WESTON MSIMBE
versus
THE STATE

HIGH COURT OF ZIMBABWE
CHATUKUTA & TAGU JJ
HARARE 22 September 2014

Criminal Appeal

B Pesenai, for the appellant
T Mapfuwa, for the respondent

TAGU J: After reading documents filed of record and hearing counsels we gave an ex-tempore judgment and dismissed the appeal. We have been requested to furnish written reasons for our decision by the appellant's counsel. The following are our reasons.

On 17 September 2010 the appellant was ordered by the magistrate court to pay maintenance for his two children he fathered with his separated wife NeliaTambara. The court order read as follows-

> "Respondent to pay US$ 100.00 per month for the two minor children with effect from 30th September 2010. Respondent is also to pay school fees for both children on or before the beginning of each term. Respondent to buy school uniforms (summer) winter and sports uniforms for the children. Respondent is also to pay medical bills for the children as and when required."

The appellant defied the order. He was prosecuted for contravening s 23 (3) of the Maintenance Act [*Chapter 5:09*] and convicted on 22 August 2012. He was sentenced to a wholly suspended sentence on condition he pays the full maintenance arrears that then stood at US$ 2 044-00. The appellant avoided going to jail by paying the full arrear maintenance. Despite that conviction and sentence, the appellant again, from August 2012 defied the order for the second time. He accrued further arrear maintenance to the tune of US$ 5 700-00. In terms of s 23 (3) (a) of the Act he was liable to a second prosecution. Subsequently, he was prosecuted and, after conviction, sentenced on 18 October 2013 to 12 months imprisonment wholly suspended on condition he pays the full arrears now totalling US$ 6 275-00, to be paid forthwith through the clerk of court Harare.

The appellant is now appealing against this second conviction and sentence. According to the record, he averred that the court a quo erred in dismissing his defence that he was a man of no means. Alternatively, he argued that the current figure of arrear maintenance is inflated because the second child is now aged over 18 years and is now at University.

A perusal of the record shows that the appellant was ordered to pay maintenance for each of the children at a rate of US$ 50-00 per month. At page 41 of the record the appellant admitted that he did not pay an amount of US$ 1 300-00. He however, argued that he owes an amount of US$ 750-00 because he had no obligation to pay maintenance for the child who is now at University. As regards school fees he admitted he owes arrears for 4 terms amounting to over US$ 2 844-00 per breakdown he gave on p 35 of the record.

On the other hand, the complainant submitted that the amount is more than that. Her argument was that fees are for five and not four terms. Over and above that she spent more money on the children's other needs.

The issue to be decided, in our view, is whether or not the appellant lacked the means to pay maintenance. The respondent argued that the appellant, a 46 year old, able bodied man was able to pay the maintenance but was not willing to do so. It was argued that he was employed in a family business and should have paid the amounts in question. On the other hand the appellant admitted having been involved in the family business at Kwekwe but argued that he stopped after his father came from overseas.

We were not persuaded by the appellant's argument that he was so poor as to be unable to raise the US$50-00 per month for the maintenance of his children. If he was so poor he could have approached the court for variation of the order. He was aware of this option as shown by the following exchange between him and his defence counsel-

"Q Why would you not go for variation downwards of the maintenance order?

A The issue of variation is not relevant because my argument is that I have no means. I have engaged the applicant outside the courts. I tried to involve the family so I did not see it necessary. I thought we would settle this out of court.

Q The issue of variation or discharge would have relieved you of this obligation. What is your take?

A It could have relieved me but I do not want to run away from my obligation of looking after my children. I still take responsibility."

Indeed, the appellant was obliged to look after his children. Considering that he was able to raise the previous arrears, one can infer that he is still a very capable man, from his

elusive resources, of paying his children maintenance of $100-00 per month. The situation which led to the previous conviction had not altered. Since the appellant's contempt of the order continued, there was no legal impediment to prosecute and convict the appellant again. The court *a quo* did not err when it ruled, after hearing evidence on his means that-

> "This is a man who is aged 46 years and he is fairly healthy. He did not seek a variation of the maintenance order downwards to levels he can afford if he felt that he could not afford the figures on the maintenance order of the court. In August 2012 he was arrested for defaulting on the maintenance and he paid the full arrears.
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> In light of these circumstances, I am not persuaded that he is not a person of means."

In our view, once it is shown that the order had not been met, which of course is common cause, willingness and mala fides on the part of the appellant is properly inferred, with the onus upon him to rebut the inference on a balance of probabilities. See *Haddow* v *Haddow* 1974 (1) RLR 5 (G) at 6A; *Gold* v *Gold* 1975 (4) SA 237 (D) at 239F – G).

The appellant argued that the offence faced by appellant is not a strict liability offence. However, be that as it may, a maintenance order providing for periodical payments, is an obligation arising by operation of law. It is an order to do a particular act. Failure to comply renders the defaulter liable to imprisonment for contempt. See *Eeinberg* v *Weignberg* 1958 (2) SA 618 (C) at 621 B –C; *Lindsay* v *Lindsay* (2) (1995 (1) ZLR 296 (SC) and *S* V Kelder 1980 ZLR 331(G).

The rational for the criminal sanction is not punishment for the disobedience for punishment's sake, but rather to coerce the defaulter to comply with the order in future. Understandingly, it is a remedy of last resort, only to be employed when all endeavours to bring the situation under control have failed, or are almost certain to fail. (See *Ansah* v *Ansah* [1977] 2 ALL ER 638 (CA) at 643 c.)

In *casu*, the appellant failed to provide adequate maintenance for his two children resulting in the granting of the order dated 17 September 2010. When the order was granted the appellant defied it leading to his first prosecution in 2012. Despite his conviction and sentence he defied again leading to the current conviction. This is clear evidence of mala fides on his behalf.

The conviction, therefore, was warranted. His appeal against conviction therefore, fails.

I will deal with the sentence. I agree with the trial magistrate that the maintenance order was poorly worded. The order did not specify that the maintenance will run until the

children attain the age of 18 years or are self -supporting, which ever was to occur first. As a result the complainant did not apply for the extention of the order to cover the child who is now above 18 years, but is still a student at the University of Zimbabwe. In my view, even if the complainant had applied for an extention, I do not think that her application was going to fail. This is a child in need of support. The court a quo did not err by ordering the appellant to pay maintenance for the child at University as well. However, the court erred in that it did not ask for enough information pertaining to the needs of this child. As a result, the court a quo is directed to carry out a proper assessment of maintenance *vis a vis* the university student.

In the result I make the following orders-

1. Appeal against conviction be and is hereby dismissed.
2. As to sentence the matter is referred back to the court a quo to carry out proper assessment as to the quantum of arrear maintenance *vis a vis* the University student.

CHATUKUTA J agrees: _____

IEG Musimbe and Partners, appellant's legal practitioners
National Prosecuting Authority, respondent's legal practitioners.