



**IN THE HIGH COURT OF SWAZILAND**

**JUDGMENT**

Case No. 302/2012

In the matter between:

**NEW MALL (PTY) LTD**

**Applicant**

**And**

**TRICOR INTERNATIONAL (PTY) LTD**

**Respondent**

**Neutral Citation:** New Mall (Pty) Ltd v Tricor International (Pty) Ltd  
302/2012) [2012] SZSC 175 (10<sup>th</sup> August 2012)

**Coram:** Dlamini J.

**Heard:** 9<sup>th</sup> August 2012

**Delivered:** 10<sup>th</sup> August 2012

*Application – question of urgency – each case to be decided on its circumstances.*

Summary: The applicant by Notice of Motion under a certificate of urgency has brought an application seeking for an order directing the respondent to account and remit to applicant all rentals collected

by respondent on its behalf. The respondent has not filed any answering affidavit but has raised *points in limine*.

- [1] It is common cause that the respondent was sometime ago applicant's collection agent. Pending before this court is a judgment on whether that relationship still subsist. However, it is common cause further that respondent is still collecting rentals from applicant's tenants and is not depositing the same to applicant's account.
- [2] The issue before me is whether the matter could be considered as urgent.
- [3] Counsel for respondent has submitted that there is absolutely no basis for urgency. The averments as appears from paragraphs 24 to 32 of applicant's founding affidavit are completely devoid of urgency. Respondent contends that applicant, as appears at its paragraph 21, became aware that the respondent last deposited rentals collection in September 2011, a period of 10 months. In May 2012 the applicant's client had instructions to institute legal proceedings as evident by correspondence demanding rentals collected from respondent, failing which legal proceedings were to follow within five days. In essence, respondent submitted from the bar, that if there is any urgency, it was self created.
- [4] Counsel for respondent referred this court to **Humphrey H. Henwood v Maloma Colliery Limited and Another 1623/94** where the learned Judge, **Dunn J.** refused to grant a prayer for treating applicant's matter as urgent.

[5] It was respondent's further contention that *in casu* applicant has waited for 10 months before instituting the legal proceedings. In response to applicant's averment that the applicant was engaged in negotiations with respondent as per its paragraph 32 of the founding affidavit, Counsel referred the court to **Humphry H. Henwood** *supra* pages 11-12 where **Dunn J.** wisely states:

*"Mr. Flynn next argued that the applicant should not be punished for having chosen to negotiate with the first respondent over his rights rather than seeking to enforce those rights in court. Whatever sympathy one may have for the appellant, he cannot have it both ways. He elected to allow the operations whilst negotiating with the first respondent and he cannot after some 18 months seek to enforce his rights in an application brought out with the provisions of Rule 6. "*

[6] *In contra*, Counsel for applicant clarified that in terms of the founding affidavit, paragraph 21 only indicates that the applicant has discovered that respondent has not been depositing the rental collections since September 2011 and that today this amounts to a period of 10 months. He further pointed out that annexure C10, the letter of demand indicates that applicant learnt of respondent's failure on the 9<sup>th</sup> May, 2012. He referred the court to paragraph 32 and submitted that since then the applicant has been negotiating for an effective period of 2 months as it moved its application on the third month. He urged the court to draw a distinction between the case cited by respondent, that is, **Humphry H. Henwood** *supra* and the one *in casu*. He pointed out that in **Humphry's** case, the applicant had been involved in negotiations for a period of 18 months

while *in casu* only for two months. It was his contention that the period of 2 months was reasonable in the circumstances and that the honourable judge **Dunn J.** did not completely bar litigants from engaging in negotiations.

[7] **Coetzee J. in Luna Menbel Bervaardigers v Makin and Another 1977 (4) S.A. 135** at 136 explaining what was entailed by urgency states as follows:

*“urgency involves mainly the abridgement of times prescribed by the rules and secondary, the departure from established filing and sitting times of the court.”*

[8] No doubt, this is an extra ordinary procedure because as well articulated by **Murray A. J. P. in Room Hire Co. (Pty) Ltd v Jeep Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 T.** although making reference to motion proceedings, his comments apply even on urgency, highlighted that a litigant who proceeds under such:

*“...deprive his opponent of a number of procedural advantages instanced in the judgment referred to viz prematurely the right to plead without disclosing his evidence, the right to make tactical denials in order to force his opponent into the witness box, the right to raise alternative defences of possible inconsistency.”*

[9] It is for this reason that **Coetzee J. in Luna supra** at 137 wisely cautions:

*“Practitioners should carefully analyse the facts of each case to determine, for purposes of setting the case down for hearing, whether a greater or lesser degree of relaxation of the Rules and of the ordinary practice of the court required. The degree of relaxation should not be greater than the exigency of the case demands. It must be commensurate therewith. Mere lip service to the requirement ....will not do and an applicant must make out a case from the founding affidavit to justify the particular extent to the departure from the norm....”*

[10] My duty is to enquire whether the degree of relaxation of the rules of this court is *“commensurate to the exigency”* of the case *in casu’s* demands as wisely propounded by **Coetzee J. supra**.

[11] In establishing the ground of urgency the applicant avers as reflected at paragraphs 24 - 32 of the founding affidavit:

**“D URGENCY**

24. *I submit that the matter is urgent by virtue of the fact that applicant is suffering continuous prejudice on a daily basis by the continued failure by the respondent to deposit rentals collected into the applicant’s designated business account.*

25. *Applicant has no knowledge of where its funds are being kept and whether or not they have been used and/or for what purpose.*

26. *There is a real danger that applicant may wake up one day to find that the respondent is unable to account for the funds collected since applicant is unable to monitor the usage thereof and is being deprived the benefit of having access to same for the purpose of running its business or even for re-investment purpose.*
27. *The respondent's employees particularly, have a history of theft as they have in the past been found helping themselves to the rental collections without respondent taking notice of the fraudulent activity. In previous incidents, fraud has been perpetrated over a period in excess of two (2) years without the respondent paying any particular attention to it. The danger of applicant incurring a loss regarding the rental collections which now amount to over E4 million coupled with the deprivation of the benefits and usage of its funds for the running of its business and/or for investment and which funds ought to be in its business bank account is a clear indication of the irreparable harm that the applicant is suffering on a daily basis as a result of the respondent's failure to deposit the rentals into the designated account and/or to remit to the applicant.*
28. *I humbly submit that the danger of potential irreparable harm alone suffices to have a matter enrolled on the basis of urgency and an applicant need not establish actual harm suffered. In any event applicant has established actual irreparable*

*harm in the present matter because it is being deprived the usage of its funds which it cannot even re-invest to yield better income for its shareholders. It is further deprived of the usage of the funds to pursue the interests of the company on a day to day basis. In that regard, I annex hereto applicant's bank statements for the designated account for the months of May 2012, June 2012, July, 2012 indicating that todate no rentals are being deposited into the designated account. Copies of the bank statements are annexed hereto marked "C7", "C8" and "C9" respectively.*

*28.1 It will further appear from the statements that the only rentals received are those being made by Electronic Funds Transfer from Truworths and Ackermans. All other payments are made to the respondent and respondent does not remit nor account for the said payments.*

*29. I submit in the circumstances that applicant cannot be afforded substantive redress at a hearing in due course. Applicant has tried to reason with the respondent to remit rental monies collected and to desist from further depositing rental collection into the unauthorised account to no avail. To that extent, I refer to a letter written by applicant's attorneys to the respondent dated 9<sup>th</sup> May, 2012, a copy of which is annexed hereto marked "C10".*

30 *I have been advised that when the main application was heard on the 12<sup>th</sup> July 2012, the court enquired from the attorneys whether rentals collected are being remitted to the applicant whilst the court is determining the dispute regarding the cancellation of the Management Contract. The attorneys could not give a clear answer because they were not aware at the time whether the respondent had remitted the rental collections after it had been served with the letter being annexure "C10". In that respect I refer this court to the Confirmatory Affidavit of Zweli Shabangu, the applicant's attorney which is annexed hereto. Since there was no clear answer from the attorneys, and the issue was not before it, the court assumed that rentals collected were being remitted to the applicant.*

31. *I submit that the applicant having filed the main application in February 2012m had hoped that the issue of the Management Contract would be speedily resolved and/or respondent would repent and remit the rentals collected to the applicant. However, it appears that the main matter is still pending for determination before the court and its finalization has taken longer than expected because of the congested court roll on civil matters, a factor that is beyond the court's control. The applicant is in the meantime suffering prejudice on a daily basis as a result of respondent's failure to remit and/or to deposit rentals into the designated business account.*



*In the circumstances, I submit that urgency in the matter is real.*

32. *The applicant has not delayed in bringing the application since it was still engaging the respondent in the issue to remitting rentals and had not anticipated that respondent would be unreasonable and refuse to remit as it has done. Applicant had further hoped that the determination of the main dispute would resolve all outstanding issues between the parties. To that extent, applicant submits that it has acted reasonably in bringing the matter to court in the manner that it has done after efforts to engage the respondent proved to be futile. Applicant is suffering harm on a daily basis as a result of the unlawful actions of the respondent and has no adequate alternative remedy than to approach this Honourable court for the relief that it seeks.”*

[12] I juxtapose the case *in casu* with that of **Twentieth Century Fox Film Corporation and Another v Anthony Black Film (Pty) Ltd**. The applicant in **Twentieth Century** case sought for an interdict, restraining respondent from conducting business of selling or otherwise with cassettes, a business in which applicant was also conducting and thereby claimed copyright infringements. The respondent objected to the matter as urgent on the basis that the applicant became aware of its activities from 8<sup>th</sup> September whereas it ordered its investigators on 9<sup>th</sup> November. In answer, the applicant submitted that the delay was occasioned by the fact that it had to obtain affidavits from persons who were overseas.

[13] The court held that it had to take cognizance of the fact that executors who were to be consulted were overseas and therefore the case was urgent.

[14] What is important in that case and the **Humphrey H. Henwood** case *op.cit.* is the *dictum* that every case has to be decided on its peculiar facts.

[15] *In casu*, I draw the conclusion as appears at paragraph 21 that:

*"21. I submit that on a monthly basis, rentals collected from The New Mall Shopping Centre amount on average to or about E400,000.00 (Emalangeneni Four hundred thousand). Applicant has learnt that the respondent last deposited rental collections into the designated account during the month of September 2011. To date, a period of more than ten (10) months has elapsed and the respondent has not remitted rentals collected nor is applicant aware of what has happened to the estimated E4 million that has been collected over the ten month period."*

[16] This paragraph is indicative not of the period applicant became aware of respondent's failure to deposit rental collection at the bank but that respondent has since September 2011 not deposited the rental collections. Further that "C10" outlines the date upon which the applicant became aware that the monies collected from tenants were not deposited. I therefore find that the applicant has been aware of the conduct of respondent which has culminated to this application for the past two months.

[17] The next query is whether in the circumstance, the applicant has been dilatory in bringing the application.

[18] It is common cause that the monies that applicant is claiming emanate from rentals from applicant's tenants. It is trite that rentals are due once in a month and that is at the end of each month. The applicant herein, as it avers has been negotiating with the respondent for the period of two months. It can safely be held therefore that in the circumstance a reasonable applicant would anticipate that respondent, pursuant to the negotiations would take a positive action at the end of the month. A failure in the first month end would operate in favour of respondent to be given a second chance. Hence the second month's wait by applicant. I must mention that this court agrees with **Mr. Flynn's** submission in **Humphrey H. Henwood** *op.cit.* that:

*"applicant should not be punished for having chosen to negotiate with ....respondent over his rights rather than seeking to enforce those rights in court."*

[19] The submission by **Mr. Flynn** in **Humphrey's** case accords well with the notion that a party should mitigate costs and not be swift to rush to court in view of litigation costs which sometimes can be astronomical.

[20] Approached from another angle, the applicant has come to court as can be deduced from his founding affidavit to assert a commercial interest. The respondent is said to be collecting a substantial amount of rentals to the tune of E400,000 per month.

Already in possession of respondent is the sum of E4 million. *Ex facie*, the applicant is losing substantial amounts in terms of interest and investment. These facts on their own warrant that the matter be treated with urgency as pointed out in **Twentieth Century** case and in our *locus classicus* case of **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors 23/2006** where the learned judge, **Terbutt J.**:

*“This court accordingly finds that it should seek to remedy a clearly unsatisfactory situation involving, as it no doubt does, financial loss, as soon as possible. It therefore, confirmed its prima facie view that the matter is one of urgency, ...”*

[21] *Fortiori in casu*, this court holds that a litigant who has averred financial loss, moreso of a high magnitude, should have its matter treated with urgency.

[22] Respondent also raised the point that the matter is not of an interlocutory nature because it is not a consequential to the main application.

[23] It is clear from the facts of the matter that the applicant claims for rental collection from respondent who collects rentals on behalf of applicant as a result of a contract which is under issue in the main application. It is therefore not clear as to the reasons respondent submits that this matter ought to have been assigned a different case number. In fact respondent’s counsel did refer to the main application when arguing the present case. He informed the court for instance that the contract has been

repudiated by its client, an averment made in the main application. In this regard, respondent's point should fail.

[24] In the foregoing, the points *in limine* are dismissed.

[25] On the question of costs, I refer again to **Shell Oil Swaziland supra** where his Lordship held:

*"...is now well recognized and firmly established viz.. not to allow technical objection to less than perfect procedural aspects to interfere in the expeditious and possible, inexpensive decision of cases on their real merits."*

[26] He then cited **Nelson Mandela Metropolitan Municipality and Others v Greyvenouw CC and Others 2004 (2) S.A. 81 (SE)** at **95F- 96A par 40** as follows:

*"The court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrance of unnecessary delays and costs."*

[27] Respondent as appears from the papers before court, was served with the urgent application on the 6<sup>th</sup> August 2012 for a hearing on the 9<sup>th</sup> August 2012. Respondent did not file anything. It chose to come to court to argue on technical points against the decided cases of this court and the Supreme Court that litigants should not rely on technicalities.

[28] **Schriener J. A. in Trans-African Insurance Co. Ltd v Maluleka 1956 (2) S.A. 273 (A.D.)** at **278** stated:

*“No doubt parties and their legal advisers should not be encouraged to become slack in the observance of the Rules, which are an important element in the machinery for the administration of justice. But on the other hand 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.”*

[29] It is not clear why respondent chose not to answer to the merits of the case. Mr. Flynn who represented the respondents informed the court that he had prepared an answering affidavit which reflected points of law but was awaiting signatures. Neither was a Notice of Intention to Oppose filed herein. Again it was not explained why the respondent, having had two days, failed to answer on the merits of the applicant’s application and chose to come to court to raise technical points only. This is by no means suggesting that a litigant cannot raise such points but it should do so and also respond to the merits of the case. Failure to do so shall in the event the points *in limine* fail be attended by an appropriate order as to costs where more so when sufficient time was available to the party to answer on merits.

[30] In the light of the authorities cited herein, having dismissed respondent’s point *in limine*, I order respondent to pay costs on attorney and own client scale.

[31] It follows therefore that prayers 1, 2, 3, 4 and 5 of applicant’s notice of motion are granted as an interim order to operate with immediate effect. A rule nisi is hereby issued, returnable on 16<sup>th</sup>

August 2012. Respondent is ordered to file its answering affidavit on or not later than 12.00 noon on 14<sup>th</sup> August 2012 and applicant to file its replying affidavit not later than 10.00 a.m. on 16<sup>th</sup> August 2012, should either party be so inclined. The matter is enrolled for 2.00 p.m. on 16<sup>th</sup> August 2012.

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**M. DLAMINI**  
**JUDGE**

**For Applicant : Z. Shabangu**

**For Respondent: Advocate P. Flynn instructed by L. R. Mamba**