CIV/T/427/2009

IN THE HIGH COURT OF LESOTHO

In the matter Between:-

KHOPOLO KOPANO	**PLAINTIFF**
AND	
NCHELA MOTEMEKOANE	**1ST DEFENDANT**
MAKOA NKHASI	**2ND DEFENDANT**

JUDGMENT

Coram	**: Hon. Nomngcongo J.**
Date of hearing	**: 25th April 2012**
Date of Judgement	**: 25th February, 2013**

[1] The plaintiff claims damages against the first and second defendants occasioned by a collision between his and the first defendant's motor vehicles. The first defendant's vehicle he alleges was driven by the second defendant in the course of and within the scope and authority of his employment with him. The plaintiffs alleges negligence on the part of the second defendant in one or all of several respects which as will be seen is not necessary to set out.

[2] The second defendant did not enter any appearance to defend and has not taken any part in the proceedings. The first defendant enters an appearance to defend and duly pleaded to the declaration. He pleads that the second defendant "*took the said lorry for his own interest and purposes and the conditions of his employment did not allow him to drive the lorry on the public roads but only to drive at the point of loading and unloading of the lorry. Defendant and loads the crusher but the 2nd defendant out of his own violation took it during the first defendant's absence for the reasons better by him. Further that the second defendant was told by the other employees that the breaking system of that lorry was not working*"

[3] The averment that the 2nd defendant was negligent in one or more of five respects is simply noted. So also is the averment that as the result of the collision plaintiffs vehicle was damaged beyond repair and that plaintiff suffered damages in the sum of R50,000 being the pre-collusion value of the vehicle and a further R25,000 for shock, pain and suffering. With respect to the damages they are noted and the plaintiff is put to the proof thereof.

[4] Now in terms of Rule 22 (3) a defendant shall in his plea, admit or deny or confess and avoid all material facts alleged in the declaration or state which

of the said facts are not admitted and to what extent. He must also clearly and concisely state all material facts he relies on.

[5] Rule 22 (4) goes on to say that every allegation of fact in the declaration which is not stated in the plea to be denied, or to be not admitted, shall be deemed to be admitted. If any explanation or qualification of any denial is necessary it should be stated in the plea.

[6] We know what the 1st defendant denies or does not admit and it is that the 2nd defendant was acting in the course of or within the scope or authority of his employment with him. The rest is simply noted. To note and to deny or not admit do not denote the same thing. A denial or non-admission is unequivocal whereas a mere noting is colourless and does not tell a plaintiff the attitude of the defendant in clear terms. Pleadings are meant to define issues between litigants and it is not permissible to leave another in doubt as to the exact nature of another's plea (*see SHULTZ V NEL, 1947 (2) S.A 1060 at 1066*).

[7] The defendant has in his plea admitted that the 2nd defendant was his employee, that by not denying it he drove his (1st defendant vehicle) negligently and that as a result thereof plaintiff suffered damages in the

sums claimed. As minutes signed by counsel for both parties record as follows:-

"ADMISSION OF FACTS AND DOCUMENTS

(a) Quantum of damages is not disputed.

(b) There are one further admissions of fact and documents save (sic) those mentioned in the pleadings".

[8] There is therefore a very narrow issue left for determination and that is whether the 2nd defendant had the 1st defendant's authority to drive the vehicle stand therefore whether he was acting within the scope of his employment. The answer to that is conclusive of the matter. I considered that in the circumstances that at the least the evidentiary burden, if not the burden of proof in the true sense rested upon the defendant as his defence constituted a special plea. See **Pillay v Krishua and Another 1946 A.D.946; Ootler v Variety Travel (Pty) Ltd 1974 (3) 621 at 629 A-D.** The duty to start was then upon the defendant. He gave evidence which was essentially a reproduction of his plea. He sought to introduce in the first place the evidence of one of his employees Counsel for plaintiff objected to this on the grounds that she had not been furnished with the statement of the

witness as required by the rules. The objection was upheld and counsel for defendant did not attempt to seek condonation of the non-compliance and chose to lead only the defendant and closed his case.

[9] Defendant's evidence is the effect that he was away in Gauteng when the collision occurred and he learnt of it from reports. The 2nd defendant from what he learned of the reports had, during the lunch time sneaked into the office, taken the keys and made off with his own when he met the accident against the express conditions of his probationary service that he use it to load and unload only in the brickyard. The vehicle was then driven to Morija it emerged, where it is the place where the 1st defendant ordinarily gets his brick making material. Where the collision occurred it was on its way back laden with the said material. With these facts anyone is entitled to conclude that the 2nd defendant was about his master's business and with his authority. 1st defendant however says he was not. In explanation of this defence he also goes on to say significantly that the 2nd defendant has been told by fellow employees before he set out from Morija that the brakes of the lorry were defective. Now first, this puts the lie to the assertion that he took the lorry furtively. Secondly it is significant that he was only a probationary driver confined to drive only in the brickyard. The

latter fact also seems to me quite problematic in itself although it was not inquired into. Why would first defendant pay the 2nd defendant, presumably a qualified and licenced driver for a merry-go-round inside a brick yard? What would he be loading and unloading anyway?

[10] I can only conclude from these facts that the 2nd defendant was employed to drive 1st defendant's vehicle in the ordinary course of business which includes driving on public roads. As a new employee he most probably was warned before setting out to Morija to collect brick laying material, that the lorry he was using had defective brakes. He nevertheless negligently took his chances resulting in the accident. When he did so it was under the general authority of the 1st defendant as his employee.

[11] Judgment is entered for the plaintiff in the undisputed amounts with costs and I may even point out that the sum claimed for pain and suffering seems to me on the modest side considering the time spent in hospitals according to plaintiff's evidence.

T. NOMNGCONGO

JUDGE

For Plaintiff : Ms N.Nku

For Defendant : Mr K. Metsing