

**IN THE HIGH COURT OF LESOTHO**  
**(Commercial Court Division)**

**HELD AT MASERU**

**CCT/0025/2021**

In the matter between:

**DEBCAS CATERING SERVICES**

**1<sup>ST</sup> APPLICANT**

**JULIA MASIENYANE**

**2<sup>ND</sup> APPLICANT**

And

**‘MATUMELO MATSINYANE**

**RESPONDENT**

Neutral Citation: Debcas Catering Services and another v ‘Matumelo Matsinyane [2022] LSHC 264 Com (30<sup>th</sup> September 2022)

**JUDGMENT**

CORAM: MATHABA J

HEARD ON: 03<sup>rd</sup> August 2022

ORDER PRONOUNCED ON: 3<sup>rd</sup> August 2022

REASONS PROVIDED ON:30<sup>th</sup> September 2022

### **SUMMARY:**

*Civil Procedure - Application for condonation and removal of the bar - Requirements thereof discussed – Applicant failing to provide a reasonable explanation for her default and bone fide defence – Application dismissed.*

### **ANNOTATIONS:**

#### **STATUTES**

**High Court Rules 1980**

#### **CASES**

##### **Lesotho**

**Lesotho Nissan (Pty) Ltd v Katiso Makara (C of A (CIV) 72 of 2014) [2016] LSCA 20 (29 April 2016)**

**National University of Lesotho v Motlatsi Thabane C of A (CIV) 67/19) [2019] LSCA 55**

**Smith v Ts'epong Proprietary Limited (C of A (CIV) 22/2020) [2021] LSCA 11 (14 May 2021)**

**Zainab Moosa and Others v Lesotho Revenue Authority C of A (CIV) 2/2014**

## **South- Africa**

**Christoffell Botha t/a Tax Consulting South Africa v Christopher James Mclure Renwick case No. 2019/35217 [2021] ZAGPJHC 37**

**Broadley, NO v Stevenson 1973 (1) SA 585 (R)**

**Dawie van der Merwe v Mariette Odendaal 4712/18 [2020] ZAMPMHC 21**

**Melane v Santam Insurance Co Ltd 1962 (4) SA 531**

**Orthotouch (Pty) Ltd v Delta Property Fund Limited Case No42987/2019 [2021] ZAGPJHC 123 (19 April 2021)**

## **INTRODUCTION:**

[1] This is an opposed application for condonation for failure to file plea as well as to remove the bar.

[2] The matter was argued on the 3<sup>rd</sup> August 2022 after which I delivered *ex tempore* judgment dismissing the application with costs. I promised to furnish reasons later. These are therefore the reasons underlying my judgment.

## **BACKGROUND:**

[3] For brevity sake, the applicants rely on the description of the parties in the main. In the declaration the first defendant (first applicant) is

inelegantly described as a sole proprietor owned by the second defendant (second applicant). The accurate description therefore is that the second applicant is a sole trader trading as the first applicant. The plaintiff (respondent) is an adult Mosotho female residing at Naleli in the district of Maseru.

[4] For purposes of this judgment, the defendants will be referred to as the applicant since the first defendant has no independent existence without the second defendant. On the 26<sup>th</sup> February 2021 the respondent sued the applicant claiming M140,125.00 together with 18.5% interest *tempore morae*.

[5] Having received summons, the applicant filed notice of appearance to defend. The applicant however did not file plea within the prescribed time, neither was same filed following a notice to file plea served on her counsel of record on the 31 May 2021. The notice gave the applicant 72 hours to file a plea, failing which she was to be automatically barred from pleading. The applicant was eventually barred from pleading, hence the instant application.

#### **APPLICANT'S CASE:**

[6] The applicant is moving this Court to grant her condonation for the late filing of the plea and the lifting or removal of bar. It is the applicant's case that after her counsel was served with notice to file plea; her counsel made attempts to telephonically contact her but could not succeed as her cell phone was unavailable as it was damaged. Consequently, so alleges the applicant, her counsel was not able to take instructions to file a plea as a result of which he withdrew from the matter.

[7] To her surprise, so states the applicant, she was served with notice of set down for the hearing of the main case which she thought her counsel was still handling. Upon receipt of notice of set down she went to her counsel who told her that he tried on numerous occasions to contact her but in vain until he withdrew from the matter. The applicant alleges that she has prospect of success in the main trial.

**RESPONDENT'S CASE:**

[8] The respondent denies that applicant's counsel tried to reach applicant in order to obtain instructions. It is the respondent's case that applicant's counsel ought to have known about applicant's physical address, he ought to have personally informed the applicant about the development of the case and obtain instructions. This mode of communication, so alleges the respondent, was practical as the respondent's counsel of record served the applicant personally at her residence following withdrawal of his counsel from the case.

[9] Further contention by the respondent is that after receiving notice to file plea and being faced with predicament of the unavailability of the applicant, applicants counsel ought to have conversed this with the respondent's counsel at the earliest opportunity as the notice of bar was served four days after the notice to file plea was served.

## ISSUES:

[10] The issue to be decided is whether the applicant has satisfied the requirements for condonation and removal of bar.

## APPLICABLE LAW:

[11] Rule 26 of the High Court Rules 1980 (*the rules*) deals with the extension of time and removal of bar. In terms of rule 26 (6) the court may, upon application remove such bar and allow the party who was barred from pleading to deliver such pleading within the time fixed by the order. The court has a discretion in terms of rule 59 to condone any proceedings in which the provisions of these rules are not followed if it considers to be in the interest of justice to do so.

[12] As a result, whenever a party to litigation fails to comply with the court rules, or time-periods contained in such rules, the court may condone such failure on application by the party that defaulted. However, condonation is not a right, but an indulgence which the court grants on good cause shown. *See: Smith v Ts'epong Proprietary Limited* (C of A (CIV) 22/2020) [2021] LSCA 11 (14 May 2021) at page 22 paragraph 61. Differently put, application for condonation is not a mere formality. *See: Zainab Moosa and Others v Lesotho Revenue Authority* C of A (CIV) 2/2014, para 18.

[13] Accordingly, in considering application for condonation, a court exercises its discretion judicially and the following factors have come to be recognised as a useful guide: the explanation for the default, the degree of lateness in making the application and the explanation thereof, the prospects of success and the importance of the case. See: **Lesotho Nissan (Pty) Ltd v Katiso Makara** (C of A (CIV) 72 of 2014) [2016] LSCA 20 (29 April 2016); paragraph 12; **National University of Lesotho v Motlatsi Thabane** C of A (CIV) 67/19) [2019] LSCA 55 at paragraph 16; **Dawie van der Merwe v Mariette Odendaal** 4712/18 [2020] ZAMPMHC 21, page 9 paragraph 10. In explaining the delay, the applicant must account for the entire period of the delay and the explanation for non – compliance must be reasonable and not patently unfounded. See: **Orthotouch (Pty) Ltd v Delta Property Fund Limited** Case No42987/2019) [2021] ZAGPJHC 123 (19 April 2021) para 19 to 20; **Smith v Ts'epong Proprietary Limited**; *surpa*, para 28; **Botha t/a Tax Consulting SA v Renwick** (2019/35217) [2021] ZAGPJHC 37 (13 April 2021) para 27.

[14] The Court of Appeal in **Zainab Moosa and Others v Lesotho Revenue Authority**, *supra*, cited with approval the decision in *Brumer v Gorfil Brothers Investment (Pty) Ltd* 2000 (2) SA 837, where at para 3 the Constitutional Court of South Africa said the following:

“It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interests of justice and refused if it is not. The interests of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is sought, the effect on the

administration of justice, prejudice and the reasonableness of the applicant's explanation for the delay or defect.”

[15] These factors are not individually decisive, but if there are no prospects of success, there would be no point in granting condonation. *See: Melane v Santam Insurance Co Ltd* 1962 (4) SA 531(A); *Lesotho Nissan (Pty) Ltd v Katiso Makara, supra*. However, where non – observance of the rules has been flagrant, an application for condonation should not be granted whatever the prospects of success might be. *See: Zainab Moosa and Others v Lesotho Revenue Authority, supra*, para 19.

[16] A defendant seeking removal of a bar must demonstrate that his defence is *bona fide*. It is not sufficient for defendant to simply say he has a defence, he must briefly set out his defence and the facts on which he relies for that defence so that the court can form opinion on its merits. *See: Broadley, NO v Stevenson* 1973 (1) SA 585 (R) at 587.

#### **APPLICATION OF LEGAL PRINCIPLES:**

[17] I now proceed to apply the legal principles to the facts of this case. The applicant failed to file her plea within 21 days as required by the rules and following notice to file same in terms of rule 26(2) and was therefore barred from pleading by virtue of rule 26(3). The effect thereof being that unless and until the bar is removed the applicant had no right to deliver its plea. Thus, in order to succeed in this regard, the applicant was expected to show good cause why condonation should be granted for her failure to deliver plea. Regarding the



default to file plea, there are two incidents of default which needs to be explained. The first is before the expiry of 21 days and the second relates to the period after notice to file plea was served.

***The explanation for the default***

**[18]** The applicant served and filed its notice of appearance to defend the action on the 19<sup>th</sup> March 2021. Taking into account that the declaration had already been filed with the summons, and computing the period from the date the notice of appearance was filed, the applicant had up to 15<sup>th</sup> April 2021 to file its plea. The applicant, in my view has an uphill struggle to convince me that she should be granted condonation for failure to file plea. Her founding affidavit is awfully prepared.

**[19]** There is simply no satisfactory explanation why the plea was not filed during that period or after notice to file plea was served. The only explanation proffered by the applicant for failure to file the plea is that her counsel of record could not contact her as her phone was damaged. The applicant knew she had a case on which she had engaged counsel. A reasonable litigant, in the circumstances of the applicant, would have followed up with her counsel or made effort to ensure there were alternative channels of communication between her and her counsel once her phone got damaged.

**[20]** The applicant's case is characterised by afterthoughts and this makes it even more unbelievable. For instance, it is only at the replying stage that the applicant says that his counsel notified the respondent's counsel of his challenges to take instructions. This is in response to a direct assertion by the

respondent that the applicant 's counsel should have notified her counsel of his challenges at the earliest opportunity. There is no explanation why this fact was not disclosed in the founding affidavit. The only reasonable explanation is that this is an afterthought.

[21] Besides, characteristic of the applicant, it is only at the replying stage that she alleges her counsel searched and found her residence, but that he could not find her as she was working in the districts. This again is in response to the respondent's assertion that the applicant 's counsel should have gone to the applicant's residence, like his counsel did in order to effect personal service to the applicant following the withdrawal of her counsel from the case. Importantly, this is clearly hearsay as applicant 's counsel has not filed an affidavit to confirm that he went looking for the applicant at her residence. There is also no explanation why the Court has not been apprised of the efforts counsel made to take instructions from client in the founding affidavit.

[22] The applicant is clearly panel beating her case at the replying stage. The story about her being in the districts is only introduced at the replying stage in reaction to the assertion that her counsel should have gone to her residence to take instructions. Pertinently, the applicant has not even explained in which districts she was engaged, neither did she explain for how long she has been away in the districts. Her assertions for non-compliance with the rules are unsupported. There is a lack of detail and specificity in respect of the explanation proffered by the applicant. Clearly the applicant has failed to provide a *bona fide* and reasonable explanation for her failure to file plea within a period of 21 days and after notice to file plea was filed.

### ***Prospects of success/bona fide defence***

[23] The respondent's case as pleaded in the summons is clear. She is claiming her share of the profits from a joint venture which she entered with the applicant. In her founding affidavit, the applicant only says that she has prospects of success. She does not set out her defence nor does she briefly set out the facts on which she relies for her defence. When she is taken to task by the respondent about this fatal omission the applicant says that the prospects of success would be articulated in the plea. As a result, the Court is unable to form an opinion whether the applicant has prospects of success or *bona fide* defence in the main. In the absence of other factors tilting the scale in favour of the applicant, failure to disclose the defence and briefly set out the facts on which it rests, is fatal.

### **CONCLUSION:**

[24] Looking at the time when the plea should have been filed, lack of reasonable explanation for the default as well as failure to disclose *bona fide* defence in the main or to demonstrate the prospects of success, I was left with no option but to refuse the application. I am convinced that the application is not *bona fide* and is calculated at delaying the conclusion of the matter.

### **ORDER:**

[25] In the circumstances, I make the following order:

1. the application for condonation to file a plea as well as for removal of bar is dismissed.
2. the applicants to pay the costs of the application.

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**A.R. MATHABA J**  
Judge of the High Court

For the Applicant: Adv. T. Peete  
For the Respondents: Mr. S. Malabulabu