

TINEI MAUTSA  
versus  
THE STATE

HIGH COURT OF ZIMBABWE  
HUNGWE & MAVANGIRA JJ  
HARARE, 16 July 2013

### **Criminal Appeal**

*L Mazonde*, for the appellant  
*J. Uladi*, for the respondent

HUNGWE J: The appellant was convicted for contravening s 23 (1) of the Maintenance Act [*Chapter 5:09*] (“the Maintenance Act,” “the Act”) on 20 August 2012. He was sentenced to three months imprisonment wholly suspended on condition he pays the applicant the sum of US\$19 800 through the Clerk of Court Harare forthwith. He noted an appeal against both conviction and sentence.

In his notice of appeal he raised six grounds against conviction and two grounds against sentence.

The brief facts upon which the appellant was convicted are set out in the judgment of the court *a quo*.

On 16 May 2012 the Maintenance Court granted an order against the appellant in favour of his four children as well as their mother in M 1150/11. In terms of that order the appellant was obliged to pay US\$6 600-00 per month. He did not pay as directed. Upon his being charged with contravening the Maintenance Act his defence was that since he was adequately providing for his wife and children he did not have to pay the amount in terms of the order.

Section 23 (4) of the Maintenance Act provides that it shall be a good defence to a charge of failure to comply with a maintenance order if there is proof that such failure was due to lack of means. The Act provides further that such lack of means should not be due to an unwillingness to work, misconduct or the incurring of debts or obligations which in all the circumstances of the case are unreasonable.

In its judgment the court *a quo* found that his defence was not that he lacked means but that he was providing sufficient support for his dependants. This was not a good defence and therefore the court rejected the defence and convicted the appellant for contravening the Act. It was pointed out by Mr *Uladi* that the appellant was obliged to comply with the order of court notwithstanding the fact that he had noted an appeal against the order for maintenance. Because the appellant had not applied for a suspension of the order he was therefore in contempt of an order of court which contempt he had not purged at the time the present appeal was heard.

Mr *Uladi*, in his heads of argument responded to the remaining grounds of appeal raised with sufficient clarity that Mr *Mazonde*, for the appellant, correctly in our view felt constrained to indicate that whilst he was not abandoning the appeal, he did not support it either.

In the event we dismissed the appeal on the turn.

Our reason for dismissing this appeal are as follows.

The court *a quo* was faced with determining the criminal charge of failing to comply with an order granted by a competent court. Had the appellant complied with the order it would have been incumbent upon him to demonstrate that he had indeed complied by furnishing proof of payment of the monthly instalment for the maintenance of those dependant on him for support. That was not his defence. His defence was that he was not at law obliged to maintain the persons in whose favour the order was granted for the reasons he gave.

This defence is misplaced for the simple reason that the appellant had raised it in the court below and lost hence the order. If he intended to defeat the order which that court granted, he needed, as soon as the order was granted, to apply for it to be suspended pending the determination of the purported appeal against the judgment of that court. He did not file such an application promptly neither did he comply with it.

Mr *Mazonde*, correctly, did not support the appeal as an offence was clearly committed by the appellant's failure to comply with the court order for paying maintenance towards his dependents.

The argument he puts forward regarding the status of his marriage to the respondent in the maintenance matter is an issue to be considered in an appeal against the finding by the court *a quo* that he is liable to maintain her.

In this appeal this court is restricted to the narrow point of whether or not his criminal conviction for failure to comply with the order was proper. In our view it was proper and that is the end of the story.

It is for these reasons that we dismissed the appeal upon Mr *Mazonde* indicating that he did not support the appeal.

MAVANGIRA J: agrees

*Gill, Godlonton and Gerrans*, appellant's legal practitioners  
National Prosecuting Authority, respondent's legal practitioners