

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

**COURT OF APPEAL CIVIL APPEAL NO. 42 OF 2002**  
**HIGH COURT MATRIMONIAL CAUSE NO. 376/01**

In the matter between

**NONOFO BANKA METSWINYANE**

**APPELLANT**

vs.

**FLORA KEGOMODITSWE METSWINYANE**

**RESPONDENT**

**Mrs. A. Motlhagodi for the Appellant**

**Mr. J. Nnoi for the Respondent**

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**J U D G M E N T**

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**CORAM: P.H. TEBBUTT, J.P.**  
**N.W. ZIETSMAN, J.A.**  
**LORD R.I. SUTHERLAND, J.A.**

**LORD SUTHERLAND J.A.**

The parties in this action were married on 29<sup>th</sup> February 1996. In January 2002 the Respondent served a summons in the High Court seeking divorce and division of the joint estate. On 3<sup>rd</sup> April 2002 a settlement agreement was signed by the parties wherein it was agreed that the divorce should proceed unopposed, that "division of the parties joint estate to be referred to the Goodhope Customary Court", that each party should pay its own costs, and that the agreement should be made an order of Court. On 27<sup>th</sup> May 2002 **Collins J.** granted a *decree nisi* for divorce, and ordered that "the issue of the division of the parties' joint

estate is to be referred to the Goodhope Customary Court.” On 10<sup>th</sup> June 2002 the Registrar of the High Court wrote to the Customary Court’s Commissioner in the following terms:

“On the 27<sup>th</sup> day of 2002 the Honourable Mr. Justice P. Collins pronounced decree nisi for divorce in favour of the plaintiff and ordered that division of property should be referred to the Chief at Goodhope Customary Court.”

The case was duly registered in Goodhope as “Goodhope Civil Case No. 11/2002”. After a hearing, on 20<sup>th</sup> August 2002 the Customary Court made an order dividing the property between the parties. The Appellant was dissatisfied with the decision and now seeks to appeal to this Court.

The Respondent has taken a preliminary objection that a person aggrieved by a decision of a Customary Court may only appeal to a higher Customary Court or the Customary Court of Appeal, and in any event the present appeal does not fall under any of the categories under which an appeal lies to this Court. The Appellant’s argument is that the High Court merely delegated its function to the Customary Court, and the decision of the latter was therefore the decision and outcome of the High Court.

In my opinion the Appellant's argument is without merit. The parties by their own agreement asked for the issue of division to be referred to the Customary Court. By this agreement they submitted to the jurisdiction of the Customary Court under Section 10 (1) (a) (ii) of the Customary Courts Act. That Court accepted jurisdiction, and registered the case as a civil case in its jurisdiction. It is to be noted that the parties' agreement and the High Court's order referred the issue to the Customary Court, and did not, as the Appellant contends, delegate its function. Once the matter had been referred, it was out of the hands of the High Court and fell under the provisions of the Customary Courts Act. There was no question of the matter being reported back to the High Court for that Court to make an order. An order of the Customary Court cannot be deemed to be an order of the High Court just because the matter was originally referred to it by the High Court.

There is no specific order of the High Court now being appealed to this Court, and accordingly we cannot entertain this appeal which should have been dealt with under the provisions of the Customary Court Act.

The appeal is dismissed with costs to the Respondent.

DELIVERED IN OPEN COURT AT LOBATSE THIS .....<sup>30<sup>th</sup></sup>.....  
DAY OF JANUARY, 2004.



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**LORD R.I. SUTHERLAND**  
**JUDGE OF APPEAL**

I agree,



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**P.H. TEBBUTT**  
**JUDGE PRESIDENT**

I agree,



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**N.W. ZIETSMAN**  
**JUDGE OF APPEAL**