VIC & DUP/JOHANNESBURG/LKS

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. J2407/99

In the matter between:

MOKUENA, M M Applicant

and

LAND AND AGRICULTURAL BANK OF SOUTH AFRICA Respondent

J U D G M E N T

KENNEDY, AJ:

[1] In this matter the applicant, Ms Mokuena, seeks default judgment in circumstances where the respondent filed its statement of defence late. The statement of case was served and filed on 17 June 1999. In terms of the court rule the respondent was required to file its statement of defence within ten days, i.e. ten court days of the filing of the statement of case. Accordingly the statement of defence was required to be filed on 1 July. It was in fact filed only on 2 August 1999, in other words approximately

four weeks after the due date.

[2] The applicant saw fit to set down the matter for default judgment notwithstanding the fact that it was aware through the correspondence with the respondent's attorney that the respondent intended to oppose the matter and to file a statement of defence. The respondent's attorney, Ms Stein of the firm Cheadle Thompson & Haysom, wrote to the applicant's attorneys on 8 July 1999 stating as follows in the relevant part of the letter:

"Our client is unable to file a response to the claim within the time period specified by the Rules of the Court because Dr Dolny whose instructions are necessary for the filing of a response is out of the country until 22 July 1999. We hope to consult with Dr Dolny as soon as possible after her return to South Africa and anticipate that the response will be filed not later than 30 July 1999. In the event of you not granting us an indulgence to file our response late, we will apply to the Labour Court for condonation."

A week thereafter, namely on 14 July 1999, the matter was enrolled for hearing on the basis of a default judgment. The applicant declined the request for any extension and accordingly proceeded on that basis.

[3] The matter was set down before this court for default judgment on Wednesday, 11 August 1999. On that morning, or perhaps the afternoon before that, an application for condonation was filed comprising an affidavit by Ms Stein explaining in brief terms the difficulty in failing to file the statement of defence earlier. The relevant passage of the affidavit setting out the most important part of the explanation is to be found in ***paragraph 6*** in which Ms Stein states as follows:

"On 17 June 1999, nearly two months later [i.e. after the outcome of proceedings at the CCMA] the applicant filed a statement of case with this Court. When I contacted the respondent on 25 June 1999 to set up a consultation I was advised that Dr Dolny was unable to consult until after she returned from leave on 22 July 1999. In the interim I consulted with other employees of respondent."

When the matter came before me on Wednesday, 11 August, Mr Kruger, counsel who appeared for the applicant, indicated that his instructions were that in fact, notwithstanding what was stated in ***paragraph 6***, Dr Dolny was present in the country and had not left on here overseas trip at the most relevant time, being 25 June 1999. The matter was

accordingly postponed to enable the applicant to file an affidavit to deal with that aspect and any other aspect that it wished to in
response to the application for condonation and for the

respondent to file a reply.

The filing of those papers took place in the last few days and the matter accordingly comes before me for final determination on the application for condonation and the request for default judgment if condonation is refused.

[4] In the answering affidavit that has been filed on behalf of the applicant, evidence is given including a letter or memorandum circulated by Dr Dolny herself indicating that her absence from the office due to her overseas trip related to the period from 5 July 1999 until 16 July 1999.

[5] The replying affidavit that has been filed is that of Ms Stein supported by a confirmatory affidavit by Dr Dolny, who is the managing director of the respondent. The affidavit of Ms Stein indicates in ***paragraph 1.6*** the following:

"It is correct that I wrote to the applicant's attorney only on 8 July 1999 and up until that day I thought I would be able to get full instructions from the acting manager

director on all of the allegations made in the applicant's statement of case, including those relating to Dr Dolny. However, this was not possible and hence I wrote to the applicant on 8 July 1999 when it became

clear on that day that I could not file the statement of case until I had consulted with Dr Dolny.

Regarding Dr Dolny's availability I confirm that I was advised on 25 June 1999, the first time which I contacted the respondent after receiving the statement of case, was that she was not available until after her return from leave. I did not pursue this issue because I thought that other employees of the bank, in particular Adrian Thoms, the acting managing director, would be able to give me instructions for the statement of claim. She has advised me that this was in any event correct as on 25 June she was involved in a 'bosberaad'; on 28 June she had prior engagements; on 29 June she had to attend a medical clinic and a board subcommittee meeting; on 30 June she had pre-arranged arrangements; on 1 July she had taken medical leave. She left for overseas on 2 July 1999 and was scheduled to return on 18 June 1999 but returned to Johannesburg on Saturday, 17 July 1999. This was in fact earlier than she had expected to return but she returned

early because of a widely publicised controversy involving her and the Land Bank. In this regard I attach a copy of the Star newspaper dated 15 July 1999 marked PS2. Prior to her leaving she had given

instructions that she was not available until 22 July 1999 for appointments on 19, 20 and 21 July 1999 as she would be in briefing sessions. Dr Dolny was unable to consult immediately due to the enormous pressure on her time in dealing with this controversy and investigation into it..."

[6] I heard lengthy argument in which it was submitted by Mr Kruger that the application for condonation should be refused because the explanation advanced is not satisfactorily set out. He raised questions as to the approach of the respondent, which he submitted showed a flagrant and arrogant disregard, of the Rules of the Court. He argued further that there was a wilful and, as I understood it, almost a *mala fide* approach on the respondent in dealing with this matter.

[7] In my view there may well be some merit in certain of Mr Kruger's submissions regarding the lack of detail set out particularly in the founding affidavit, required to give a full explanation for the difficulties faced by the

respondent in filing a statement of defence timeously. Mr Kruger correctly submitted that an applicant for indulgence, such as for condonation, should set out in full, clear and frank detail a proper explanation for why there has been non-compliance with the rules. As I have indicated, certain of his criticisms may be well founded. However, when viewed realistically, I am not satisfied

that the contention that there has been flagrant, let alone wilful disregard of the rules can be sustained. The court must obviously be aware of and take into account, firstly, the pressures and demands of any typical legal practitioner's practice and, secondly, the realistic situation of and commitments of people involved in commerce and business, particularly such a senior official as Dr Dolny.

[8] The court also takes into regard the fact that this is not a case where there was an extremely lengthy period of delay which has gone unexplained. On the contrary, there is an explanation for the brief period that was allowed to elapse and that, in my view, does seem to be a proper *bona fide* and acceptable explanation.

[9] Parties to litigation must show the necessary flexibility as must the court in assessing compliance or

non-compliance with the Rules of Court such as those requiring pleadings to be filed within a certain time. Mr Kruger, in his argument, laid emphasis on the point that rules are to be respected and that if they are not justice may be denied. He urged the court in this case to send out a message to parties generally that there is a requirement to comply with rules and a warning that those who do not comply with the rules do so at their peril. He also urged me to send out a warning that parties may not regard their other commitments as

being more important than compliance with Rules of Court.

[10] While it is so that ordinarily rules should be complied with, in my view the arguments of Mr Kruger in this

regard overemphasise the importance of the rules at the expense of the necessary practical flexibility that must be applied in such cases. There are various judgments in our law which deal with the correct perspective to be applied in enforcing the rules and in interpreting them and applying them, particularly in situations where there has been a failure by a party to comply with the strict provisions thereof. In the case of **Federated Trust Ltd v Botha 1978 (3) SA 645 (A)** at *654D* the following was stated:

"The court does not encourage formalism in the application of the Rules. The rules are not an end in themselves to be observed for their own sake. They are provided to secure the inexpensive and expeditious completion of litigation before the courts."

In the case of **Vitorakis v Wolf 1973 (3) SA 928 (W)** at *932F-G* **Coetzee J**, as he then was, stated:

"...Courts generally do strive to assist litigants to get to grips as inexpensively and expeditiously as possible without enforcing sheer formality

whenever this is only calculated to produce a *litiscresence* devoid of real legal content or procedural advantages such as greater clarification of issues."

In **Trans-African Insurance Co Ltd v Maluleka 1956 (2) SA 273 (A)** at *278F-G* it was stated that:

"Technical objections to less than perfect procedural steps should not be permitted in the absence of prejudice to interfere with the expeditious and, if possible, inexpensive decision of cases on their real merits."

That *dictum* of **Schreiner JA** is, in my view, of particular importance in the present matter. In my view, no real prejudice has been shown to have resulted to the applicant, particularly where the delay has been of a limited nature.

[11] The consequences of acceding to the applicant's request, namely to refuse condonation for the late filing of the statement of defence and the grant of a default judgment, would, in my view, be excessive and unjustified. It would certainly not serve the interests of justice which Mr Kruger contended required the enforcement of the rules strictly in the manner for which he contended. On the contrary, justice would, in my view, clearly be denied in circumstances where the respondent simply would have no opportunity to have its version put before the court, either by way of
pleadings or indeed by way of evidence and argument at the trial. This effectively would non-suit the respondent. It would also deprive the court of the opportunity to decide the matter on the merits with the benefit of both parties' input. That, in my view, clearly cannot serve the objects of justice or indeed the objects of the ***Labour Relations Act 66 of 1995,*** which are best served by deciding and resolving labour disputes on their merits rather than on technical points.

[12] I am therefore prepared to accede to the request to condone the non-compliance and to condone the late filing of the statement of defence and accordingly the application for

default judgment must fall away.

[13] There remains to be decided only the issue of costs. Both Mr Kruger and Ms Stein contended that costs should be awarded in favour of their clients. Costs are of course a matter for the discretion of the court, to be exercised with due regard to the requirements of the law and of fairness. Ordinarily a party seeking the indulgence of the court should bear the costs incurred as a result of the need for condonation to be sought and to be granted. That general approach would apply in the circumstances of this case but, in my view, only up to a point. Regard must also be had to the fact that the affidavit seeking the condonation was lodged at a

relatively late stage, as I have indicated either on the morning or in the afternoon immediately preceding the day when the matter was set down for default judgment. In my view, however, the approach of the applicant has been unnecessarily technical and formalistic and has not shown the necessary flexibility that the courts would generally expect of practitioners in circumstances such as these. The costs have, in my view, been unnecessarily increased as indeed has the burden of the court as a result of the approach of the applicant in taking such a strict approach

to compliance with the rules and in failing to accede to a request, lodged at a relatively early stage by the respondent's attorney, for the indulgence.

[14] In my view fairness would best be served if the respondent were ordered to pay portion of the applicant's costs incurred in relation to these proceedings. The matter has come before the court for argument on two occasions, both Wednesday 11 and today 13 August 1999. In my view it would be fair to award costs on the following basis:
That the respondent is ordered to pay the applicant's costs incurred in respect of the hearing on Wednesday 11 August but that there should be no order for costs of today.

[15] In conclusion therefore I grant the following order:
(a) Condonation is granted for the late filing of the respondent's statement of case.
(b) The application for default judgment is refused.
(c) Respondent is ordered to pay the applicant's costs in respect of the hearing on Wednesday 11 August 1999 and the parties are to bear their respective costs in respect of today's hearing.

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ACTING JUDGE KENNEDY

ON BEHALF OF APPLICANT	:	**ADV M A KRUGER**
Instructed by	:	**Mokuena Attorneys.**
ON BEHALF OF RESPONDENT	:	**MS P STEIN**
Instructed by	:	**Cheadle Thompson & Haysom Attorneys.**
DATE OF HEARING	:	**13 AUGUST 1999**
DATE OF JUDGMENT	:	**13 AUGUST 1999**