

# IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

**CIV/T/201/04**

In the matter between:-

**LEJONE LEBABO**

**PLAINTIFF/APPLICANT**

**AND**

**PEP STORES (PTY) LTD**

**1<sup>ST</sup>DEFENDANT/1<sup>ST</sup> RESPONDENT**

**FAROOK ISSA**

**2<sup>ND</sup>DEFENDANT/2<sup>ND</sup>RESPONDENT**

## **RULING**

**Coram** : Hon. Mahase J.  
**Date of hearing** : 10<sup>th</sup> November 2008  
**Date of Judgment** : 26<sup>th</sup> February 2015

### *Summary*

*Civil Procedure – Main trial – Damages for severe injury caused as a result of defendant’s negligence – Application of Joinder of second defendant after close of pleadings in main action been filed- Special power of Attorney and return of service having not been filed on behalf of second defendant – Lack of mandate for Attorney to act on behalf of second defendant.*

ANNOTATIONS

CITED CASES:

- **Amalgamated Engineering Union v. Minister of Labour 1949(3) S.A. 637(A)**
- **Property Enterprises (PTY) LTD v. Schindler Lifts 1953 (4) S.A 637(A)**
- **Kethel v. Kethel Estate 1949 (3) S.A 598**
- **Home Sites (PTY) v. Senekal 1948(3) 514**

- **Fakroodeen v. Fakroodeen & Others 1971 (3) S.A 395**
- **Crowden Products (PTY) LTD v. Graswell (PTY) LTD & Another 1959 S.A. 231**
- **Associated Manganese Mines of S.A. LTD v. Claassens 1954(3) S.A. 768**
- **Barris farming (PTY) LTD v. Schmidt and Another 1978 (4) S.A 158**
- **Pepper v. Lipschitz and Another 1956(1) S.A. 423**
- **Marais Others v. Pongola Sugar Milling Co LTD and Others 1961 (2) S.A 698**
- **Crowden Products v. Gradwell 1956(1) S.A. 231**

STATUTES:

- **High Court Rules (Legal Notice) No. 9 of 1980**

BOOKS:

- **Herbstein and Van Winsen – The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> edition, page 165.**

[1] The plaintiff instituted an action for damages against the defendant in total sum of M52,534.50. The breakdown of same is as follows:

- M50,000.00 for pain and suffering
- M 2,534.50 for medical expenses

Summons were filed in this Court on the 11<sup>th</sup> May 2005. However, on the 2<sup>nd</sup> November 2006, the plaintiff filed on application for joinder of one Farook Issa. This was so filed after pleadings in the main action had been closed.

[2] The said damages are as a result of severe bodily injuries which the plaintiff/applicant sustained when he fell into a ditch which had allegedly been dug and left unattended at the building/complex from which the defendant/1<sup>st</sup> respondent – Pep Store operated its business.

- [3] That ditch is in front of the 1<sup>st</sup> defendant's /1<sup>st</sup> respondent's store and the plaintiff/applicant alleges that he had at all material times hereto, been under the impression that the ditch had been dg by the 1<sup>st</sup> defendant/1<sup>st</sup> respondent.
- [4] However, having been served with the witnesses' statement filed of record, it became clear that the 2<sup>nd</sup> defendant/2<sup>nd</sup> respondent being the Landlord of plaintiff has a direct and substantial interest in the said matter because it is alleged that it was the 2<sup>nd</sup> defendant who was the Landlord of the 1<sup>st</sup> defendant and that it was the 2<sup>nd</sup> defendant in his capacity as a landlord who had engaged services of the building so as to make appropriate stairs for customers going/ coming to the said premises.
- [5] In other words, the 1<sup>st</sup> defendant firstly demies that it was it which had engaged contractors who left that ditch open, unprotected and without displaying any visible signs to warn members of the public that there was a ditch. Secondly it denies that it had any say in the matter and the construction workers who were solely under the control of the landlord and were the landlord's agents.
- [6] The application for joinder of the 2<sup>nd</sup> defendant, Mr. Farook Issa, as an interested party in the main case is opposed by the 1<sup>st</sup> defendant/1<sup>st</sup> respondent even though the 1<sup>st</sup> defendant specifically denies digging that ditch/put as alleged or at all.
- [7] Both the plaintiff and first defendant/first respondent have duly filed special Powers of Attorney authorizing nominating their respective counsel to

represent and r to act on their behalf in prosecuting and defending this action. No such special Power of Attorney has been filed by the second defendant/ second respondent authorizing and or nominating any counsel to defend, in its behalf, this application for joinder nor, to defend the main action on its behalf.

[8] The basis and or the authority upon which counsel for the first defendant purports to oppose this application of joinder of the second defendant is therefore not clear. It has no clear mandate to act for and or on behalf of the second defendant/second respondent.

[9] There is, further, nothing in the minutes of a meeting of the Board of Directors of Pep Stores (PTY) LTD filed of record, dated the 1<sup>st</sup> April 2004; in which counsel for the first defendant (Pep stores) has resolved that the company should act for and or request the second defendant. Pep Store (PTY) LTD, has therefore never resolved to also defend this action on behalf of the second defendant.

[10] There is also no return of service filed of record indicating and confirming that the second with any court process in relation to this application and the summons in the main action.

[11] There is further no notices filed on behalf of the 2<sup>nd</sup> defendant/2<sup>nd</sup> respondent indicating whether or not he intends to oppose the application and or to defend the main action. This is a clear indication that the 2<sup>nd</sup> defendant may not at all be aware of the proceedings in question. This is particularly so because of the absence of the above documents which are the only lawfully

recognized documents to proof service and to indicate that a litigant is aware of process issued against it.

[12] In the premises, and until such time that proper service and notification upon the 2<sup>nd</sup> defendant about the court process herein has been effected this court is not in a position to make any final determination upon the application of joinder of the 2<sup>nd</sup> defendant. In the premises, counsel for the plaintiff/applicant is ordered to cause and ensure that the 2<sup>nd</sup> defendant is duly serviced with Court process herein; and that proper return of service to that process is duly filed. This is so as to enable to give the second defendant a chance to be heard and to brief counsel of his choice to represent him if so desired. For these reasons, absolution from the instance is granted. Costs are granted to the plaintiff.

**M. Mahase**

**Judge**

For Plaintiff/Applicant - Adv. Phafane K.C  
For First Defendant/First Respondent - Webber Newdigate Co.  
For Second Defendant/Second Respondent No appearance