CIV/A/25/92

IN THE HIGH COURT OF LESOTHO

In the appeal of:

MAKHALAKI TSILO — Appellant

and

THABO TSILO — Respondent

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi
on the 7th day of June 1994

This is an appeal from the subordinate Court of Berea. This matter concerned a claim for maintenance for the Respondent and a minor child against the Appellant. The claim was filed by way of summons. The learned magistrate had in her short judgment made a finding that in terms of Wages and Conditions of Employment Order 1978, the Appellant (Plaintiff) was entitled to a salary of M225.19 (being a minimum salary in terms of the said Act.) The learned magistrate proceeded to order the Defendant (Appellant) to pay maintenance for the minor child LEPEKOLA in the amount of M60.00 per month and for the Plaintiff in the amount of M60.00 per month. Before setting out the circumstance

of this matter as disclosed in the Court a quo, it is useful to set out the Appellant's grounds of appeal. They were substantially that:

(a) The learned magistrate misdirected herself and/or erred in law in holding that Appellant was gainfully employed by his father.

(b) The learned magistrate misdirected herself and/or erred in law in holding that Appellant was earning a sum of M225.19 per month from such employment.

(c) Respondent clearly failed to prove Appellant's ability to maintain on the balance of probabilities.

(d) There is no evidence to indicate that Appellant would be able to pay a sum of M120.00 per month as maintenance in the circumstances of this case.

(e) The judgment is against the weight of evidence as its reasoning is based on an artificial footing.

The position at common law in maintanance claims is that the plaintiff shall prove the following elements namely:

(a) That the person claiming support must be unable to

support himself. That the claimant is in need.

(b) The person from whom support is claimed must be able to support the claimant. That the person from whom mainanance is claimed must have sufficient means.

(c) The relationship between the parties must be such as to create a legal duty of support between them.

The learned author P.Q.R. Boberg in his work The Law of Persons and The Family - with Illustrative Cases 1st Edition at page 249, having endorsed the above requisites goes further and he says "The first two requirements are concerned with questions of fact to be determined by the Court in each case. The third is a matter of law." In connection with therequirement under (b) above the footnote further reads as follows: "Now the duty to maintain is facultative: It depends upon the reasonable requirements or needs of the party claiming it and the ability of the party from whom it is claimed to furnish it; per Van der Heever J in OBERHOLIZER vs OBERHOLIZER 1947(3) SA 204(O) at 297. For emphasis I may say that together with the above requisites is the need for the plaintiff to proof that the Defendant is gainfully employed and that he has such means. The onus to discharge this elements is throughout with the Plaintiff. That

is why it has been submitted the evidential burden or the need for rebuttal only arises when there is a prima facie case established. The prima facie case consists of the key elements stated above in the absence of which there is no prima facie case and there is no need for rebuttal. A finding of absolution from the instance would be a proper finding in the circumstances. Tied up with the above concepts is that of the inquiry as to what "sufficient" means and as when is there "unwillingness to pay" on the part of the Defendant.

The Plaintiff and Defendant are man and wife with a minor child LEPEKOLA. Defendant worked in the mines and while on holidays used to work at his father's shop. It appears that Defendant for some reason lost his job in the mines and worked at his father's place. At one time Plaintiff and Defendant were staying at the Defendant's father's home where they were given accommodation. This continued to be so until as a result of a quarrel or a misunderstanding between Defendant's mother and Plaintiff. Plaintiff removed to her maiden home together with the minor child. I formed an impression that the Plaintiff was not working at all material times or at least the record did not reveal so.

What gives a definite colour or character to this dispute is the fact that the record does not reveal if Defendant employed

what were the terms and conditions of such employment by the father of the Defendant; whether or not Defendant was getting a salary and if so how much. It is common cause that there is no evidence that the defendant was working for a salary. The Defendant was seen to be contributing to the family business, as is stated in Plaintiff's evidence in chief that "As Defendant's wife we used to take out our money to buy stock for the shops. We were not expecting to get anything in return but we were just helping as children in that family." I would reject the submission that this is an answer in any way, to that the Defendant ought to be getting a salary or wages. Neither would it be an indication of the Defendant's ability as at the material time. I would refuse to draw any inference that he did get a salary or wages. Suffice it to say that there was no proof of wages or salary. This is the difficulty that the learned magistrate had to contend with in the court a quo. The learned magistrate was not able to find that the Defendant was gainfully employed as a fact. I emphasize as a proved fact.

I would say that this Rhodesian case of R v DENIS 1966(4) SA 214 (RAD) was very helpful in illuminating the question of onus in statutory offence (involving maintenance) as against the common law situation. It also had a lot to say about inability to pay and the other opposite of which is unwillingness to pay. In the Rhodesian case it had been submitted that "in view of the

straitened financial circumstances of the company the Appellant could not be expected to borrow £120 a month from the Company to meet his liabilities. The Appellant had thus discharged his onus of showing that he cannot pay the full maintenance of £70 because of lack of means." The learned chief Justice Bealle went on to say at page 215G: "This argument turns on the proper interpretation of the relevant section of the statute which reads":

(4) Proof that any failure which is the subject of a charge under this section was due to lack of means and that such lack of means was not due to the unwillingness to work or misconduct on the part of the person charged, shall be a good defence to any such charge.

Provided that if the Court finds that the person charged was able to pay a portion of any particular payment and failed to do so, such proof shall not be a defence in relation to the portion of the particular payment which the person may be able to pay. The question for determination here is whether the word "lack of means" in the operative part of the section mean simply lack of available liquid assets from which the accused can pay the maintenance or whether "lack of means" means the lack of ability to pay." The most important thing to note is that a distinction is made between the two concepts of lack of means and

unwillingness to pay. But even most important is the onus on the accused person to show that lack of means was not due to the causes stated in the section four (4).

In seeking support from the said case of R v DENIS the Respondent was taking advantage of the decision in the case namely that "an Accused is required to prove in his defence that he is simply not able to pay and his ability to pay must be judged in the light of all existing circumstances, if he has reasonable facilities for borrowing he fails to discharge the onus of establishing lack of means." (See headnote) (my underlining). In this case the accused was possessed of assets and a running company and current accounts. The short fall to full maintenance could be raised by seeking a loan to which he would be eligible (reasonable facilities). This was to make up for what the Court decided was or would constitute sufficient means. In this case a few things seem to have been common cause or proved, namely that the Accused was gainfully employed or possessed means and he could pay more by securing a loan. Unfortunately this case is not useful to the Respondent in the instant case for the following reasons:

(a) there was no proof that Appellant was gainfully employed;

(b) His ability to borrow is just only assumed but not

proved.

I would have great difficulty in surmising that his father would be ready to advance such a loan.

Indeed it is strange that a major married man with a family to support would be content to work without a salary or reward and without a thought (and action) of supporting his family. It would furthermore be against public policy (if not outright illegal) for the Appellant's father to have kept him working for him (his father) without a salary. Indeed it is strange as Mr. Mohau submitted. But have we got proof that the Appellant did work for a salary and how much he earned? This is difficult on the evidence before us. It would amount to unfounded suspicion and speculation to surmise that the Appellant's father must have been paying him a salary and could not keep his son working for him without a reward.

There is a further problem. That is, that, even if we were to assume that Appellant was employed for a salary (which is still a bad inference) we would still have to fix a reasonable amount (quantum) which he must pay. This is so for the following reasons:

(a) Each party has to contribute to such maintenance in a reasonable amount in proportion to the means of such

party.

(b) Each party would still be required to pay according to his means.

(c) A reasonable estimate would have to be arrived at. Such reasonable estimate would still be required to take account of the factors in (a) and (b) above.

I have already alluded to the nature of this claim from the point of view of prima facie case, onus of proof and ability to pay as against unwillingness to pay. I appreciate that one of the problems on the part of the plaintiff could have been as who to call to prove the agreement of employment as between father and son and as to how much defendant actually got as wages. Having said this I can safely conclude that I would find fault with the learned magistrate's approach and conclusion. This is more so because it is not based on any probabilities. I would agree with the Appellant's submission that it was based on a fictional footing. I agree that the Wages and Conditions of Employment Order would entitle a Court in a proper case to award a minimum wage, may be of the awarded M225.19, at the material time. But this would still depend on proof of a contract of employment and that the complainant was either paid too little (below the statutory minimum), was paid in kind or was being

unpaid. The magistrate came to a conclusion, that on the evidence, that helping parents at their cafe, as such is to be taken as employment of Appellant by his parents. This is erroneous.. The facts actually render the Wages and Conditions Law not applicable to the extent that the Court would be precluded from presuming a minimum wage when a contract of employment has not been proved. I do observe that at the material time the ruling minimum wages law was Wages and Conditions of Employment Order 1978. Section 2(1) of the said Order is framed as follows:

> "2 (1) This Order shall apply to all persons employed in any Commercial or Industrial undertaking whose minimum rate of remuneration, excluding any allowance bonus, overtime payment or other additional benefit, does not exceed....."

It is important to note that the person must be employed. The word "employee" in the Employment Act 1967 was interpreted as meaning "a person who works under a contract with an employer, whether for manual labour, clerical work or otherwise. The word Contract in the 'said Act' means a Contract of employment, whether oral or in writing, express or emplied, by which an emmployee enters the service of an employer....."

The legal situation is now clear. In the premises I would allow the appeal. There ought to have been an order for absolution from the instance.

T. MONAPATHI
JUDGE

For the Appellant : Mr. L. Pheko

For the Respondent : Mr. G. Nthethe