

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**In the matter Between:**

‘MAMANEHELLA MAPESHOANE

Plaintiff

And

SENTLE MAPESHOANE

Defendant

**JUDGEMENT**

Coram : Mr Justice T. E. Monapathi  
Date of Hearing : 16<sup>th</sup> February 2012  
Date of Judgement : 12<sup>th</sup> September 2013

**SUMMARY**

*It is not irregular for a court to order for issuing of a subpoena even if it calls for the other party in divorce proceedings or over the issue of maintenance more especially when it concerns the earnings of the party who is called. Where maintenance is decided/ordered by a magistrate and where on the other hand the prayer for maintenance is also pending before the High Court, the latter becomes res judicata.*

**CITED CASES**

***Charter Motor Holdings CC v David Bruce Fairweather (J1894/1999) [2000]***

***ZALC 101***

***Horowitz v Brock and Another 1998 (2) SA 160 (A) at 178***

## **STATUTES**

*High Court Rule 40 (1)*

## **BOOKS**

*South African Law of Evidence* 4<sup>th</sup> edition at 337

[1] The issue in this matter is whether having been granted an order for maintenance in the magistrate court, while proceedings were pending in the High Court, the Plaintiff can validly pursue another claim for maintenance in the High Court that belongs to ancillary relief.

[2] A divorce order was granted in this matter on the 14<sup>th</sup> May 2008. Custody of minor children was awarded to the Plaintiff. The other ancillary issues pertaining to maintenance and property were deferred. In the meantime the Plaintiff instituted another application for maintenance in the Magistrate Court in November 2012 under case number CC1056/12.

[3] The order of maintenance was granted in December 2012, in the amount of M400.00 per month, against the Defendant. The Defendant complied with the said order and duly paid maintenance for the months of December 2012 and January 2013 and would readily continue doing so.

[4] The Plaintiff then came to the High Court to pursue the outstanding ancillary relief, that of maintenance included. The Defendant took a point that the issue of maintenance was *res judicata*. It is noteworthy further that the Plaintiff had issued a *subpoena* calling the Defendant before court. The Defendant is also challenging that *subpoena* as an irregular step. The Defendant does so while well aware that it is the court that made the order for that *subpoena* to be issued. The rationale behind that step was that the court was aware or wanted to avoid an oppressive order for maintenance being issued against the Defendant. If information about Defendant's earnings was not disclosed. That inquiring about what the Defendant earned in order sought was to enable the court to fix the amount of maintenance.

[5] On the issue of *subpoena*, the Defendant's Counsel argued that to issue a *subpoena* to another litigant in the same proceedings is not allowed in law. That the Defendant cannot be the Plaintiff's witness, that is, the Plaintiff cannot *subpoena* the Defendant to testify for the same Plaintiff in the same proceedings. Further that a husband cannot *subpoena* his wife to testify for him in the same proceedings where they were adversaries. The Counsel for the Defendant maintained that even if the Defendant was *subpoenaed* as per the Court's direction, that would still be an irregularity. I do not agree. I have already explained that this was a court order for a specific purpose.

[6] Counsel for the Plaintiff contended on the other hand that an opposite party in civil proceedings is a compellable and competent witness. That there is no principle of law in civil proceedings barring an opposite party to come and testify. He felt that **Rule 40 (1)** of the **High Court Rules** does not bar the calling of an

opponent. He further contends that there would be no prejudice to the Defendant when he is called to testify on how much he earns for purposes of determining the appropriate quantum of maintenance. Further that it was by order of court that the Defendant was subpoenaed and that was done in the best interest of the minor children. I agreed with respect.

[7] The court is inclined, I repeat, to agree with the Plaintiff on this point that indeed since this is a matrimonial matter involving the issue of maintenance of the minor children, the calling of the Defendant was consequently not irregular on any principle.

[8] On the issue of *res judicata*, the Plaintiff's Counsel agree that the order of maintenance was granted by the Magistrate but argued that such an order was only granted *pendente lite*. He contended further that if the point of *res judicata* was raised as a special plea, they would call evidence to show that the order was granted *pendent lite*. He is challenging the fact that the point of *res judicata* had been raised just like an ordinary point of law by the Plaintiff, though ought to have been raised as a special plea. In short the challenge is that the point was not properly raised. The claim here is that the objection based on *res judicata* does not appear *ex facie* the declaration and must therefore be specifically pleaded and be supported by evidence so that the Plaintiff could replicate thereto.

[9] The Defendant maintains that the objection of *re judicata* was properly raised in terms of **Rule 32 (7) and 32 (8)** of the **High Court Rules**. The Defendant

claims that if the court can find it fit to order the leading of evidence that could be done. However, both parties could not come out clear as to whether as a matter of fact, may be as borne out by the record, the order of maintenance made by the Magistrate was made *pendent lite* or not.

[10] The court had to satisfy itself before making a ruling on the objection of *res judicata* by perusing the record in the said CC1056/2012. The allegation that the maintenance order made by the magistrate in CC1056/2012 was made *pendente lite* is not borne out by the record in that matter nor is any indication to that effect. It reads:

“On the 15<sup>th</sup> December 2012 Defendant is ordered to pay maintenance on the amount of M400.00 per month starting from month end December 2012.”

[11] The above quoted order appears a final order. The requirements of the special plea for *re judicata* were succinctly captured by Molahlehi AJ quoting *South African Law of Evidence* Hoffman and Zeffert, in *A.B. Charter Motor Holdings CC v David Bruce Fairweather (J1894/1999) [2000] ZALC 101*:

“The requisites for the exception *res judicata* are stated by Hoffman and Zeffert the *South African Law of Evidence* 4<sup>th</sup> edition at 337 as follows: ... that a prior final judgement had been given in proceedings involving (a) the same subject matter, or, put in another way, if the cause of action has been finally litigated in the past by the parties, a later attempt by one of them to

proceed against the other on the same cause, for the same relief, can be met by the exception *res judicata*.”

[12] It appears that this issue of maintenance meets all the above mentioned requirements. The matter had been adjudicated upon between the same parties on the same cause and the same thing (maintenance) is being claimed before this court. See *Horowitz v Brock and Another 1998 (2) SA 160 (A) at 178*. As Molahlehi AJ put it in *A.B Charter Motor Holdings C.C. (supra)*:

“It would be both improper and contrary to public policy for me to go behind the said order and determine its validity”.

[13] The logic behind the above statement is unassailable and I agree with it. The exception of *res judicata* is therefore upheld in relation to the issue of maintenance. The ancillary issue relating to property still remain, only the issue of maintenance was challenged.

[14] It appeared however, that the Defendant’s notice to raise points of law lacked a prayer and that was challenged by the Plaintiff. Mr. Thulo conceded however that in the interest of justice that was condonable. Mrs. Lephatsa asked for condonation and it was granted.

[15] The order I make is that:

- a) Objection of *res judicata* is upheld. Point relating to the issue or propriety of calling of the Defendant to testify is dismissed;
- b). No order as to costs.

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**T. E. MONAPATHI**  
**ACTING CHIEF JUSTICE**

For Plaintiff : Mr. Thulo  
For Defendant : Mrs. Lephatsa