IN THE HIGH COURT OF LESOTHO

In the matter between

LERATA TŠIU **Plaintiff**

and

LESOTHO NATIONAL GENERAL INSURANCE COMPANY LIMITED **Defendant**

JUDGMENT

Delivered by the Honourable Mr. Justice M.M. Ramodibedi
on the 6th day of **March 2001**

The point of dispute in this case is a short one revolving around the principle of joinder of parties and the duty of the High Court as upper guardian of the minor children within its jurisdiction. But first the salient facts of the case.

On the 1st June 1994 a certain Liteboho Tšiu (hereinafter referred to as the deceased) was allegedly killed in a motor vehicle accident leaving behind his wife 'Mapelaelo and his minor child Pelaelo, a girl born in 1992. Pursuant thereto the Applicant/Plaintiff who is the deceased's father issued summons in the instant matter in his representative capacity "as the father-in-law and guardian of 'Mapelaelo Tšiu and Pelaelo Tšiu" claiming the sum of M73,000.00 damages for the deceased's death. The summons was issued on the 12th March 1997 and apparently served on the Defendant on the 15th April 1997.

The Defendant filed two special pleas as well as a plea on the merits. The first special plea raised prescription it being alleged that as the summons was not served upon the Defendant within the period of two years from the date upon which the claim arose and as required by Section 12 read with Section 10 of the Motor Vehicle Insurance Order, 26 of 1989 as amended the Plaintiff's claim had become prescribed.

The second special plea attacked the *locus standi* of the Plaintiff to act on behalf of either 'Mapelaelo or Pelaelo. Indeed it was further averred in the special plea that the Plaintiff has not been appointed by a competent court of law as the legal guardian of the minor child Pelaelo.

I interpose at this stage to mention that although the special pleas in question were apparently served and filed in July 1997 the Plaintiff only filed the present application for joinder of 'Mapelaelo two full years later namely on the 16th September 1999. I shall revert to this aspect in due course.

In his Notice of Motion for joinder the Applicant/Plaintiff seeks an order in the following terms:-

"1. 'MAPELAELO TŠIU be joined in these proceedings as a co-plaintiff;

2. LERATA TŠIU be appointed co-guardian putatively of the minor child PELAELO TŠIU for purposes of the proceedings in the main action herein;

3. All acts and procedural steps taken by LERATA TŠIU on behalf of 'MAPELAELO TŠIU and PELAELO TŠIU in the main action

be ratified and confirmed retroactively and be deemed to have been duly taken by him in his representative capacity as a co-guardian.

4. Defendant be ordered to pay the costs hereof in the event of opposing this application, otherwise the costs hereof be costs in the course (sic);

5. Granting Plaintiff (Applicant) herein further and/or alternative relief."

It is convenient, I think to start with prayer 2 for essentially the Applicant must in the particular circumstances of this case, face the firing line first as the Plaintiff in the matter. The real question for determination is whether he has *locus standi* in the matter; conversely whether he has a direct and substantial or legally enforceable interest in the matter. I should add that if a litigant satisfies this requirement the court has inherent or common law jurisdiction in respect of joinder of parties even *mero motu*. Authorities in this respect are legion.

See for example Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 AD.

S.A. Steel Equipment Co. (Pty) Ltd. and Others v Lurelk (Pty) Ltd. 1951 (4) SA 167 (TPD) at 172.

Nor do I think that Rule 10(1) of the High Court Rules 1980 on joinder of parties introduces any departure from the common law principle set out above. That Rule reads as follows:-

"10. (1) Any number of persons, each of whom has a claim whether jointly, and severally, separately or in the alternative, may join as plaintiffs in one action against the same defendant or defendants against whom any one or more of such persons proposing to join as plaintiffs would, if he brought a separate action, be entitled to bring such action, provided that the right to relief of the persons proposing to join as plaintiff, depends upon the determination of substantially the same question of law or fact which, if separate actions were instituted, would arise in each action, provided further that there may be a joinder conditionally upon the claim of any other plaintiff failing " (emphasis added).

In my view the word "claim" used in the Rule must obviously mean "legally enforceable claim." I am reinforced in this view by the subsequent words used in the Rule namely .... "be entitled to bring such action." The purpose of the Rule is no doubt to obviate a multiplicity of actions and to avoid unnecessary costs as a result of abortive actions brought by people who have no *locus standi in judicio.*

Now, as I see it, it is not disputed that the Applicant/Plaintiff is not the legal guardian of the minor child Pelaelo and in fact it is precisely for this reason that he is applying to Court to be appointed one. This notwithstanding the fact that it is common cause that the minor child has her own legal guardian namely 'Mapelaelo. There is no evidence that the Applicant/Plaintiff has been appointed by the deceased's family as legal guardian of the child at all and it follows, in my view, that he has failed to show that he is entitled to sue in that capacity and that he has a direct and substantial interest capable of legal enforcement in the matter. Accordingly the application contained in this prayer falls to be dismissed.

In fairness to Mr. Tšenoli for the Applicant/Plaintiff he very fairly and properly conceded that the Applicant/Plaintiff has failed to show that he has *locus standi* in the matter.

Although the Applicant/Plaintiff has no *locus standi* to be appointed guardian of the minor child in question the application for joinder of the child's natural mother 'Mapelaelo who is its natural guardian after the death of her husband the deceased stands on a somewhat different footing. This is so mainly because of two considerations namely:

(1) 'Mapelaelo is the deceased's wife as well as the minor child's natural mother and legal guardian. I find therefore that she has a direct and substantial interest capable of legal enforcement in the matter.

(2) As upper guardian of all minor children within its jurisdiction this Court has a duty to safeguard the interests of the minor child in question in the instant litigation.

I am mainly attracted by the following remarks of Claassen J. in the case of Yu Kwan v President Insurance Co Ltd 1963 (1) SA 66(T) at 69 (confirmed in President Insurance Co Ltd. v Yu Kwan 1963 (3) SA 766 AD):

> "Where an action has been taken on behalf of a minor without the necessary application to Court, the Court will ratify such a step *ex post facto*, if the step had been to the benefit of the minor and would probably have been approved by the Court in the first instance."

Continuing in the same vein the learned judge states the following at p 70:-

"The Court being the upper guardian of the minor in this case can step in and ratify *nunc pro tunc* what has been done on behalf of the minor by a person who *bona fide*, but mistakenly believed himself to be the natural guardian of the minor."

I respectfully agree.

It remains in this regard then to investigate the matter and consider two issues firstly whether the Applicant/Plaintiff *bona fide*, albeit mistakenly, believed himself to be the natural guardian of the minor child and secondly whether his action for damages is in the best interest of the minor.

Regarding the first issue raised above it will be recalled that the Applicant/Plaintiff issued summons for damages not on his own behalf but in a representative capacity. It seems to me therefore that he did not seek any personal interest as such. On the contrary he crisply states the following in paragraphs 4 and 5 of his founding affidavit:-

"4.

In the summons I described myself as the guardian of deceased's dependants, namely his wife and minor child. This was done in good faith as I indeed became their factual guardian as even under customary law I am deemed their father.

5.

In view of the role I have played in the matter in pushing the said deceased's dependants' claim through the Court, and their factual dependency on me it would be in the interests of the said minor child that its natural mother be joined in as a co-plaintiff and I also be appointed co-

guardian of the said minor child for purposes of winding up the litigation on its behalf. I respectfully aver that, no prejudice will be occasioned to Defendant."

In paragraph 5 of his opposing affidavit Roland Frederick John Castle in effect makes a bare denial to Applicant/Plaintiff's averment that he acted in good faith in instituting the action in his name. The deponent relies on the fact that the Applicant/Plaintiff was represented by attorneys at all relevant times and accordingly alleges that "they (the attorneys) would have informed him (the Applicant/Plaintiff) in all probabilities that he was neither the natural nor the legal guardian of either of the dependants and that no valid action could be instituted."

It seems to me that Roland Frederick John Castle's averment quoted above is speculative and that no reliance can be made on it in the face of the Applicant/Plaintiff's unchallenged version that under customary law he is "deemed" the father of both 'Mapelaelo and the minor child in question. It is not necessary to express any view on the legal validity of this view but what is important is that it sets out the Applicant/Plaintiff's subjective state of mind towards good faith. This is further borne out by the unchallenged fact which I accordingly accept on the authority of Plascon-Evans Paints v Van Riebeeck Paints (Pty) Ltd. 1984 (3) SA 623 AD that both 'Mapelaelo and the minor child are factually Applicant/Plaintiff's dependants and that he has been responsible for pushing their claim through the court. It is difficult to imagine why he would take all this trouble unless he *bona fide* regarded himself as their guardian, albeit mistakenly. I come to the conclusion on the probabilities therefore that the Applicant/Plaintiff *bona fide*, albeit mistakenly, believed himself to be the natural guardian of the minor child.

Regarding the second issue as to whether Applicant/Plaintiff's action for damages is in the best interests of the minor child I would have thought that this was obvious enough. Moreover this is not disputed as even the summons was issued on behalf of the minor child. It follows therefore that the action for damages is in the best interests of the minor child. Nothing more need be said on the issue.

It follows from the aforegoing that this is a fit case in my view where the Court must step in, in the best interests of the minor child and ratify *nunc pro tunc* what the Applicant/Plaintiff has *bona fide*, albeit mistakenly, done on its behalf. There can be no real prejudice and none was shown to exist.

It should be borne in mind that joinder of parties is a matter within the discretion of the Court. See Waikiwi Shipping Co. v Thomas Barlow & Sons 1978 (1) SA 671 AD at 678. That however is not to say that the Court must exercise its discretion arbitrarily or for a wrong purpose. Although the Applicant/Plaintiff is strictly speaking non-suited I have considered the best interests of the minor child in the matter as being one of the decisive factors. I have also considered the fact that 'Mapelaelo is indisputably the natural guardian of the minor child after the death of her deceased husband. Moreover I have taken into account the fact that she has actually filed an affidavit in support of her own joinder in which she confirms that following the death of her deceased husband she and Pelaelo became dependants of the Applicant/Plaintiff in respect of support and maintenance. Significantly this is in fact admitted. She further confirms that Applicant/Plaintiff's action for damages was made on behalf of the minor child and herself and that it would be in the interest of the minor child that she should be joined as a co-plaintiff in the matter.

Furthermore I consider that it would be convenient to order joinder of 'Mapelaelo now rather than dismiss the application and suffer her to institute fresh summons thus adding more costs and delay to the prejudice of the minor child in particular.

Prescription

The Defendant's opposition to the application for joinder, as I see it, is predicated upon the perceived fear that such joinder would rob the Defendant of a special plea of prescription and hence it would be prejudicial to it. I cannot accept this argument mainly for the reason that prescription does not run against a minor.
See Commercial Union v Makhabane Letsie 1997-98 LLR and Legal Bulletin 339.

It follows from the aforegoing therefore that the application for joinder of 'Mapelaelo as a co-plaintiff must succeed. It seems to me that it would be premature at this stage to determine prescription in so far as it affects her in her personal claim. That issue would first have to be pleaded and canvassed in the normal way before an informed and proper determination can be made on it.

Costs

The final matter remains to be dealt with namely costs. The general rule is that costs follow the event. However, as is obvious in this case, the Applicant/Plaintiff has enjoyed both success and failure in this application. All things being considered I have mainly been influenced by the following factors:

(1) The Applicant/Plaintiff's application for joinder in the particular circumstances of this case is in the nature of an indulgence and as such I consider that it would be fair and just to saddle him with costs. Conversely it would not be fair and just to saddle the Defendant with costs in these circumstances.

(2) As previously stated the Applicant/Plaintiff delayed by a period of more than two years to bring the application to court after he had been challenged on *locus standi.* This has delayed finality in the matter and I consider that the court must mark its displeasure by an appropriate order as to costs.

(3) The Applicant/Plaintiff has failed in his attempt to be appointed co-guardian of the minor child in terms of prayer 2 of the Notice of Motion.

It follows from the aforegoing that the Applicant/Plaintiff must pay costs.

In sum, there shall be an order as follows:

(1) 'Mapelaelo Tšiu is hereby joined in these proceedings as a co-plaintiff.

(2) The application of Lerata Tšiu to be appointed co-guardian of the minor child Pelaelo Tšiu is dismissed.

(3) All acts and procedural steps taken by Lerata Tšiu on behalf

of 'Mapelaelo Tšiu in the main action are hereby ratified and confirmed retroactively and are deemed to have been duly taken by him in his representative capacity.

(4) The Applicant/Plaintiff must pay the costs of the application.

M.M. Ramodibedi
JUDGE
6th day of March 2001

For Applicant/Plaintiff : Mr. Tšenoli

For Respondent/Defendant: Mr. Grundlingh