

**IN THE HIGH COURT OF LESOTHO**

**HELD AT MASERU**

**CIV/T/515/2016**

In the matter between

**LEROTHOLI POLYTECHNIC**

**PLANTIFF**

AND

**MABULA KHETHENG**

**DEFENDANT**

Neutral Citation: Lerotholi Polytechnic v Mabula khetheng [2024] LSHC Civ 228 (25 October 2024)

## **RULING**

**CORAM** : **BANYANE J**  
**HEARD** : **18/09/2023**  
**DELIVERED** : **25/10/2024**

### **Summary**

Civil Procedure-plea filed out of time-application to set the proceeding/step aside-plea *pro-non-scripto* and set aside.

### **ANNOTATIONS**

#### **Subsidiary Legislation**

1. High Court Rules 1980

#### **Cited cases**

1. Moalosi v Machabeng Hospital CIV/T/810/2019

2. Tseliso Motsamai v Lebatsang Qhelane CIV/T/120/2019

## **RULING**

**BANYANE J**

### **Introduction**

**[1]** This is an opposed application to set aside the defendant's plea filed on 16 July 2020 on the ground that it amounts to an irregular step or proceeding.

### **Background facts**

**[2]** The brief facts underlying the application are that the plaintiff, Lerotholi Polytechnic, issued summons against Mr. Khetheng, the defendant on 30 August 2016 for payment of M34 071.20 as reasonable costs of motor vehicle repairs, together with interest. This claim arose from a collision that occurred on 02 November 2012 between the plaintiff's vehicle and the vehicle driven by the defendant at the material time. The summons was served on 12 February 2020 after two failed attempts of service.

**[3]** On 13 February 2020, the defendant entered his notice of appearance to defend and also filed and served a request for further particulars. The plaintiff furnished and filed its further particulars on 26 February 2020.

**[4]** On 25 March 2020, the plaintiff served a notice requesting the defendant to file his plea within 3 days of receipt thereof. No plea was filed within the period stated in the notice. It was only filed on 16 July 2020; four months later after the service of the notice to file a plea.

### **The defendant's opposition**

[5] The defendant opposes the application. In his opposing affidavit, he deposed that he was disabled from filing by nationwide movement restrictions imposed in March 2020 due to covid-19 pandemic. He alleges that when the request to file the plea was served, there was a nationwide lockdown. During this period, the business of the Courts was suspended. It was therefore impossible for him to file the plea within 3 days as requested. He was only able to file his plea in July 2020 following the easement of the restrictions.

### **The reply**

[6] In its reply, the plaintiff refutes the defendant's allegations that he was disabled from filing due to the lockdown. It attached a government gazette **Legal Notice No.27 of 2020** to its replying affidavit to show the periods when the lockdown began. In the notice, it is stated that;

“Lockdown means the restriction of movement of persons during the period for which these Regulations apply, being the period from midnight the 29 March 2020 to midnight of 21<sup>st</sup> April 2020.”

[7] Additionally, the plaintiff attached **Judiciary Circular No.2 of 2020** to refute allegations that the business of the Courts was suspended during the lockdown. In this circular, the Registrar of the High Court issued general directions for the dispensation of justice and services in the Judiciary during the lockdown period.

### **The parties' argument**

[8] The thrust of the plaintiff's argument is that when the defendant sought to file his plea in July 2020 he was barred from pleading. He was automatically barred in terms of Rule 26 (3) of the High Court Rules (as amended). The plea is therefore *pro non scripto* and must be set aside as an irregular step or proceeding.

[9] The defendant requested the Court to accept the plea because no prejudice was occasioned by its late filing.

### **The issue for determination**

[10] The sole issue for determination is whether the plea is *pro non scripto* and therefore liable to be set aside.

### **Discussion**

[11] Periods for filing a plea, barring, and removal of the bar are governed by Rule 26 of the High Court Rules, 1980, being the applicable Rules when this claim was filed in 2016. Rule 26 reads as follows in relevant parts:

“26 (1) where the defendant has entered appearance to defend he shall within 21 days of the service of the declaration upon him deliver a plea, or an application for further particulars to the declaration, or an exception to the declaration or an application to strike out portions of the declaration.”

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

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

(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 taking any step in connection with the proceedings.

(5) Any such extension may be ordered by the court although the application thereof is not made until after the expiry of the time prescribed or fixed

(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 order.”

**[12]** These Rules need no elucidation. They are clear that where a party fails to deliver a pleading within the period specified in the notice; in this case 3 days of receipt of the notice, they are automatically barred from pleading until the bar is removed by an order of the court on an application made by the defaulting party.



**[13]** In the instant matter, it is common cause that instead of filing his plea after serving his notice of appearance to defend, the defendant exercised his option to request further particulars on 13 February 2020. These were furnished on 26 February 2020. The defendant took no further steps. This prompted the plaintiff to issue a notice in terms of Rule 26(2) requesting him to file his plea within three days. This notice was served on Wednesday 25 March 2020 but the defendant only filed in July 2020.

**[14]** The question is whether he was entitled to file the plea in July 2020 without an application for the upliftment of the bar. Authorities show that when the defendant files their plea after being automatically barred and without applying for the upliftment of the bar in terms of rule 26 (6), this amounts to an irregular step.<sup>1</sup> In other words, once a party is automatically barred, they are not entitled, without leave of court, to file such pleading out of time.

**[15]** It follows that the defendant was not entitled to file the plea without seeking removal of the bar in terms of Rule 26 (6) and extension of time to file. His explanation of the causes of the delay may be

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<sup>1</sup> Moalosi v Machabeng Hospital CIV/T/810/2019, Tseliso Motsamai v Lebatsang Qhelane CIV/T/120/2019

relevant to support the application for the upliftment of the bar. I express no view on whether the application would succeed or whether lockdown restrictions were linked to the delay because the lockdown began on Saturday 29 March 2020 according to Legal Notice No.27 of 2020 whereas the three days prescribed in the notice to file plea were computable from 26-28 March 2020.

### **Disposal**

[16] For these reasons, I accept the plaintiff's contention that the plea is *non pro scripto* and amounts to an irregular step. The application must therefore succeed.

### **Order**

[17] In the result, it is ordered that:

- a) The application succeeds

b) The plea filed on 16 July 2020 is set aside as an irregular step or proceeding.

c) Plaintiff is awarded costs of this application.

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**P. BANYANE**  
**JUDGE**

For Applicant : Advocate Khoboko

For Respondents : Advocate Akhosi