IN THE LAND CLAIMS COURT OF SOUTH AFRICA

Held at **RANDBURG** on 23 June 1999 **CASE NUMBER**: LCC14/99
before **MEER J**

In the case between:

T E XABA Plaintiff

and

A B VAN NIEKERK Defendant

JUDGMENT

MEER J:

[1] This is an interlocutory application in which the plaintiff seeks to oust the defendant as a participating party in the main action. He does so on the grounds that the defendant failed to file and furnish a notice of appearance to defend the action in accordance with the rules governing the procedure of the Land Claims Court (hereinafter referred to as "the rules").[1] It is the plaintiff"s contention that the defendant is not a participating party within the meaning of Rule 26(1).

> "**26. RIGHT TO PARTICIPATE IN CASES**
>
> (1) A party that—
>
> . . . .
>
> (b) has filed a notice of appearance in accordance with these rules;
>
> . . . .
>
> is a participating party"

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1 Land Claims Court Rules GN 300 contained in Government Gazette 17804 of 21 February 1997, as amended.

Whilst the defendant did file a notice of appearance to defend with the Registrar of the Court, the notice is argued by the plaintiff to be irregular and not in compliance with the rules. The plaintiff asks for an order in the following terms:

> "1.1 Declaring that the defendant herein is not, within the meaning of Rule 26(1) a participating party.
>
> 1.2 (a) Declaring the issue and service of defendant's special plea and plea to be an irregular step, within the meaning of Rule 32(3);
>
> (b) Striking out defendant's special plea and plea;
>
> 1.3 (a) Declaring the defendant's participation and representation in all the pre-trial procedures, including the pre-trial conference, to be an irregular step, within the meaning of Rule 32(3);
>
> (b) Striking out all references to defendant's participation at the pre-trial conference.
>
> 1.4 (a) Declaring the defendant's participation and representation before the above Honourable Court to be an irregular step, within the meaning of Rule 32(3).
>
> Prohibiting defendant and/or his representative from appearing before the above Honourable Court.
>
> 2. An order directing defendant to pay the costs of this application.
>
> 3. Further and/or alternative relief."

[2] A notice of action in the main matter was served on the defendant on 22 February 1999. Plaintiff's statement of claim annexed thereto alleges that she is a labour tenant on the farm Eensgevonden, district of Vryheid, KwaZulu-Natal, of which the defendant is the registered owner. It alleges further that the defendant denies her labour tenancy status, that she is at risk of being evicted from the farm by him and goes on to pray for judgment against the defendant as follows:

> "1. An order that the plaintiff is a labour tenant;
> 2. Costs of suit;
> 3. Further and /or alternative relief."

[3] The notice of action accompanying plaintiff's statement of claim is in accordance with Form 8 of Schedule 1 to the rules. Page 2 thereof, as is required by Form 8, states:

> "If you wish to participate in the case you must complete the Notice of Appearance forms attached hereto being Annexures A and B and hand, fax or send by registered mail to:
> [my emphasis]
>
> (a) The Registrar
> Land Claims Court
> Private Bag X10060
> Randburg 2125
> Trust Bank Centre
> Randburg Mall
>
> (b) Loots Attorneys, P O Box 149, Pietermaritzburg.
>
> Your notice must -
>
> (a) reach the Registrar and Plaintiff no later than 10 (TEN) days after you have received this document (in counting the days do not include Saturdays, Sundays and Public Holidays);
>
> (b) contain an address for delivery to you of further documents in this case. That address must be the address of your attorney or a physical address within 8 kilometres of the Land Claims Court or the Magistrate's Court for the district where the abovementioned land is situated.
>
> If your notice does not reach the Registrar and Plaintiff in time -
>
> (a) you will not receive further documents in this case and you may not participate in this case; and
>
> (b) the Land Claims Court may give a judgment which affects you without giving you any further notice.
>
> If your notice is received in time -
>
> (a) you may file a plea; and
>
> (b) Plaintiff will deliver a notice to your service address telling you when to do this and who must receive it.
>
> Your attention is furthermore directed to the content of Form A which is annexed hereto marked "C".[2]

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2 "C" is a document in accordance with Form 9 of Schedule 1 to the rules attached to notices by which cases are initiated and warning of the importance of the case.

[4] The notice of appearance forms attached to the statement of claim as Annexures A and B, are addressed both to the Registrar of this Court and plaintiff's attorney and are based on Form 10 of Schedule 1 to the rules as is required by Rule 25(1):

> "**25. NOTICE OF APPEARANCE**
>
> (1) Any party that wants to participate in a case must, within 10 days after service on him or her of the process by which the case is initiated, file a notice of appearance based on Form 10 of Schedule 1 and furnish a similar notice to the applicant or plaintiff, or if there is more than one, to the first applicant or plaintiff."

The defendant did not complete Annexures A and B and send them to the Registrar of the Court and plaintiff's attorney as he was instructed to do in the notice of action. Instead, on 25 February 1999 he filed a document with the Court called "kennisgewing van verskyning aan Grondeisehof" in which he expressed his intention to defend the action.

[5] Thereafter, on 7 May 1999, the defendant filed a special plea and furnished plaintiff's attorney with a copy thereof. The special plea states that the defendant is not the registered owner of the farm and indicates the name of the registered owner. It goes on to seek a special costs order de bonis propriis on an attorney and own client scale against the plaintiff's attorney, alternatively on an attorney and own client scale against plaintiff herself, on the grounds that the defendant has unnecessarily been brought to Court. Thereafter, on 25 May 1999, a pre-trial conference was held with the legal representatives of the plaintiff and the defendant and the hearing of the special plea was set down for 23 June 1999.

[6] On 25 May 1999, after the pre-trial conference, the plaintiff's attorney sent a letter to the defendant's attorney stating that upon consideration it became clear that the defendant's plea

constituted an irregular step in the proceedings because the defendant is not a participating party. It does not state the grounds upon which he is not a participating party. The letter calls for the defendant to withdraw his plea within five days failing which the recommendation will be made to the Legal Aid Board that an application be brought to set aside the defendant's plea. The letter goes on to explain that due to an oversight this matter was not raised at the pre-trial conference.

[7] The defendant's attorney responded in a letter dated 26 May 1999:

> "Ons instruksie is om die Spesiale Pleit te argumenteer, tensy die aksie teen ons klient teruggetrek word en koste getender word.
> . . . .
> Indien u kliënt van voorneme is om enige aansoek te liasseer soos deur u aangetoon, word voorgestel dat dit vir doelmatigheid op die sake datum geplaas word vir beregting."

[8] On 18 June 1999, the plaintiff's attorney filed a notice of withdrawal in the main action, in which he tendered to pay the defendant's costs of the action exclusiveof to costs pertaining to the plea and any subsequent costs which the defendant may have incurred. At a pre-trial conference on 21 June 1999, the plaintiff's attorney conceded that the wrong defendant had been cited and clarified that the costs tendered were on a party and party scale and neither de bonis propriis or on an attorney and own client scale, as sought in the special plea. The respondent rejected the offer and persisted with his prayer for special costs.

[9] It was anticipated that on 23 June 1999, the date set down for the hearing of the special plea, the special costs order only would be considered. Instead the present application was brought, in which the founding affidavit of plaintiff's attorney, Christo Loots alleged that defendant was not a participating party as he had neither served an appearance to defend on the plaintiff, nor filed one with the court. It was only on the morning of 23 June, prior to the hearing, once the parties had perused

the court file, that plaintiff became aware of the notice of appearance to defend filed by defendant with the court on 25 February 1999. Also, immediately prior to the commencement of the hearing Mr Dreyer, for the defendant, handed in an affidavit by S Bester (an employee of defendant's attorney) which attempted to prove that an appearance to defend had been faxed to the plaintiff's attorney. Annexed to this affidavit as "S1a" is a covering a letter dated 24 February 1999 alleged to have been faxed to plaintiff's attorney by defendant together with a notice of appearance to defend. The notice of appearance allegedly faxed is not annexed. Annexure "S1b" to the affidavit is alleged by defendant to be the fax transmission slip in respect thereof, although it does not indicate the facsimile number of plaintiff's attorney.[3]

[10] At the hearing, Mr MacIntosh for the plaintiff, pointed out that the effect of Rule 26(1)(b) was that only a person who has filed a notice of appearance to defend in accordance with the rules is a participating party. He argued that the defendant was not a participating party as the notice of appearance filed with the Court on 25 February 1999 was irregular. It was not based on Form 10 of Schedule 1 to the rules as is required by Rule 25(1). It also did not contain the name of the plaintiff to whom it was delivered nor proof of delivery upon the plaintiff. These are requisites for a filing notice specified at Rule 18(2)(e) and (f) respectively, which according to Rule 25(2)(b) every notice of appearance must contain.[4] Furthermore it did not accord with Rule 44(3)(a)[5] which provides that

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3 See paragraphs 13 to 18 below.

4 Rule 25(2) reads as follows:

> "Every notice of appearance must—
>
> (a) be to the effect that the person concerned wants to participate in the case: and
> (b) contain the requisites for a filing notice, as set out in Rule 18 (2)"

The relevant part of Rule 18(2) reads as follows:

> "A filing notice must contain -

a party opposing the relief claimed in a notice of action must file a notice of appearance as described in Rule 25(1).

[10.1] To this Mr Dreyer, for the defendant, replied that the notice of appearance filed with the court was a pro forma document used by defendant's attorney, which whilst not identical to form 10, was based thereon, as was required by Rule 25(1).

The fact that the notice of appearance filed is not identical to Form 10 is not problematic. It is, however, problematic that it fails to contain the name and address of plaintiff and proof of delivery of the notice to her, requisites for a filing notice which Rule 25(2) says a notice of appearance to defend must contain. No matter what form a notice of appearance takes it must contain these requisites.

[10.2] With regard to proof that the notice of appearance was delivered in accordance with Rule 18(2)(f), Mr Dreyer asked that the covering letter addressed to the court and filed with the notice of appearance, be accepted as proof of such delivery. His argument went as follows: Rule 18(2)(f) permitted proof of delivery to be endorsed on a filing notice or a separate document annexed thereto.

. . . .
(e) the names of parties to whom the document was delivered; and
(f) proof of delivery of the document, which proof may be endorsed on the filing notice or be contained in a separate document annexed to the filing notice."

5 Rule 44(3)(a) states:

"A party opposing the relief claimed in the action -

(a) must file a notice of appearance as described in Rule 25(1);"

The covering letter annexed to the notice of appearance filed with the court is identical to a letter[6] accompanying an appearance to defend alleged by defendant to have been faxed to plaintiff's attorney together with a notice of appearance. The covering letter in the court file should therefore be accepted as proof that the appearance to defend was delivered to plaintiff's attorney as required by Rule 18(2)(f). I cannot accept this. To conclude from the mere fact that the two letters accord verbatim with each other, that the requisite proof of delivery in accordance with Rule 18(2)(f) is satisfied, would be a contortion of Rule 18(2)(f).

[11] I accordingly agree with Mr MacIntosh that the notice of appearance filed with the Court is irregular. This document differs significantly from Annexures A and B to the Notice of Action and accordingly with Form 10 of Schedule 1 to the rules, and does not contain the requisites of a filing notice especially those prescribed at Rule 18(2)(e) and (f). It is clearly addressed to the Court only and not to the plaintiff or her attorney as well. With regard to proof of delivery thereof on plaintiff's attorney, regard must be had to Rule 2(1)(a)(ii).[7] This rule states that where an appearance to defend

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6 Annexure "S1a" to the affidavit of Bester referred to in paragraph 9 above.

7 Rule 2(1) states:

> "2 **DEFINITIONS**
>
> (1) In these rules, unless inconsistent with the context -
>
> . . . .
>
> `deliver' in relation to any document means -
>
> (a) to furnish a copy of that document to each party at the service address given by that party for the delivery of documents -
>
> (i) by hand delivery, for which an acknowledgment of receipt must be filed;
>
> (ii) by facsimile transmission, in respect of which the machine transmission slip must be filed, and to send a confirmation copy of the document within one day by ordinary mail or by any other suitable method; and

is delivered to a party by facsimile, a facsimile transmission sheet must be filed at Court with the original notice of delivery as proof of appearance of a copy thereof on the plaintiff. The defendant did not file such a fax transmission sheet with his notice of appearance to defend. Thus proof of delivery did not occur in accordance with the rules.

[12] A further irregularity pointed to by Mr MacIntosh was that the defendant had not delivered a notice of appearance to defend to the plaintiff or her attorney as prescribed at Rule 25(1) read with Rule 2(1)[8]. In his view, the probabilities were that the fax transmission consisting of the notice of appearance and covering letter did not result in these documents being sent to plaintiff's attorney's facsimile number. He suggested that where the facsimile transmission report failed to reflect a telephone number (as in the present case) a host of possibilities may exist. One could not exclude an error, such as an incorrect number being dialed or the transposing of digits. Whatever the explanation, these documents, he asserted were not received by plaintiff's attorney's facsimile machine. Had they been received, he stated, a Rule 25(3)[9] notice would have been sent to

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(iii) by registered mail, for which a certificate of posting must be filed:

Provided that -

(aa) a document sent by facsimile transmission is deemed to have been received on the date of transmission, unless the contrary is proved; and

(bb) a document sent by registered mail is deemed to have been received within ten days after the document has been posted in a properly addressed envelope by prepaid registered mail, unless the contrary is proved; and

(b) to file the original document with the Registrar together with proof that copies were furnished in terms of paragraph (a)."

8 Rule 25(1) is quoted in paragraph [4] above and the definition of "deliver" is quoted in supra n 7.

9 Notice to all parties who have entered appearance containing names and addresses of all parties who have filed notices, and calling upon them to deliver responses within 15 days.

defendant's attorney. For the notice of appearance to defend to have been properly delivered by facsimile to the plaintiff's attorney, he added, Rule 2(1)(a)(ii) required defendant or his attorney to have filed the facsimile transmission slip with the Court (as proof of delivery), and to have sent a confirmation copy of the faxed notice of appearance to the plaintiff's attorney within one day by ordinary mail or any other suitable method. Defendant's attorney had not done this and hence defendant was not a participating party.

[13] In support of a prima facie case that a notice of appearance to defend had been faxed to plaintiff's attorney, Mr Dreyer relied on the contents of Annexure "S1a", the covering letter allegedly faxed by defendant's attorney to plaintiff's attorney with the notice of appearance. Annexure "S1a" states:

> ". . . Hiermee saam ons klient se Kennisgewing van Voorneme om die aksie te verdedig vir u vriendelike aandag . . . "

Although this suggests that a notice of appearance accompanied the covering letter, no such notice is annexed to Annexure "S1a", nor does the affidavit of Bester allege that such a notice was faxed. A further Annexure, "S1b" is alleged by Bester to be the fax transmission verification report in respect of "S1a" to plaintiff's attorney, but as has been stated, fails to display plaintiff's attorney's telephone number to which it was sent, a not uncommon occurrence, according to Mr Dreyer. Despite these crucial omissions Mr Dreyer asked me to accept that the covering letter, Annexure "S1a" was based on Form 10 of Schedule 1 to the rules, that it complied with the requirements of a filing notice for an appearance to defend, and moreover that the affidavit of Bester together with its annexures sufficed as proof that defendant's attorney had faxed a notice of appearance to defend to plaintiff's attorney.

[14] This I am unable to do. Clearly all Annexure "S1a" is, is that it is a letter to plaintiff's attorney which states that it accompanies a notice of appearance to defend. It would be straining the ambit of interpretation and application of the rules to an unacceptable degree, were I to find that Annexure "S1a" was a notice of appearance in compliance with the rules. Similarly, on the basis of annexure "S1b" alone, I am unable to accept that a notice of appearance was faxed or that the transmission verification report is in respect of a fax sent to the plaintiff's attorney. All Annexure "S1b" tells me is that three pages were faxed to an unknown number on 24 February 1999 at 12h10. I am also unable in the absence of proof of faxing of these documents, to permit Mr Dreyer to rely on the proviso at Rule 2(1)(a)(aa) to the effect that a document sent by facsimile transmission is deemed to have been received unless the contrary is proved.

[15] A supplementary affidavit by Bester (for which leave to furnish was granted to the defendant at the hearing) as well as plaintiff's reply thereto was filed with the court a day after the hearing. It seeks to rectify the omissions to the affidavit of 23 June 1999 by alleging that a notice of appearance to defend was sent to plaintiff's attorney together with the covering letter (Annexure "S1a" to the affidavit by Bester of 23 June 1999). A notice of appearance to defend to plaintiff's attorney (dated 24 February 1999) is indeed annexed to the affidavit . Filed also, as proof that this notice was sent to plaintiff's attorney is a covering letter dated 24 June 1999 to his firm together with a facsimile transmission verification report on which plaintiff's attorney's facsimile number clearly appears.

[16] The affidavit of Bester dated 24 June 1999 and the appearance to defend addressed to plaintiff's attorney annexed thereto may on a balance of probabilities show that a notice of appearance was faxed to plaintiff's attorneys within 10 days of service upon defendant of the notice of action. However, this still falls short of compliance with the requirements for delivery of a

document by fax as prescribed at Rule 2(1)(a)(ii), namely the dispatching of a confirmation copy within one day by ordinary mail or any other suitable method. This simply did not occur. A confirmation copy of the notice was neither posted by defendant's attorney to plaintiff' attorneys nor was one received by plaintiff's attorney. Mr Dreyer suggested that this should not be seen as an irregular step as in practice confirmation copies of faxed documents are not usually sent in accordance with the Land Claims Court Rules. I cannot accept his argument. If, as he suggests, the practice deviates from the rules, then the practice must be adapted to the rules and not vice versa. The rules clearly take precedence over any practice.

[17] Mr Dreyer argued also that in accordance with Rule 26(1)(b) all that was required for defendant to be a participating party was the filing of a notice of appearance to defend, which he had done. Nowhere at Rule 26(1)(b), he argued was it stated that a participating party is one who files and serves. It is Rule 25, he averred, which deals with only the process by which one is required to file and serve a notice of appearance to defend and not with the definition of a participating party. If one wants to establish the definition of a participating party, he said, one looks to Rule 26(1)(b) only. He suggested also that the words, "in accordance with these rules" at Rule 26(1)(b)[10] should not be construed so as to mean in accordance with the requirements set out at Rules 25, 18(2), 2(1), 44(3)(a) or any other rules which might specify requirements with which a notice of appearance to defend must comply. I am of the opinion that such an interpretation goes against the grain both of the purposive theory of interpretation accepted by this Court.[11] I accordingly do not accept the interpretation ascribed by him to Rule 26(1)(b) .

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10 The section is quoted in para [1] above.

11 *Dulabh and Another v Department of Land Affairs* 1997 (4) SA 1108 (LCC) at 1123-1128; *Minister of Land Affairs and Another v Slamdien and Others* [1999] 1 All SA 608 (LCC) at 615-617.

[17.1] Even if I were to accord the interpretation favoured by Mr Dreyer, it would not allow defendant to escape the filing requisites specified at Rule 25(2)(b) (and the necessity for service or delivery contained therein by cross reference to Rule 18). This is so because he would in any event have to abide by the Rule 25(2)(b) filing requisites specified at Rule 44(3)(a).[12] The latter rule applies to parties like the defendant who opposes the relief claimed in a notice of action and provides that such a party must file a notice of appearance as described in Rule 25(1). Mr Dreyer's interpretation would also not enable defendant to escape the particular meaning accorded to "file" contained at paragraph (b) of the definition of "deliver".[13]

[17.2] It is clear from this extract that a participating party not only files an original notice of appearance with the registrar, but also provides proof that copies were delivered, for which actual delivery must be a requisite.

[17.3] Finally it must be pointed out that Mr Dreyer's argument, would not make good the irregularities to the notice of appearance to defend filed with the Court by defendant , namely the failure to comply with Rule 18(2)(e) and (f) and Form 10 of Schedule 1 to the rules.

[18] In the circumstances and for all of the above reasons I find that the defendant's notice of appearance to defend is irregular and does not comply with the rules. It as an irregular step within the meaning of Rule 32(3). It now falls upon me to consider whether in the circumstances the fair and prudent course for me to follow would be to grant plaintiff the order sought by her in this

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12 Supra n 5.

13 The definition of "deliver" is quoted in supra n 7.

application, which would result in ousting the defendant as a participating party, or to condone the defendant's irregular notice of appearance.

[19] Rule 32(7)[14] read with Rule 32(5)[15] (in particular 32(5)(b)(ii) and (vii)) permits me to condone an irregular step mero motu after granting the party responsible for the irregularity an opportunity to be heard .The grounds upon which our courts will grant condonation are well established. In *Federated Employers Insurance Company v McKenzie*[16] where Holmes JA identified the following factors for a Court to consider when deciding whether or not to grant condonation:

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14 Rule 32(7) states:

> "If a party fails to comply with any of these rules or an order or direction of the Court, the Court may, of its own accord and after granting that party an opportunity to be heard, make any of the orders set out in subrule (5)."

15 Rule 32(5) states:

> "In the event of an irregular step, or in the event of any party failing to comply timeously or at all with any provisions of these rules or with any order or direction of the Court, any other party may, within a reasonable time of becoming aware of such irregular step or such failure, give written notice to the defaulting party -
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> (a) to rectify (if rectification is possible) or withdraw the irregular step; or
> (b) to comply with the applicable provision of these rules or with the order or direction of the Court (as the case may be),
>
> within five days, failing which the Court may upon application -
>
> (i) set aside the irregular step;
> (ii) condone the irregular step;
> (iii) strike out the non-complying portion of any document;
> (iv) order the defaulting party to comply with the applicable provision of these rules or with the order or direction of the Court (as the case may be) within a stated period;
> (v) strike out the claim, defence or response of the defaulting party, whereupon the defaulting party will no longer be entitled to exercise the rights set out in Rule 26(2); or
> (vi) order that any appeal lodged by the defaulting party shall lapse; and
> (vii) make any order (including an order as to costs) which it considers just."

16 1969 (3) SA 360 (A) at 362G. See also *Beinash v Wixley* [1997] 2 All SA 241 (A).

> "The degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice".

In *Melane v Santam Insurance Co (Ltd)*[17] Holmes JA also stated at 532E:

> "What is needed is an objective perspective of all the facts. Thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay."

[20] More recently there has been a trend to refuse condonation where rules of court have been disregarded and the courts have expressed their displeasure at legal practitioners who hold the rules in disdain.[18] I do not believe this to be such a case.

[21] Having heard the defendant I am of the view that he believed, albeit mistakenly, that he had filed and delivered a notice of appearance in accordance with the rules. Whilst the notice of appearance was irregular, the degree of non-compliance cannot be said to have been of such magnitude as to have prejudiced the plaintiff. I am mindful of the fact that there is clear proof in the court file that there was an intention to defend which was communicated timeously on 25 February 1999 (three days after the notice of action was served on him), albeit imperfectly. Further evidence

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17 1962 (4) SA 531(A). See also *National Union of Metalworkers of South Africa v Jumbo Products CC* [1996] 4 ALL SA 177 (A).

18 See, for example, *Tshivhase Royal Council & Another; Tshivhase & Another v Tshivhase & Another* 1992 (4) SA 582 (A) at 859E-F. *Ndebele v Ncube* 1992 (1) ZLR 288 (S) at 290C-E; *Allround Tooling (Pty) Ltd v National Union of Metalworkers of South Africa* [1998] JOL 2719 (LAC) at 5; *Alpha Bank Bpk en Andere v Die Registraar van Banke en Andere* [1998] JOL 884 (A) at 4; *Beit Bridge Rural District Council v Russell Construction Company (Pvt) Ltd* [1998] JOL 3244 (ZS) at 4-6, *Southern Cape Car Rentals CC t/a Budget Rent a Car v Braun* [1998] 4 ALL SA 585 (A) at 590; *Darries v Sheriff of the Magistrate's Court (Wynberg) and Another* [1998] JOL 2154 (A) at 9-10.

of defendant's intention to participate is his special plea, this time delivered also to the plaintiff's attorney.

[21.1] Against all of this I am mindful also of the plaintiff's conduct. Even though plaintiff did not timeously receive a similar notice of appearance to defend as was filed with the court, in response to her notice of action (which she knew from the return of service was served on defendant on 22 February 19999), she did not treat the matter as unopposed as might have been expected. She took no action during the following two months prior to receiving the special plea as an unopposed litigant, as she might have. Then, when she was clearly made aware of the defendant's intention to defend the action (at the very latest on 7 May 1999 when her attorney received defendant's special plea), she did not respond with alacrity and declare his participation in the case to be irregular. On the contrary, her conduct right up to the conference of 25 May 1999 can be construed as accepting of the defendant as a participating party. I do not believe her conduct thereafter [when plaintiff's attorneys properly wrote to defendant's attorneys alerting them to the irregular step (in substantial compliance, I believe, with Rule 32(5)[19]) and ultimately withdrew with a tender of costs] should detract from this salient fact. Were I to condone defendant's irregular notice of appearance, I believe there would be little prejudice to plaintiff who by and large has treated defendant as a de facto participating party. A failure to condone would however greatly prejudice defendant who would be ousted from the action. True, a condonation would open the way for defendant's special prayer for costs being adjudicated upon, but it is preferable that that be dealt with on its merits.

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19 Supra n 15.

[21.2] There is another factor which weighs upon me. In the light of the overwhelming evidence of defendant's intention to defend this action, I believe it would be inequitable[20] for him to be ousted for what at the end of the day amounts to a technical defect in his notice of appearance to defend, no more no less. In this regard I am fortified by the dicta of Schreiner JA in *Trans-African Insurance Co Ltd v Maluleka*[21] where he stated:

> "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".

Rules are made to give procedural effect to the law and they must be complied with. However, when non-compliance is not of a degree so gross as to render the law inoperative, it ought not to stand in the way of an examination of the issues, and the effective disposal of a case. Often it is of limited benefit and a costly exercise to become embroiled in a quagmire of technicalities and an over-analysis of the rules. It is unfortunate that such a situation arose in this case.

[22] Regard being had to all of the above, I believe an application of the factors referred to by Holmes JA in the *Federated Employer's* case[22] weighs in favour of condonation being granted to the

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20 Section 33(c) of the Restitution of Land Rights Act, No 22 of 1994, states that in considering its decision in any particular matter this Court shall have regard to the requirements of justice and equity.

21 1956 (2) SA 273 (A) at 276.

22 Supra n 16.

defendant. I am of the view that this is a case in which the powers of condonation granted to me at Rule 32(7) would be well exercised. The application is therefore dismissed and the following order is made in terms of Rule 32(5).

1. The plaintiff's application is dismissed.

2. The defendant's notice of appearance to defend is condoned.

3. The defendant is declared to be a participating party in this action.

4. The question of costs is to stand over for determination when the special plea is argued.

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JUDGE Y S MEER

Heard on: 23 June 1999 **Handed down on:** 6 July 1999

For the Applicant:
Mr MacIntosh, instructed by *Loots Attorneys*, Vryheid

For the Defendant:
Mr Dreyer instructed by *Philip du Toit Inc*, Pretoria