right to dignity which is to be protected by our Courts. Adultery by nature inflicts a heavy blow to the personality of the innocent spouse.
37. The above considerations must necessarily outweigh any concepts of rights to freedom of association. Entering into a marriage relationship necessarily means one has voluntarily opted to limit his or her freedom of association.
38. Generally an innocent spouse filing for divorce bases his action on grounds of loss of consortium and or contumelia connoting being degraded in the eyes of the community for which he is to be

compensated. See MABOTE'S case above where an award of P7,000=00 was made by the Court of Appeal.

39. On account of the injury so inflicted on the personality and dignity of the innocent spouse, the maxim *UBI JUS IBI REMEDIUM* meaning where there is a right there must be a remedy is applicable.
40. In view of the evidence coupled with the view that society's attitude towards marriage is still that the relationship is sacrosanct, the appeal must fail as regards liability.
41. As regards quantum it is this Court's considered view that the amount is excessive and has to be reduced. Accordingly Respondent is awarded damages in the sum of P6,500=00.
42. In view of the Appellant's partial success on quantum of damages costs are awarded against him but only to the extent of 50% thereof.

43. The Registrar of this Court is hereby directed to forward a copy of this Judgment to the President of the Customary Court of Appeal not only for its own consumption but also for the purpose of apprising the other Customary Courts of the current position of the law in this jurisdiction on the subject being that the judgment of that Court in appeal case No: **FCIVA 27/2015** which involved the same parties is hereby overruled.

DELIVERED IN OPEN COURT AT GABORONE ON THIS 7TH DAY OF MAY 2021.



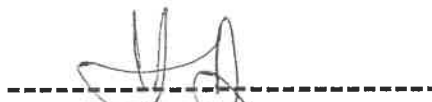
**M. S. GAONGALELWE
JUSTICE OF APPEAL**

I AGREE



**I. B. K. LESETEDI
JUSTICE OF APPEAL**

I AGREE



**L. I. DAMBE
JUSTICE OF APPEAL**