



**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Reportable:	YES/NO
Of Interest to other Judges:	YES/NO
Circulate to Magistrates:	YES/NO

Case number: 3876/2016

In the matter between:

V. V. M.

Applicant

and

P. M.

Respondent

HEARD ON: 13 OCTOBER 2016

JUDGMENT BY: GELA, AJ

DELIVERED ON: 20 OCTOBER 2016

[1] This is a Rule 43 application brought by the applicant against her husband, the respondent, for an order in the following terms:

1. Maintenance for the applicant in the sum of R3000.00, and R3000.00 for each child per month *pendent lite*.
2. A contribution towards the applicant's legal costs in the amount of R5000.00.
3. That the respondent be ordered to give to the applicant one of the parties motor vehicles, namely, NISSAN ALMERA with registration numbers [B...].
4. Costs to be costs in the cause.

[2] The parties are no longer staying together as man and wife, the applicant having left the common home during December 2013. She has since instituted an action for divorce which is pending in this court. She says that the marriage relationship between herself and the respondent has broken down irretrievably and there is no reasonable prospects of a normal marriage relationship between them.

[3] The parties were married in community of property on the 27 April 2006. Three children were born out of this marriage and all three children are still minors. These children are currently staying with the applicant.

[4] The basis of the claim for maintenance *pendent lite* is that though the applicant is employed her income is not enough to support herself and the three minor children. She has submitted a statement of her monthly financial requirements totalling R3102-70. She wants the respondent to contribute an amount of R3000-00 for herself and R3000-00 per month for each child.

- [5] She is also claiming a contribution towards the costs of her divorce action in the amount of R5000-00. Furthermore, that the respondent hands over to her one of their vehicles (Nissan Almera [B...]) for use by her and the children.
- [6] The respondent is opposing the application on the following grounds:
1. He denies that the applicant's monthly expenses are true and correct, further stating that they are inflated and unrealistic.
 2. He also states that his monthly expenses are exceeding his monthly income with a deficit of R880-43 per month.
 3. He has no knowledge of the Capitec Bank loan, the African bank loan and the African Bank credit card alleged by the applicant and he denies that these loans were taken up by the applicant while they were staying together in Upington.
 4. He alleges that when the applicant left the communal home in December 2013, it was out of her own accord and she left the respondent with all the debts they incurred while they were still staying together.
 5. He further alleges that the Nissan Almera motor vehicle has serious mechanical defects which will cost approximately R30 000-00 to repair which is more than its current market value.
- [7] When the matter was called, the respondent's counsel, on a point in *limine*, submitted that the Court had no jurisdiction to consider the issue of maintenance for the minor children, in the light of the order made by the maintenance court. I was referred to **Rabie v Rabie** 1992 (2) SA (W) where an order against the respondent

made by the maintenance court for the payment of maintenance for the children was still existing.

- [8] In the Rabie case it was contended on behalf of the applicant that the cases which had held that the court had no jurisdiction where there was a maintenance order in existence had dealt with a post-divorce situation and were therefore distinguishable.
- [9] The Court held, that the principle had a general application and was not to be confined to a post-divorce situation. It was held further, that there were no exceptional circumstances justifying the court supplementing the order of the maintenance court. It was held, accordingly, that the court had no jurisdiction to deal with the question of maintenance for the three minor children.
- [10] The position in the matter before me is the same as in the Rabie case (*supra*) in that there is an existing order against the respondent, made by the maintenance court in terms of which the respondent was ordered to pay an amount of R2040,00 per month towards the maintenance of the three minor children.
- [11] It was contended on behalf of the applicant that the same Rabie case did not shut the doors for cases where exceptional circumstances existed justifying the court to entertain this aspect.
- [12] The existence or non-existence of exceptional circumstances is still a matter to be determined by this court.

[13] In Joseph v Joseph 1958 (4) SA 268 (SR) the court stated at 199:

“the ordinary rule of law is that an order made by a court can (except by way of appeal or review in a higher court) not be varied except by the court itself; and in maintenance cases where there is a change of circumstances the court which made the original order must be approached for variation.”

Later, at 199H the court said the following:

“If, however, it be regarded not as a variation of the original order co-existing with it, it is equally open to objection. The principle *nemo debet bis vexari pro una et eadem causa* is fundamental in our law and is infact the basis of the rule as to the finality of judgments ... The existence of judgments by two different courts each dealing with the same subject and mutually inconsistent clearly infringes the principles.”

[14] I have not found any exceptional circumstances in the current matter. In my view, the exceptional circumstances referred to by the applicant’s counsel have no application here. It follows therefore, that I have no jurisdiction to deal with the maintenance of the three minor children.

[15] I am however able to deal with the other matters provided for in this application which were not dealt with in the maintenance court or any other competent court, including maintenance of the applicant.

[16] I have considered counsel's argument and the papers before me and the following order is made:

That *pendent lite*, the respondent shall

1. Pay an amount of R2000-00 per month as maintenance for the applicant,
2. The applicant's claim for maintenance of the three minor children is dismissed,
3. The maintenance order granted by the maintenance court in the amount of R2040.00 in respect of the three minor children to remain in existence,
4. Respondent is further ordered to make contribution towards the applicant's legal costs in the amount of R5000-00, payable at the rate of R1000-00 per month.
5. All payments are to commence in December 2016 and payment is to be made on or before the 7th of each month.
6. Respondent is further ordered to hand over to the applicant one of the parties motor vehicles, namely Nissan Almera with registration numbers [B...].
7. Costs herein shall be costs in the cause.

N. GELA, AJ

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