



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 180 (24th August 2012)

Coram: Dlamini J.

Heard: 16th August 2012

Delivered: 24th August 2012

Interlocutory application - elements thereof - appeal - leave to appeal peremptory - affidavit - description - cost de bonis propriis - reasons thereof.

Summary: By notice, the applicant moved under a certificate of urgency an application seeking for payment of rentals collected from its client by the respondent pending judgment on the main

application on whether the contract of agency between applicant and respondent was still subsisting. The matter was heard on the 9th August 2012 and respondent from the bar, opposed the application on the basis that it was not urgent. A written ruling was delivered on the 10th August 2012 where after careful consideration, the court held that the matter was urgent. Respondent was granted leave to file answering affidavit and applicant reply, should each party be so inclined. The matter was enrolled for 16th August 2012 in the afternoon. I am now called upon to determine the merits of the application.

[1] Respondent's counsel filed an answering affidavit late in the afternoon of the 14th August 2012 which, for purposes of this judgment, it is imperative that I quote it verbatim:

"I, the under signed, LINDIFA MAMBA do make oath and say that:

- 1. I am the attorney of record for the respondents in this matter. As such I am entitled to depose to this affidavit. The facts herein are within my personal knowledge and are true and correct.*
- 2. I have read the affidavit of the applicant and the judgment of the above Honourable Court dated 10th August 2012.*
- 3. I must, with respect, state that I am a bit confused as to what the respondent is expected to say in the affidavit it is directed to file. My humble view is that the orders granted with particular reference to Orders 4 and 5 as*

well as the Order of Costs have final effect. It is therefore not, in my view, open to the respondents to deal with the merits of the matter in this Honourable Court and the respondents have accordingly filed an appeal against such order.

- 4. In so far as it is permissible and purely to place matter in proper perspective, I would like to state the following: The papers were served in this matter on the 6th August 2012 at 15.04 hrs and the applicant gave notice that an answering affidavit should be filed by not later than 12.00 hrs on the 8th August 2012. The application was served on my office as the attorneys representing the respondents in case No. 302/2012. The directors of the respondents were out of the country at the time and it was impossible to prepare and file an affidavit dealing with the merits of the matter in the time imposed by the applicant.*
- 5. I had to telephonically get in touch with the directors and also by email. I also had to instruct counsel.*
- 6. When it became clear that we could not meet the deadline for service, I sent an electronic copy of the draft affidavit to the applicant so that they would now what points were to be raised. I annex hereto a copy of such email and affidavit. (No annexure was filed nor was it handed during submission) (words in brackets my own)*

7. *Because of the time constraints we had been placed under, it was not possible to go into the merits of the matter for purposes of the application.*
8. *I have instructions that contrary to what has been stated in the affidavits, monthly payments in respect of interest to the shareholders of the applicant, the Public Service Pension Fund and the City Council of Mbabane are made as had been done before the unlawful repudiation of the agreement.*
9. *I have in my possession on behalf of the respondents, documentary evidence of such payments having been made and this runs into hundreds of pages and will be made available to the Court at the hearing of the matter, in order to avoid over burdening this affidavit.*
10. *It would seem that the stratagem of the applicant is to enforce, through the court, a repudiation which has been challenged and in respect of which judgment is still pending. The respondents have not accepted the repudiation. They continue to manage the shopping centre in the same way they had done before the repudiation; nothing has changed except that the bank account that was muscled in unlawfully by the applicant. They continue to liaise with the tenants; they continue to manage and pay service providers and they continue to make monthly payments to shareholders of the applicants as they have always done.*
11. *By making the order it has made, the Court has, with respect, prejudged the matter that is still pending*

before it under case No. 302/2012 and has allowed the applicant to give effect to its unlawful repudiation.

12. I do not, with respect, believe that it is now open to the court to reverse or change that.

13. It would seem that the above Honourable Court also gave directions to the parties in respect of the filing of these affidavits without hearing whether such time limits could be met by the parties and indeed without it would seem, considering whether they were still necessary, in view of the Order.

14. In the event it has not been possible to retain the services of the counsel that had been briefed in the matter due to a prior engagement he has in the Eastern Cape.

15. It is my view that, with respect, the issues can only now be addressed on appeal and the above Honourable Court is functus officio in the matter.

16. May I also with respect invite the above Honourable Court to mero motu consider whether in view of its judgment in this application, it has not prejudged the matter that is pending before it and in respect of which no judgment has been handed down."

[2] Respondent's counsel attached an unsworn affidavit purportedly in the name of Respondent's Managing Director. As I intend to address in detail the nature of this annexure, I shall repeat the averments thereof and in some make comments enclosed in brackets which are:

"I, the under signed, COLIN FOSTER do make oath and say that:

- 1. I am an adult male and I am the Managing Director of the respondent herein. I am duly authorized to depose to this affidavit for and on behalf of the respondent by virtue of the annexed resolution. The Managing Director of the respondent who would normally depose to an affidavit of this nature is out of the country and given the extremely short notice afforded in the respondent, I am authorised to depose to this affidavit. (No resolution attached)*
- 2. The facts contained herein are within my personal knowledge unless otherwise stated or appears and are to the best of my knowledge true and correct.*
- 3. Any legal submission made herein are made on the basis of the advice of my legal representatives which advice I accept to be correct.*
- 4. I am presently out of the country on business in the Republic of South Africa. I have had the application transmitted to me. Due to my absence and the short notice, I am unable to have the original of this affidavit filed timeously and will cause a scanned copy to be filed with the original being submitted in due course. I have instructed my attorneys to cause a draft of this affidavit to be sent to the applicant's prior to my signing it. I beg the indulgence of the*

court in that above regard. (No scanned copy was filed).

5. *I have read the founding affidavit and the annexures attached thereto. It will be submitted on behalf of the respondent at the hearing of the application on the 9th August 2012 that this application is an abuse of the procedures of this Honourable Court and that it should be struck off the roll with costs on the attorney and own client scale. The application purports to be interlocutory application (described as a “sequel”) to an application under Case No. 302/2012. It is also brought as an urgent application which was served on the respondent’s attorney in Case Number 302/2012 at 15h04 on the 6th August 2012.*
6. *This affidavit addresses the abusive nature of these proceedings and the failure of the applicant to establish a case of urgency. The short notice of the hearing and the contents of the founding affidavit make it impossible to deal with the merits of the application and the respondent should, in any event, only be required to do so in an application in compliance with the Rules of this Honourable Court.*
7. *I am advised and it will be submitted on behalf of the respondent that this is not an interlocutory application but that it seeks separate and substantive relief and is accordingly a fresh application albeit between the same parties.*

8. *It will be further be submitted on behalf of the respondent that the applicant has not established a case for this matter to be heard in terms of the provisions of Rule 6 (25) of the High Court Rules. I am further advised and it will be submitted that the applicant was not, in the circumstances of this application, entitled to ignore Rules 6 (9) and 6 (10).*
9. *This affidavit will only deal with those paragraphs of the founding affidavit which are relevant to the abusive nature of this application and the absence of urgency. The respondent nevertheless reserves its right to deal fully with the allegations contained in the founding affidavit in an answering affidavit should that be necessary but only in the event that the applicant deems it fit to bring a proper application in compliance with the rules. (words underlined my emphasis)*
10. *I deny that Cleopas S. Dlamini is duly authorized to institute these proceedings and to depose to the affidavit on behalf of the applicant merely because he is the Chairman of the board of directors. There is no resolution of the board of the applicant and there is no evidence whatsoever that he is authorised.*
11. *I deny that the facts and submissions contained in the founding affidavit are true and correct.*
12. *The citation of the parties is admitted.*
13. *AD PARAGRAPH 12 and 12.1*

It will be submitted that the description of the application as a “sequel to the main application” is legally meaningless. Insofar as this labelling of the application is intended to depict this application as an interlocutory application for purposes of evading the requirements of Rule 6, it will be submitted that it is not interlocutory and the proceedings are irregular and abusive. Legal argument in this regard will be presented in this regard at the hearing of this application on the 9th August 2012.

The application papers referred to herein in case number 302/2012 indicate that the respondent contended in that application that the applicant had unlawfully repudiated the management agreement between the parties and there is also reference to the bank account therein. The respondent herein will refer to those papers at the hearing hereof insofar as that may be necessary. The present application therefore seeks to pre-empt the outcome of another substantive application by seeking what amount to additional relief prior to judgment in that matter.

14. AD PARAGRAPH 16 TO 23 -

14.1 *It is apparent from the contents of these paragraphs that the alleged urgency of the application has no foundation at all. The respondent is entitled in terms of the rules to answer all the allegations in these paragraphs*

in an answering affidavit filed within the normal time limits and the respondent reserves the right to answer these allegations at an appropriate time in the event that the applicant proceeds hereafter in the normal way under Rule 6.

14.2 *The applicant contends that it is not aware how its monies are dealt with and that respondent has not accounted for any rentals from October 2011 to date. In paragraph 23 the respondent states that a period of 10 months has elapsed and respondent has not remitted rentals in terms of the agreement. It is clear therefore that the applicant has taken no steps to enforce its alleged legal rights for a full ten months but now seeks to do so on two court days notice to the respondent. The applicant cannot plead urgency in these circumstances.*

15. AD PARAGRAPH 24-32 - Urgency allegations

15.1 *The respondent alleges that it is suffering prejudice on a daily basis but on its own version this is alleged to have commenced in October 2011 and cannot be relied upon to contend that the application is not urgent. The same applies to the contents of paragraph 25 and 26 and the allegation in respect of irreparable harm.*

15.2 *The contents of paragraph 27 are specifically denied and the deponent to the founding affidavit and the applicant itself must be aware that the circumstances of the previous loss were fully canvassed in the respondent's answering affidavit in the application under Case Number 302/2011. The applicant now seeks to raise an issue which has been fully ventilated in another application, some time ago, and to use it as a ground for urgency in this application. It will therefore be submitted that these allegations do not support urgency.*

15.3 *The allegations in paragraph 27 are also defamatory and constitute a serious defamation. The allegations are defamatory of the respondent, its directors, its management and its employees. The respondent reserves all its rights to institute action for defamation in due course against the applicant, the deponent to the founding affidavit and also against the drafter thereof. The respondent regards the unfounded and reckless allegations that its employees have a history of theft and that it ignored fraudulent activity for a long time in a very serious light. The respondent repeats that these reckless, defamatory statements do*

not establish a basis for treating this application as urgent.

15.4 It is also submitted that the applicant has not made out a case that it cannot be afforded redress in due course. The applicants allegation (in paragraph 29) that it has tried to reason with respondent and in that regard addressed a letter to the applicant on the 9th May, 2012, merely reinforces the fact that this application should not have been instituted urgently in the manner in which it has been. It is remarkable that this letter calls upon the respondent to transmit the monies by close of business on the 16th May, 2012 failing which the applicant's attorneys are said to be instructed to institute legal proceedings against the respondent. Over two and a half months have elapsed since that letter was sent and since the instructions were allegedly given and yet the applicant now contends that the matter is urgent.

15.5 The applicant also refers to an enquiry by the court in the application in Case No. 302/2012 with regard the remittal of rentals. I am advised and it will be submitted that this enquiry does not assist the applicant in establishing urgency.

I am further advised that legal argument will be addressed to this Honourable Court in respect of the applicant's allegation that it was engaging the respondent and that it therefore has acted reasonably in bringing the matter to court in the manner in which it has done because these efforts proved futile. I am advised and it will be submitted that there is no merit in this contention.

16. *I am advised and it is submitted this Honourable Court should not dispense with the forms, service and procedures and should not condone non compliance with its rules in this application. It will be submitted that the application is a patent abuse of the rules of this Honourable Court. The respondent therefore prays that the relief sought in prayers 1 and 2 of the Notice of Motion be refused and that the matter be struck off from the roll with costs on the attorney and own client scale including the costs of counsel in terms of Rule 68 (2)."*

(This statement was not signed by both deponent and Commissioner of Oaths nor was a copy of a signed one annexed as suggested hereof).

Issues

- [3] Respondent's attorney submitted as supported by the averments in the answering affidavit that he has lodged an appeal on the basis that the ruling on urgency and the order subsequent thereto calling upon the respondent to account and transmit the rentals to applicant, although there was the wording "*interim*

order” was owing to the subsequent phrase “*operate with immediate effect*” final in effect and therefore appealable. The return date was nothing but a cosmetic dressing so to speak by the honourable court. In the end result, the court was *functus officious* as the matter was *res judicata*.

[4] Although paragraphs 8 and 9 of respondent’s counsel purports to address the merits, counsel on behalf of respondent did not motivate the same during *viva voce* submission. In fact when applicant stood up to address the court on the respondent’s attorney’s averments on the said paragraphs, respondent sprung up a strenuous objection on the basis of his previous submission that the matter was *res judicata* and therefore the court could not interrogate the merits.

[5] Crystallised, the issues for determination are whether the matter is *res judicata* owing to the orders of 10th August 2012; whether there is any appeal pending; whether the answering affidavit deposed by respondent’s attorney is admissible and whether the attached affidavit of respondent has any weight.

[6] *Res judicata*

The first question before court is whether the court is *functus officio* by reason of the matter being *res judicata* or put more precisely was the order of 10th August 2012 final in effect?

[7] In order to address the above question one needs guidance as to whether the order of 10th August 2012 was interlocutory or not?

[8] Addressing this point, in finer details, **Corbett J. A.** in **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) S.A. 534** at **549-550** stated:

“ (a) In a wide and general sense the term “interlocutory” refers to all orders pronounced by the court, upon matters incidental to the main dispute, preparatory to, or during the progress of the litigation. But orders of this kind are divided into two classes; (i) those which have a final and definitive effect on the main action; and (ii) those known as “simple (or purely) interlocutory orders” or “interlocutory orders proper” which do not.

(b) Statutes relating to the appealability of judgments or orders (whether it be appealability with leave or appealability at all) which use the word “interlocutory” or other words of similar import, are taken to refer to simple interlocutory orders. In other words, it is only in the case of simple interlocutory orders that the statute is read as prohibiting an appeal or making it subject to the limitation of requiring leave, as the case may be. Final orders, including interlocutory orders having a final and definite effect, are regarded as falling outside the purview of the prohibition or limitation.

(c) The final test as to whether an order is a simple interlocutory one or not was stated ...“... preparatory or procedural order is a simple interlocutory order and therefore not

appealable unless it is such as to 'dispose of any issue or any portion of the issue in the main action or suit or, which amounts, I think, to the same thing, unless it 'irreparably anticipates or precludes some of the relief which would or might be given at the hearing.'

[9] It is against the above principle that I determine the issue as raised by respondent.

[10] The order of 10th August 2012 read as follows:

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

[11] Applicant's prayers as per 1, 2, 3, 4 and 5 were as follows:

"1.Dispensing with the usual forms, rules and procedures of this Honourable Court relating to service and time limits and allowing this matter to be heard on the basis of urgency;

2. *Condoning the applicant's non-compliance with the said forms, time limits, rules and procedures of this Honourable Court relating to service and allowing this matter to be heard on the basis of urgency;*
3. *Directing the respondent to desist from and /or interdicting the respondent from depositing any monies collected as rentals on behalf of the applicant from tenants of the New Mall Shopping Centre into any account not expressly authorized by the applicant;*
4. *Directing Respondent to deposit all monies collected as rentals from tenants of New Mall Shopping Centre into the business account that was dully authorized by the applicant and held with First National Bank of Swaziland Limited, Mbabane Branch, to wit;*

Commercial Cheque Account No. 57711185184
5. *Directing the Respondent to account for and to remit to the applicant all rentals collected by respondent from tenants of New Mall Shopping Centre from October 2011 to date of final payment together with accrued interest thereon.*
6. *That the respondent pays the costs of this application.*
7. *Granting further and/or alternative relief.*

[12] Following the *ratio decindi* as laid down in **South Cape** *supra* and followed in numerous cases such as **Transvaal Canoe Union v Butgereit and Another 1990 (3) S.A. 398** the next

question is: whether the order granted on 10th August 2012 as outlined above, when given effect to or executed, might cause respondent damage or prejudice irreparable in the final judgment.” If the answer is to the positive, then the order is not purely interlocutory and it is appealable. If no, it is purely interlocutory and in terms of section 14 (1) (b) of the Court of Appeal Act, leave must be filed for appeal.

[13] **Schreiner J. A. in Pretoria Garrison Institute v Danish Variety Products (Pty) Ltd 1948 (1) S.A. 839 at 870** on the question of “*damage or prejudice irreparable in the final judgment*” stated:

“...regard should be had, not to whether the one party or the other has by the order suffered an inconvenience or disadvantage in the litigation which nothing but an appeal could be put right, but to whether the order bears directly upon and in that way affects the decision in the main suit.”

[14] **Wessels J. A. in Globe and Phoenix Gold Mining Co. Ltd v Rhodesian Cooperation Ltd 1932 AD 146 at 155** states similarly:

“We have not to look to any inconvenience or even expense which an interim order may cause to the person against whom such order operates. We look to its effect upon the issue or issues in the suit.”

[15] **Curlewis J. A. in Globe and Phoenix supra** states:

“...in order to be appealable an interlocutory decision must be one which is irreparable, not in the sense that the effect which it produces cannot be repaired having regard to the resources at the command of the person against whom it is made, but in the sense that (if it remains unreserved) it irreparably anticipates or precludes some relief which would or might have been granted at the hearing.”

[16] Can *in casu* be said that the orders granted preclude relief which would or might be granted at the hearing? Or rather, are the orders of 10th August 2012 irreversible.

[17] As already stated herein irreparable does not refer to the expenses to be suffered by the respondent in executing the orders but that reversal of the orders would under the circumstances be of no effect. The essence of the orders herein is that the respondent should transfer all monies together with interest thereon collected by the respondent from applicant's tenants to applicant pending the outcome on the merit of the application *in casu*. Counsel for respondent did not explain either on affidavit presented or *viva voce* submission during the hearing as to what it was that rendered the order under issue to anticipate irreparable damage which could not be redeemed by an order at the hearing or at least show the relief to be precluded by the order of 10th instant at the hearing in due course.

[18] In fact when the return date was pronounced, it was for the sole reason to determine whether the order granted on 10th August 2012 could be confirmed or discharged. The matter was to be disposed into finality on the return date.

[19] **Their Lordships in Temahlubi Investment (Pty) Ltd v Standard Bank Swaziland Appeal 35/2008** held in a similar application where leave to appeal was filed:

“...for applicant to succeed in its application before this court it has to establish that the order made by the court a quo has a final and definitive effect as orders held to be interlocutory are non-appealable.”

[20] The learned Justices proceeded to give examples of orders refusing summary judgment and absolution from the instance as not appealable. At page 8 of the judgment they wisely state:

“On the facts of the matter before us it cannot be held that ‘the final word has been spoken in the suit’ and it cannot be said that the decision taken by the court a quo cannot be repaired.”

[21] *Fortiori*, no “final word” had been spoken in the present application on the 10th August 2012 or that the orders of 10th August 2012 cannot be repaired and therefore the matter is not *res judicata*.

[22] Approached from a different angle, **Ziestman v Electronic Media Network Ltd and Another (771/2010) [2011] ZASCA 169** highlighted on *res judicata*:

“The underlying ratio of the doctrine of res judicata is that where a cause of action has been litigated to finality between the same parties on a previous occasion, a subsequent attempt by one party to proceed against the

other on the same cause of action should not be permitted.

The constituent elements of this defence are:

(a) an earlier judicial decision;

(b) which is final and definitive of the merits of the matter;

(c) involving the same parties

(d) where the cause of action in both cases is the same; and

(e) the same relief is sought.”

[23] Another case analogous to this present application is that of **Melusi Qwabe N. O. and Another v Sabelo M. Masuku N. O. and Another Appeal No. 34/2007** where in the court a quo respondent had sought for orders staying sale in execution and delivery of a movable. At page 2 of the judgment, it reads:

“These prayers were granted with costs when the court a quo gave an order in the terms of Notice of Motion. The stay of the sale and Order for delivery to the Liquidator (being Mr. Sabelo M. Masuku) were ordered to operate interim pending the finalization of “this application”. The appellant claims that the order for delivery of the Isuzu, although interim in nature, was final in effect...”

[24] The appeal court held that the orders were interlocutory.

[25] Similarly *in casu*, the matter has not yet been determined on the merits nor is the order having final effect. In essence the matter is interlocutory.

- [26] Having determined that the order of 10th instant did not render the matter *res judicata* and that the application was interlocutory, the next question is whether the order of the 10th instant is appealable without leave to appeal.
- [27] Counsel for respondent urged the court that the question as to whether there is an appeal or not is one to be determined by the appeal court itself and not this court. I refer to the case of **Mvuselelo Fakudze v Mcolisi Mdluli Case No. 788/2008** where my brother **Mamba J.** was faced with a similar argument. The learned Judge dismissed such argument and decided that there being no record of proceedings filed within the stipulated period, there was no appeal. Similarly *in casu*, there being no application for leave to appeal on interlocutory order, there is no appeal following the cases cited herein decided by the appeal court on such issues and in line with the principle of *stare decisis*, this court is bound to observe the *ratio decindi* at the appeal court.
- [28] In **Melusi Qwabe supra**, appellant claimed further that the order “*was final in effect and that leave to appeal to this court was therefore not required.*” The court having found that the order did not have final effect, therefore interlocutory however, ruled that leave to appeal was necessary, and in the absence of leave to appeal, struck off the matter from the appeal’s roll.
- [29] A similar question was seized by their **Lordships** in the matter of **The Minister for Housing and Urban Development v Tikhatsi and 10 Others Appeal Case No. 3/2008** akin to the case *in casu*, an appeal was lodged without leave to appeal. The

learned Judge **Ramodibedi J. A.** as he then was, firstly cited section 14 (1) of the Court of Appeal Act as follows:

*“14 (1) An appeal shall lie to the Court of Appeal -
a) from all final judgments of the High Court; and
b) by leave of the Court of Appeal from an interlocutory order, an order made ex parte or an order as to costs only.”*

[30] **His Lordship Ramodibedi** proceeded on the order that was appealed against:

“Quite plainly, therefore, it was not meant to be final in effect. Indeed the latter could hardly be the case because Maphalala J. did not dispose of the merits of the main application which remains outstanding to date.”

[31] As already alluded, *in casu* the respondent merely noted an appeal without filing application for leave to appeal. This is contrary to the provisions of section 14 (1) (b) and not in line with case law as cited herein and for that reason, I conclude that there is no appeal filed compelling this court to desist from dealing with the present application pending outcome of an appeal.

Affidavit

[32] Having found that the matter is not *res judicata* and therefore this court is not *functus officio*, I now adjudicate on the affidavit filed in answer to applicant’s application.

[33] An affidavit has been described by **His Lordship De Villiers J. P.** in **Gordwood Municipality v Rabie 1954 (2) S.A. 404** at **406** as:

“a statement in writing sworn to before someone who has authority to administer on oath.”

[34] The learned Judge proceeds further and states:

“an affidavit means a solemn assurance of a fact known to a person who states it, and sworn to as his statement before some person in authority such as a Judge, or a Magistrate or a justice of the peace, or a commissioner of the court, or a commissioner of oaths.”

[35] It is general rule of evidence that hearsay evidence is not allowed in affidavits. For this reason, affidavits are generally deposed to by person who can attest to the facts thereto. However, where an affidavit is deposed by a person who does not have any first hand information to the facts, **Herbstein and Van Winsen** in **“The Civil Practice of the Supreme Court of South Africa” 4th Ed** at page **369** point out that, the person may

“annex a verifying affidavit by a person who does have knowledge of those facts.”

[36] In interlocutory matters however, the learned authors state;

“The court has allowed the deponent to state that ‘he is informed and verily believes’ certain facts on which he relies for relief.”

[37] **Theron J. in Galp v Tansley, N.O. and Another 1966 (4) S.A. 555 at 558 H** stated in regard to affidavits filed by persons who did not have first hand information:

“For a considerable period now, our courts have recognized the need to admit and act upon sworn statements of “information” and “belief” in interlocutory matters (as distinct from matters in which the rights of the parties concerned are finally decided) where urgency or possibly the existence of other special circumstances appear to justify their doing so.”

[38] At page 559, the learned judge puts it much concisely by stating:

“...our courts refused to countenance the admission as evidence for any purpose whatever - of any statement embodying hearsay material, save where such statement has properly been made the subject of an affidavit (or solemn affirmation) of information and belief, i.e. save where the deponent (or affirmer) has not only revealed the source of the information concerned but in addition has sworn (or solemnly affirmed) that he believes such information to be true and furnished the grounds for his belief.” (words underlined my emphasis)

[39] *In casu* Counsel for respondent has described himself as attorney of record for respondent and therefore is entitled to depose to

the affidavit. He does not state whether he has been given such mandate to depose to the affidavit. At paragraph 8 he states that his instructions are that monthly payments are made in respect of interest to shareholders, Public Service Pension Fund and City Council. It is clear that the averment at paragraph 8 is hearsay evidence in so far as Counsel for respondent is concerned. However, he does not specify as to who is the source of the instructions. There is no confirmatory or verifying affidavit or any affidavit to his answering affidavit. Counsel for respondent further fails to inform the court that he believes such facts or statement to be true and does not furnish any grounds for the belief in the truthfulness of the statement in paragraph 8 as envisaged by the dictum in **Galp supra**.

[40] No explanation either on affidavit or *viva voce* from the bar was advanced as to the reason for the respondent's failure to depose to the affidavit moreso when reasonable time was afforded to the respondent to file its answering affidavit viz, from 10th August 2012 to 14th August 2012.

[41] In the premises the affidavit by Counsel for the respondent stands to be struck off in its entirety.

[42] Even if for a second one were to accept the answering affidavit, it does not comply with the requirements pertaining to answering affidavit.

[43] **Erasmus supra** at page **B1-44** states:

"The requirements for a respondent's answering affidavit, which deals with the allegations contained in the

applicant's founding affidavit, are the same as far as that of the applicant. If the respondent's affidavit in reply to the applicant's fail to admit or deny or confess and avoid, allegations in the applicant's affidavit, the court will, for the purposes of the application, accept the applicant's allegations as correct."

[44] From paragraphs 4-7, respondent's counsel opted to deal with matters which were irrelevant at the stage of the application. The averments at paragraph 4-7 were good on the 9th August 2012 which were not advanced and certainly not on the 16th August 2012.

[45] At paragraph 13, respondent's counsel attacks the court's decision to dictate time frame upon each party could file affidavit, if so inclined, contrary to Rule 6 (25) of the High Court Rules which gives the court such discretion. The rule reads:

"(25) (a) In urgent applications, the court or judge may dispense with the forms and service provided for in these rules and may dispose of such matter at such time and place and in such manner and in accordance with such procedure (which shall as far as practicable be in terms of these rules) as to the court or judge, as the case may be, seems fit." (my emphasis)

[46] The attached affidavit of Colin Foster, the Managing Director of respondent also stands to be struck out as it is unsworn and therefore of no probative value. At any rate it does not address the merit of the case but deals with questions of law which were disposed off in the ruling of 10th August 2012.

[47] There being no challenge to the averments of applicant, I accept as evidence that for the past ten months respondent has failed to deposit monthly rental collections into the assigned bank account.

[48] In the premises I confirm the orders granted on 10th August 2012.

Costs

[49] Firstly, it is clear from the affidavit filed by Counsel for respondent that again technical points were raised to resist applicant's application. This was despite the judgment of the court of 10th August 2012 where a number of authorities were cited which frowned upon respondent's conduct of over reliance on technicalities only to dispose off a matter.

[50] Time and again our courts have emphasised the need to dispose off matters on their merits rather than on technicalities. This ratio has been repeated even very recently in the last sitting (May 2012) of the Appeal Court **in Nokuthula N. Dlamini v Goodwill Tsela, Appeal Case 11/2012 [2012] 28 SZSC.**

[51] Secondly, the answering affidavit deposed to by respondent's Counsel failed to adhere even to simple procedural aspect such as answering to each paragraph or averments raised by applicant. Total disregard of simple procedure was adopted by the respondent. Paragraph 8 which is an attempt to answer to the issues does not inform the court as to which averment in the founding affidavit is being addressed. The court is called upon to

speculate. There was no denial, admission or material facts addressing applicant's affidavit as per **Erasmus** *op. cit.*

[52] Thirdly, the court was over-burdened further by having to read an unsworn affidavit of the managing director. To exacerbate the adverse situation further, this affidavit did not address the issues but raised technical points which were the subject of determination on the 9th August 2012 when the matter was first enrolled. It is not clear as to what purpose was this unsworn statement attached. To add salt to the injury, during submissions, counsel for respondent chose not to address the court on his paragraph 8 of the answering affidavit and when applicant addressed the court on the averment of paragraph 8, Counsel for respondent objected ferociously.

[53] Fourthly, the court was further informed that even though it ordered that respondent remit the rental collection, as an interim relief, that was not done.

[54] Without necessarily making a finding on whether respondent's conduct smirks of contempt, it is worth mentioning however, that this court *ex facie* frowns upon respondents conduct.

[55] Fifthly, this application is peculiar in that since its commencement, nothing points to the presence of the respondents *per se*. There is no evidence of authority except what counsel for respondents says that he is the attorney for the respondent. By no means do I suggest that this court does not take respondent's counsel in confidence but what boggles the mind is the absence of an explanation for the absence of an affidavit either verifying or confirming respondent's attorney's

averments as filed under answering affidavit by the respondents, nor was a copy of the signed affidavit email attached. In fact no document under the hand of respondent was filed herein. This court views this as a serious irregularity in the light of the applicant's claim of a substantial amount of over E4 million.

[56] Following the *dictum* in **Ventor N. O. Scott 1980 (3) S.A. 988 O** at **994** where the court held:

"The general rule is that a trustee or any person acting in a similar fiduciary position, is not liable for costs of litigation de bonis propriis unless he has acted mala fide, or negligent or unreasonably..."

[57] I hold that respondent's counsel acted unreasonably and negligently and further as highlighted by **Marais J.** in **Zalk v Inglestone 1961 (2) S.A.** at **795:**

"...an order to pay costs de bonis propriis, because the Latin phrase has no application where the losing party does not appear in a representative capacity."

[58] **A. C. Cilliers, Law of Costs**, at page 10-22 on the aspect of costs *de bonis propriis* confirms this position as he states:

"The principle of awarding costs de bonis propriis is applicable only where a person acts or litigates in a representative capacity."

[59] *In casu* respondent's counsel has deposed to an answering affidavit stating that he is the attorney for the respondent and therefore entitled to depose to the affidavit.

[60] Further it is my considered view from the conduct of respondent's counsel as demonstrated in the preceding paragraphs under costs that he could not reasonably have had certainty of being successful. **Smuts J.** in **Venter supra** at **994** states in support of this principle:

"If the trustee indulge in legal proceedings, which clearly have no reasonable prospects of success Then it is undeniable that he renders himself liable to pay costs out of his own pocket ..."

[61] In the final analysis, having confirmed the rule nisi granted on the 10th August 2012, I order respondent's counsel to pay costs *de bonis propriis*.

M. DLAMINI
JUDGE

For Applicant : Z. Shabangu

For Respondent: L. R. Mamba