

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

CIV/T/120/2019

In the matter between

TSELISO MOTSAMAI

PLAINTIFF

AND

LEBATSANG QHELANE

DEFENDANT

JUDGEMENT

Neutral Citation: Tseliso Motsamai v Lebatsang Qhelane [2022] LSHC Civ 52 (22 March 2022)

CORAM: BANYANE J

HEARD: 01/03/22

DELIVERED: 22/03/22

Summary

Application in terms of Rule 30 - to set aside a plea filed out of time as irregular proceeding - whether the irregularity may be condoned where the rules are clear that where a party is barred from filing a pleading, he must move to have the bar lifted - consequences of failure to do so.

ANNOTATIONS

Cited Cases

1. Liquidator Lesotho Bank v Raleting CIV/APN/16/07
2. National University of Lesotho v Motlatsi Thabane LAC (2007-2008)
3. Moalosi v Medical Superintendent Machabeng Hospital CIV/T/810/2019 (November 2021)
4. Smith v Tsepong Propriety Limited C of A (CIV) 22/2020
5. Bester & Others v NO v Target Brand Orchards & Other case No. 22593/2019(Western Cape Division of the High Court, South Africa)
6. Smith No v Brunner No & Another 1954(3) SA 352
7. Dalhouzie v Bruwer 1970(4) SA 566

Subsidiary legislation

1. The High Court Rules 1980

Books

1. Herbstein & van Winsen: The Civil Practice of the High Courts of South Africa; Vol. 1(5th Ed)

BANYANE J

Introduction

[1] This is an application filed in terms of Rule 30 of the High Court Rules 1980 seeking to set aside the defendant's plea as an irregular proceeding, since it was filed out of time. It is opposed by the defendant.

Backgrounds to the application

[2] The plaintiff sued the defendant for damages in the amount M90. 867.87 for reasonable and necessary costs of repairs to his vehicle. This claim arises out of a collision which occurred on the 28th July 2017 between the plaintiff's vehicle and a vehicle driven by the defendant.

2.1 It is common cause between the parties that summons in this regard was served on 14th March 2019. On the 15th March, a notice of appearance to defend was filed. On the 26th March 2019 the defendant requested further particulars. These were supplied on the 24th June 2019.

[3] No plea was filed during the period prescribed by the rules. On the 10th September, the defendant's attorneys were served with a notice to file plea within 3 days of receipt thereof. This was not done. The defendant was consequently barred from filing.

[4] On 23rd September 2019, the defendant was served with a notice to the effect that the matter has been set down for hearing by default on 28th October 2019. On the same date, request for default judgement was filed.

[5] On the 01st November 2019, the defendant without first seeking upliftment of the bar, filed his plea. It is the filing of the plea that is complained of.

Parties submissions

[6] Mr Nthabi for the defendant does not dispute the fact that the plea was filed after defendant was automatically barred from doing so. He

explains that he filed it on the understanding that the plaintiff's attorney would not take issue with the late filing because he apprised her of his predicament or logistical problems that disabled him from timeously filing.

[7] He thus asks this Court to condone the defendant's non-compliance with the rules because the plaintiff will suffer no prejudice if the plea is accepted. He relied on the case of **National University of Lesotho v Motlatsi Thabane LAC (2007-2008)** to submit that the Court retains a discretion to condone a breach of the rules in order to achieve a just result, this being that the defendant be given an opportunity to defend the plaintiff's claim regard being to the substantial amount claimed against him.

[8] It is Ms. Taka's contention on behalf of the plaintiff that before filing the plea, the defendant ought to have applied for removal of the bar and extension of time to file. She adds that the rule to that effect is mandatory because removal of the bar itself is subject to an applicant meeting certain requirements, namely, good cause which also entails the question whether the applicant has prospects of success. She referred the Court to the case of **Bester & Others v NO v Target Brand Orchards & Other case No. 22593/2019(Western Cape Division of the High Court, South Africa)** for this submission.

8.1 She contended on this basis that the defendant cannot seek condonation (informally) without giving any justification for his non-compliance with the rules. She is of the view that the case of **Motlatsi Thabane** cannot come to the defendant's rescue because he has proffered no reason for his failure to comply.

Discussion

[9] The uncontroverted facts giving rise to this application are that the defendant failed to file his plea within the period prescribed by the Rules.

On the 10th September 2019, the plaintiff granted a further 3 days extension for defendant to file the plea. He failed to do so resulting in him being barred from filing it. Since the defendant was barred filing the plea, the plaintiff applied for default judgement.

Issues

[10] Two main issues must be determined. They are whether the late filing of the plea amounts to an irregular step /proceeding. If the answer to this question is in the affirmative, the next is whether the late filing may be condoned and plea be accepted. I deal with them in turn.

Does the late filing of the plea constitute an irregular step / proceeding?

[11] An application to set aside a specific pleading as an irregular step is provided for under Rule 30 of the Rules of this Court which deals with irregular or improper proceedings or steps. It reads;

“Rule 30(1)

Where a party to any cause takes an irregular or improper step any other party to such case may within 14 days of taking of such step or proceeding apply to Court to have it set aside.

Provided that no party who has taken any further step in the cause with knowledge of the irregularity or impropriety shall be entitled to make such application.

...

30(3) if at the hearing of such an application, the Court is of the opinion that the proceedings or step is irregular or improper, it may set it aside in whole or in part either as against all the parties”.

[12] This rule does not however provide a definition of the phrase irregular step / proceeding. Examples of what constitutes an irregular step have been given in various cases.

12.1 In **Liquidator Lesotho Bank v Raleting CIV/16/07**, it was held that failure to observe time periods laid down in the rules amounts to an

irregular step. Delivery of a plea out of time has been held to constitute an irregular step in **Moalosi v Medical Superintendent Machabeng Hospital CIV/T/810/2019 (November 2021)** where the defendant filed a plea more than a year later without applying for upliftment of the bar. The Court held that the applicant there was, under the circumstances entitled to move to set aside the plea as irregular.

[13] Rule 26(2) deals with the time frames within which pleadings ought to be filed. It reads;

If any party fails to deliver any pleading, save as it is stated in sub-rule(1) within the time laid down in these rules or within any extended time allowed in terms thereof or allowed by agreement between the party, any other party, may by notice served upon the party in default, require him to deliver such pleading within 3 days after the day the notice is served upon him.

26(3) 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.

26(4) Notwithstanding anything contained in these Rules, the Court may, upon application by any party and on notice delivered to other parties and on good cause shown, make an order extending any time prescribed by these Rules for delivering any pleading or for taking any step in connection with the proceedings.

26(6) If there has been a barring of any party from delivering a pleading in terms of Sub-rule(3) herein, the Court may upon application by such party on notice given to all other parties remove such bar and allow the party applicant to deliver such pleading within the time fixed by an order.

26(8) On any application made in terms of sub-rules (4) and (5), (6) and (7) herein, the Court may refuse the application or grant it on such terms as to costs or otherwise as it may thin fit.

[14] This rule clearly sets out the steps to be followed where a party failed to deliver their plea within the specified period and subsequently the extended period, as well as the effect of automatic bar to delivery of a pleading and what is expected of a party so barred. The effect of having been barred is that the defendant could only file the plea upon obtaining the Court's sanction in terms of Rule 26(6). The filing of the plea without removal of the bar is therefore improper.

Should the late filing be condoned?

[15] Counsel for defendant urged the Court to condone the late filing and accept the plea. This he did without filing an application for condonation nor removal of bar.

15.1 The question that must be answered is whether the plea must be rejected on account of the late filing or whether the late filing should be condoned. The answer to this is to be found in the Rules themselves.

[16] Explicitly clear from Rule 26, is that the defaulting party must either apply for extension of time terms of Rule 26(4) or removal of bar in terms of rule 26(6) depending on whether or not they have been barred. In terms of Rule 26(8), the indulgence to grant such applications rests in the discretion of the Court. To put it differently, where a party had failed to comply with the rules on dates of filing, he must apply in terms of sub rule 4, on notice, for an order extending the period prescribed. Where is he barred, he must ask for removal of the bar and leave to file such a pleading. He does so by filing an application in terms of Rule 26(6). These the defendant has not done.

[17] It was held in **Dalhousie v Bruwer 1970(4)SA 566** at **571** that a litigant who is out of time with a pleading but has not been barred and seeks extension of time to plead, is not very different from the one who

has been barred because in both cases, the object of the application is to obtain the Court's leave to pursue their defence.

17.1 In **Smith No v Brunner No & Another 1954(3) SA 352**, the court held that the discretion in an application for removal of bar must be exercised in accordance with the circumstances of each case. The following were stated to be some of the major considerations; **a)** a reasonable explanation for the applicant's delay in filing; **b)** the application is bona fide and not made to delay the other party's claim; **c)** there has not been a reckless or intentional disregard of the Rules of Court; **d)** the applicant's case is not ill-founded(without foundation) and lastly, the other party is not prejudiced to an extent which cannot be rectified by a suitable order as to costs. See **Smith No v Brunner No & Another 1954(3) SA 352**. See also **Herbstein & van Winsen, (5th edition) p730-732**.

[18] In the light of these authorities, it is my considered opinion that condonation for non-compliance with the rules, cannot, in the circumstances of this matter, be granted from the bar without good cause being shown. This is because even a written application for condonation is not just a mere formality. Condonation is not to be had for the mere asking. An applicant must give cogent reasons for non-observance of the rules. In other words, he/she must disclose all the relevant facts that led to non-compliance. **Smith v Tsepong Propriety Limited C of A (CIV) 22/2020**.

[19] An application for removal of bar, as stated under paragraph 16 and 17.1 of this ruling, may be refused where no good cause is shown by a party asking for removal of the bar. It follows therefore that before filing the plea, the defendant must persuade the Court to remove the bar because a stage had been reached whereby he was no longer allowed to file or deliver his plea. Until he does so in an application in terms of the relevant sub-rule, he is barred.

Conclusion

[20] For reasons set out above, the application must succeed, and the plea must resultantly be set aside.

Order

[21] In the result, the following order is accordingly made;

- a) The defendant's plea served upon the plaintiff on the 1st November 2019 is set aside as an improper proceeding.
- b) The plaintiff is awarded costs of this application.

P. BANYANE
JUDGE

For Plaintiff: Ms Taka

For Defendant: Advocate Nthabi