

IN THE HIGH COURT OF LESOTHO

In the matter of :

OMNIA FERTILIZER LTD

VS

M.A. ABUBAKER

J U D G M E N T

Delivered by the Honourable Acting Chief Justice Mr.
Justice J.L. Kheola on the 10th day of November, 1986

This is an exception by the defendant to the plaintiff's declaration, as amplified by further particulars on the ground that the summons and declaration, as amplified, are vague and embarrassing in that in the summons and declaration the claim is for the balance on the goods sold and delivered while in the further particulars the claim is for the overpayment of a credit to the defendant.

The plaintiff claims that the exception is made out of time and should be dismissed with costs because at the time the exception was taken the defendant had already been served with a Notice to file a plea in terms of Rule 26 (2) of the High Court Rules 1980.

The summons was served on the defendant on the 18th February, 1986. A declaration was served on the defendant on the 25th April,

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1986 and the defendant filed a request for further particulars on the 14th May, 1986. Further particulars were served by the plaintiff on the defendant's attorneys on the 15th August, 1986. The notice to file plea was served on the defendant's attorneys on the 24th September, 1986. Instead of filing the plea the defendant's attorneys filed a notice of exception on the 26th September, 1986.

The facts of this case are almost identical with those in the case of Petrose Ramollo v. Charlie Goetsch, CIV/APN/45/85 (unreported) in which I interpreted Rule 26 of the High Court Rules 1980. The Notice to File Plea was made in terms of Rule 26 (2) and subrule (3) of Rule 26 reads as follows:

"Any party failing to deliver the pleading referred to in the notice within the time required, or within such further period as may be agreed upon between the parties, shall be automatically barred from delivering such pleading." (My underlining).

In Petrose Ramollo's case - supra - I held that when a Notice to File Plea is served upon the defendant he cannot file any other pleading except the pleading referred to in the notice. I still maintain that that is the correct interpretation and meaning of subrule (3) ^{of Rule} 26. The notice of exception filed by the defendant in the present case was, without any doubt, an irregular proceeding/pleading because it is out of time.

The last day on which the defendant ought to have taken the exception is within twenty-one (21) days after he was served with further particulars. Having been served with the further particulars on the 15th August, 1986 the last day was the 10th September, 1986.

Mr. Sooknanan, for the defendant, argued that a special barring procedure had to be adopted by the plaintiff i.e. Notice of Intention to Bar had to be served upon the defendant. The plaintiff, however,

sought to bar defendant from pleading if defendant did not supply the plaintiff with the plea within three days of the service of notice to file plea". He further submitted that, in the same breath, it cannot be said that the defendant is barred from excepting.

I totally disagree with this submission inasmuch as the exception is governed by Rule 29 (1) (a) which clearly indicates that it must be made within 21 days after receipt of further particulars. Regarding the "special barring procedure" referred to by Mr. Sooknanan, I am not aware of such procedure and I doubt if the Rules provide for it. The plaintiff is applying that the exception be set aside under Rule 30 (1) which provides for a procedure where a party to any cause takes an irregular or improper proceeding or improper step.

The exception is dismissed with costs.

The defendant must file his plea within fourteen (14) days or must apply for the removal of the bar in terms of Rule 26 (4) of the High Court Rules 1980.

J.L. KHEOLA
ACTING CHIEF JUSTICE.

10th November, 1986.

For Plaintiff - Mr. Koornhoff
For Defendant - Mr. Sooknanan