

BETWEEN POROTESANO SOAVELE of Papa
Sataua, Married Man

APPELLANT

A N D TUALA T. LILII Maintenance
Officer acting on behalf
of LILIOLEVAO TAULIILI
Married Woman of Falealupo,
Savaii pursuant to Parts VI &
VII of the Maintenance and
Affiliation Act 1967

RESPONDENT

Counsel : L.R. Va'ai for Appellant
K. Latu for Respondent

Hearing (submissions) : 8th March 1993

DECISION : 11 March 1993

DECISION OF SAPOLU, C.J.

This is an appeal against decisions of the Magistrates Court in respect of an interim maintenance order, a permanent maintenance order and a disobedience order for non-payment of maintenance arrears, made against the appellant.

The appellant and the respondent in this case were married in April 1991. They became separated a week later but the total period in which they lived together as husband and wife was about 3 weeks. The marriage did not work out and very soon afterwards it fell apart. The respondent, who is the wife, filed a claim for maintenance through the Maintenance Officer in the Magistrates Court. That claim was heard by the Magistrates Court on 7 April 1992.

It appears from the brief notes of the evidence heard by the Magistrates Court that prior to the marriage and during the short duration of the marriage, the respondent was looking after her mother's shop which sometimes made a profit of \$30 but sometimes made no profit when there are too many faalavelave. She says she asked her husband, the appellant, for money but he never gave her any money. She also says she was always providing for the appellant. The appellant is a carpenter and builder by trade. He does not earn a regular income but I presume that when he has a carpentry or building job to do he earns some income. Prior to the marriage the appellant was not working and probably that situation remained during the short duration of the marriage. There is some evidence that the appellant spent his money on beer and nothing for the respondent. There is also evidence that the appellant was running a plantation. There is also evidence which arose out of cross-examination that the respondent is now asking for maintenance as the appellant kept taking her money. These are briefly the relevant facts as may be gathered from the notes of the evidence.

Before going further, I must say that I am faced with some difficulties on the evidence having regard to the matters the Court should take into account in deciding whether a maintenance order should be made against a husband in favour of his wife, what should be the amount of the maintenance, and what should be the periodical intervals at which the maintenance is to be paid. I will come back to those matters the Court should take into account.

The difficulties I find with the evidence are these. It is not clear whether or not the respondent was earning any income by way of wages from looking after her mother's shop, and if so, how much. It is also not clear what needs she has and to what extent she can provide for her needs. Although the appellant does not earn a regular income, it is not clear what income he earns even on an irregular basis.

The appellant spends his money on beer so that he is not completely without money. However it is not clear how much he spends on beer and whether he receives that money from his trade, the plantation he was running or from some other source. It is also not clear whether the appellant could contribute to the respondent's maintenance from the products of his plantation. No doubt these are matters which relate to the appellant's means. On the evidence available to this Court I am not in a position to draw any inferences one way or the other on the uncertainties I have pointed out. Perhaps the lower Court was certain on those matters from hearing the evidence but this Court can only proceed on the evidence as presented in the notes of evidence.

Now at the end of the hearing of the respondent's action on 7 April 1992, the Court made an interim order in favour of the respondent for \$20 a week with the first payment to be made on 14 April 1992. The case was then adjourned and on 25 August 1992 it was called again and was further adjourned to 24 November 1992 for the parties to attempt a reconciliation. The interim order still continued in force. On 24 November 1992, the case was called again and it is clear that some misunderstanding arose between counsel for the appellant and a member of the Court staff. Counsel was present awaiting this case to be called. It was a Tuesday and therefore a mention day for the Magistrates Court's civil and criminal lists. It must have been a busy day for the Court since close to 12 noon the Court was still engaged in calling its civil and criminal lists. Counsel for the appellant who was still waiting for this case was then told by a member of the Court staff to come back at 2.00pm of the same day. However this case was called at 12.30pm and the Court made a permanent order against the appellant for \$20 a week and a disobedience order that the appellant paid forthwith \$340

for arrears under the interim order in default 2 months imprisonment. When counsel returned to Court at 2.00pm he found out that a permanent order and a disobedience order had been made against the appellant. Counsel now says that he had wanted to make submissions on the maintenance question and to provide some figures to the Court before any permanent order was made. Circumstances beyond his control and not of his own making deprived him of that opportunity. He further says that he was unaware that any disobedience proceedings were to be called against the appellant as he had not been given any summons or advised of such proceedings.

The grounds of appeal are that the interim order was contrary to sections 16 and 25 of the Maintenance and Affiliation Act 1967, the permanent order was also contrary to section 16 of the Act and the spirit of the Act and was made in the absence of counsel and is against the weight of the evidence, the disobedience order was made without any knowledge of counsel about any disobedience proceedings against the appellant and that the action by the respondent is an abuse of the Court's process.

Before dealing with the arguments for the appellant, I must point out that maintenance is one area of our law where the relevant legislations call for urgent revision and updating in view of the number of maintenance cases which come before the Courts either as applications for maintenance filed in the Magistrates Court or, sometimes, as part of a petition for divorce in the Supreme Court. This is not to mention the maintenance claims the Maintenance Office has to deal with on a daily basis. Thus our maintenance laws are of real practical importance.

The two provisions relied upon by the appellant are sections 16 and 25 of the Act. Section 16(2) in particular provides:

"Unless the Magistrate is satisfied that the wife is a destitute person, no maintenance order shall be made against the husband if it is proved that he is not of sufficient ability to contribute to her maintenance."

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This particular provision is identical to section 17(4) of the Destitute Persons Act 1910 (NZ) which Act was repealed and replaced by the Domestic Proceedings Act 1968 (NZ). In fact the whole sections 16 and 17 of the Maintenance and Affiliation Act 1967 which provide for the maintenance of wives and husband appear to be based on section 17 of the Destitute Persons Act 1910 (NZ) but the Destitute Persons Act has long ceased to exist as part of New Zealand law. Section 2 of our Act then provides for the general jurisdiction of the Magistrates Court to make maintenance orders.

There is also an obvious absence from the Maintenance and Affiliation Act 1967 of any guidelines as to how the Court is to decide whether a maintenance order should be made, the amount of the maintenance to be paid under such an order, and the periodic intervals the maintenance is to be paid. Given this situation, I think that the matters the Court ought to take into account are the needs of the person who is seeking maintenance, the ability of that person to provide for his or her needs, the means of the person against whom maintenance is sought and his or her potential earning capacity, the responsibilities of the person against whom maintenance is sought including his or her responsibilities to any person he or she has a legal obligation to support and any person he or she is in fact supporting, the ability of the person seeking maintenance to increase his or her earning capacity, the duration of the marriage and the extent to which it has affected the earning capacity of the person who is seeking maintenance, and any other matter the Court considers to be relevant. If support is needed for this view, I refer to the provisions of section 27 of the Domestic Proceedings Act 1968 (NZ). No doubt the degree of relevance of these individual matters to each case will depend on the facts of the case.

Coming back to the arguments by counsel for the defendant, the gist of his first line of argument is that the respondent is not a "destitute person" as those words are defined in section 2 of the Act and therefore no maintenance order should be made against the appellant because of section 16(2). On the evidence I am satisfied that the respondent is not a destitute person. However, as already pointed out, I have difficulties with the evidence whether the appellant has sufficient ability to contribute to the respondent's maintenance. The appellant is completely not without money as he is shown to be spending money on beer. But where does that money come from? He also has a trade as a carpenter and builder as well as a plantation but it is not clear what income, if any, does he earn from his trade or from his plantation even if that income is earned on an irregular basis. The next line of argument advanced in support of the appeal is that the permanent order was against the weight of the evidence. The short answer to this argument is that the brief notes of evidence does not place this Court in a position where it can be said with the required degree of satisfaction whether that is so or not. As to the argument that the permanent order was made in the absence of the counsel who wanted to make submissions on the maintenance question but could, do so because of some misunderstanding with a member of the Court staff as to the time this case was to be called, I am of the view that argument should succeed. Likewise the appeal against the disobedience order should succeed as counsel was unaware of those proceedings and if the case had been called at 2.00pm as counsel was advised by the Court staff, he would undoubtedly have sought an adjournment to obtain full instructions from the appellant and to prepare himself.

Finally, I am not prepared to accept the argument that the respondent's action is an abuse of the Court's process as she was only using maintenance proceedings to recover the money she had spent on

the appellant. There is no doubt that the Magistrates Court has inherent power to prevent any abuse of its process. However, having regard to the evidence and to the matters the Court ought to take into account in deciding whether a maintenance order should be made, the amount of the maintenance to be paid, and the periodic intervals maintenance is to be paid, I do not think the action in this case amounts to an abuse of the Court's process.

In all I have come to the view that this appeal should be allowed and that, given all the circumstances of this case, the best course of action to take is to remit the case back to the Magistrates Court for a rehearing of the maintenance action and the disobedience proceedings.

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CHIEF JUSTICE