

**PRISCILA MAKONI**

**Versus**

**PAIDAMOYO MASHINGE**

IN THE HIGH COURT OF ZIMBABWE  
MAKONESE & DUBE-BANDA JJ  
BULAWAYO 18 OCTOBER 2021

**Civil appeal - *Ex tempore* judgment**

Appellant in person  
Respondent in person

**DUBE-BANDA J:** This is an appeal against the whole judgment of the Magistrates Court, sitting in Victoria Falls. The court *a quo* found appellant liable for adultery damages in the sum of ZW\$100 000.00 and costs of suit. Aggrieved by the judgment of the trial court, appellant noted an appeal to this court. The grounds of appeal as framed in the notice of appeal are that:

1. The court *a quo* *erred* in that it decided to ignore and underplay the fact that respondent's husband orchestrated the suit against appellant as a means to get back at the respondent for breaking up with him.
2. The court *a quo* further *erred* by believing that the appellant knew that the respondent was married, when in fact the respondent's husband had initiated the illicit affair and would reasonably have hidden his true status from appellant at all costs.
3. The court *a quo* *erred* by dismissing as immaterial, the fact that the supposed continuation of the relationship was only a means to stop the respondent's husband from continuing his violent acts of assaulting the appellants and her boyfriend.
4. The court *a quo* also *erred* by granting an amount for damages which amounts to having respondent's husband benefiting from a wrongdoing which he initiated.

This appeal will be better understood against the background that follows. On the 7 July 2020, respondent (plaintiff) caused a summons to be issued against appellant (as defendant) claiming RTGS\$250 000.00 adultery damages. In her summons she pleaded that she was

married to Richard Mushing (Mushing) in terms of the Marriages Act [Chapter 5:11]. She averred that appellant was having an affair with Mushing. The relationship started in August 2019, and she discovered it in June 2020. She claimed RTGS 250 000 damages for loss of affection and suffering. Mushing denied her conjugal rights. Appellant filed an appearance to defend, and in her plea denied that she knew that Mushing was married to the respondent. She pleaded that Mushing informed her that he was a divorcee.

Respondent testified in support of her case. She said she was married to Mushing and the marriage still subsists. She averred that appellant got into a sexual relationship with Mushing when she knew that he was married. She mentioned a number of facts in support of her contention that appellant knew that Mushing was a married man, e.g. he never removed his wedding ring, and she saw phone messages between the two, where appellant would ask Mushing if he was at home, if he said “yes”, she would then say they shall talk later. She was informed of the relationship by appellant’s workmates. Mushing testified in support of respondent’s case, he told that court that he informed appellant that he was a married man. He never removed his ring. He went to appellant’s rural village to see the home of a person he was in love with. Respondent adduced the evidence of Howard Moyo, who told the court that Mushing introduced appellant to him as his aunt.

Appellant testified and denied that when the relationship started she knew that Mushing was a married man. She got to know that he was a married man in May 2020. The relationship started in August 2019. When she tried to end the relationship, Mushing became violent, and she then decided to continue with the relationship. She called the evidence of Waxon Tapiwa Makwara, he testified that the suit by respondent was Mushing’s plan to hit back at appellant for terminating the relationship.

The court *a quo* found that appellant had knowledge of Mushing’s marital status. It found that this case was not instigated by Mushing as appellant would want the court to believe. The trial court rejected appellant’s version that she continued with the relationship because Mushing was being violent towards her. Again, it found that the circumstances of the case aggravated the damages.

The appellant is appealing against the court *a quos*’ factual findings. The hearing of an appeal against findings of fact is guided by the principle that in the absence of demonstrable and material misdirection by the trial court, its findings of fact are presumed to be correct and

will only be disregarded if the recorded evidence shows them to be clearly wrong. See: *Smith v Smith* SC 50/20; *Hama vs National Railways of Zimbabwe* 1996 (1) ZLR 664 (S) at p 670; *Reserve Bank of Zimbabwe v Granger and Anor* SC 34/01.

There is no basis on which this court may interfere with the factual finding of the court *a quo*. It has not been shown that the court *a quo* failed to appreciate a fact at all, or made a finding of fact that is contrary to the evidence actually presented. In brief it is common cause that Mushinge is married to the respondent in terms of the Marriages Act [Chapter 5:11] and the marriage still subsists. It is further common cause that from about August 2019, appellant had a sexual relationship with Mushinge. The court *a quo* found that appellant knew that Mushinge was a married man. It took into account the duration of the relationship i.e. between August 2019 to June 2020. She took Mushinge to her village home in Gokwe, but did not know his residence in Victoria Falls. She knew Mushinge's children, they would visit her, but could not visit them herself. Her version that in May 2020, she failed to end the relationship because he was violent cannot be the truth. She is a policewoman, she knows and equipped with means to protect herself from domestic violence. Victoria Falls is a small community, the probabilities of this case point to the conclusion that she knew that Mushinge was indeed married. The court *a quo* cannot be faulted in finding that appellant had knowledge that Mushinge was a married man.

As regards the quantum of damages, an appellate court should not interfere unless there is some striking disparity between its estimate of the damages and that of the trial court, and further unless there is some unusual degree of certainty in its mind that the estimate of the trial court is wrong. See: *Smith v Smith* SC 50/20. The court *a quo* factored into the equation that appellant's adulterous relationship with Mushinge caused respondent emotional stress, and for five months there was no intimacy between her and her husband. It is appellant's appearance in the scene that wrecked respondent's marriage. There is no basis at law on which this court, sitting as an appellate court may interfere with such an award of damages.

The reasoning of the court is supported by evidence presented before it. Its findings of fact cannot be described as irrational. In view of the above the appeal has no merit and must be dismissed. The rule is that costs follow the cause, and there is no basis on which this court may depart from that rule.

In the result I make the following order: The appeal is dismissed with costs.

Makonese J..... I agree