

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE

CASE NO. 08/2022

In the matter between

PUR INVESTEMENTS (PTY) LTD

APPELLANT

AND

POWER PROJECTS (PTY) LTD

RESPONDENT

Neutral Citation: *PUR INVESTMENTS (PTY) LTD v POWER PROJECTS (PTY) LTD (08/2022) [2023] SZSC 47 (21 NOVEMBER, 2023)*

Coram : M. D. MAMBA JA

Heard : 13 OCTOBER, 2023

Delivered : 21 NOVEMBER, 2023

- [1] *Civil Law and Procedure – enforcement and execution of Court Orders – Court discretion to direct execution of its own orders.*
- [2] *Civil Law and Procedure – Execution of Court Orders – Application for interim relief for stay of Court Order pending review application – No Common Law rule that filing or noting of Review Application automatically suspends operation of Court Order – Court has discretion on good cause shown to so suspend operation of its own orders.*
- [3] *Civil law – Application for Stay of Transfer of Immovable property pending review application in terms of Section 148 (2) of the Constitution. No irreparable harm shown to be suffered by the Applicant if stay not granted. If review is successful, re-transfer of property to occur expeditiously.*

MAMBA JA.

- [1] On 31 July 2023, this Court handed down its judgment dismissing the applicant's appeal. The Court in effect confirmed an Order issued by the High Court wherein the Applicant was ordered to transfer to the Respondent certain fixed or immovable properties situated in the Matsapha Industrial Estate. This Order was based on a written agreement entered into and executed by the parties in 2015 whereby the Applicant granted the Respondent an option to purchase these properties for a sum of E26,000,000.00. The Applicant was ordered to transfer the properties to the Respondent within 7 days of the judgment, failing which the Sherriff or the Registrar of the High Court was empowered to execute the transfer. The Applicant was further

ordered to pay the costs of the appeal, which costs included those of Counsel.

- [2] Following the said judgment, the Applicant noted and filed this application for the review of that judgment. This application was filed and served on 01 September, 2023 and it is said to be in terms of Section 148 (2) of the Constitution. In this application, the Applicant seeks, *inter alia*, an order:

‘2. Reviewing and correcting the judgment delivered by the Supreme Court on 31 July, 2023 on the basis that the judgment is erroneous both in fact and in law and causes a manifest injustice irremediable by normal Court processes, as is envisaged in Section 148 (2) of the Constitution;

3. Pending finalisation of prayer 2 above, an order that the order of the Supreme Court under case number 08/2022 be stayed.’

The Application is opposed and this judgment is only in respect of the interim order sought in terms of prayer 3 quoted above, it being common cause that the main application (for review) would not be heard or determined within the present session of this Court.

- [3] The Applicant states that the application is urgent inasmuch as the Respondent has indicated to the Applicant that it is desirous of having the properties in question transferred to its name, by furnishing the Applicant with a guarantee of the purchase price. The Applicant avers that this is a clear indication by the Respondent that it wants the properties to be transferred into and registered in its name as soon as possible and that this would be prior to the hearing and finalisation of the review.
- [4] The Applicant avers that it has good or reasonable prospects of success in its review application and thus it would be undesirable to have the properties transferred into the name of the Respondent before the finalisation of the review application. Additionally, the Applicant asserts that it does not want to dispose of the properties and only has to do so by virtue of the relevant Court orders. It is argued further by the Applicant that in the event it is successful in its review application, it would be inevitable that the properties be re-transferred to the Applicant and this exercise would, expeditiously and inexpensively, be avoided by a stay of the Order of this Court. Although the order for

the stay is opposed by the Respondent, the Respondent has given an undertaking or promise that pending this ruling (on the stay), it would not take any steps or do anything to effect the transfer of the properties into its name.

- [5] Both sides have stated that a stay of the execution of the Court Order would deprive it of the revenue it would otherwise have obtained or received in respect of monthly rental for the properties. It is common cause that the monthly rental is about E209,000.00. If the stay is granted, it has been argued, the Respondent would be compelled to pay this amount every month until the review application is finalised. This would be a considerable loss to the Respondent. Similarly, if the stay is refused, this would constitute a loss of rental by the Applicant, once the properties are registered into the name of the Respondent. Both parties were of the view that in either event, it would be not easy for a party to claim or recoup such loss in the event of succeeding on review.

- [6] The Respondent has stated that the main application is nothing but a second appeal and thus it has no prospects of success. Because of this fact, it has been argued, the stay should not be granted as it would only prolong or delay the respondent from accessing or enjoying its legal rights over the properties in question.
- [7] The dispute between the parties centres around two issues; namely, the interpretation of clause 22 of the agreement which refers to both an option to purchase and a pre-emptive right to purchase at the same time. The argument or contention by the Applicant is that these are two distinct terms of contract and in the context of the contract in issue, this Court and the High Court were both in error in holding that the Applicant had unequivocally granted an option to purchase to the Respondent. The second point relevant for determination is the applicability or otherwise of the provisions of the Land Speculation Act 8 of 1972 and Section 211 (3) and (5) of the Constitution. Whilst the matter may appear relatively brief on these defined parameters, it is by no means simple. It would therefore not be proper for me to determine at this stage of the proceedings whether the application for

review is proper, irregular or whether the applicant has reasonable prospects of success in the application. It cannot be said though that the Applicant's case is so hopeless as to be classified as inarguable. Whilst I readily accept that if on a *prima facie* view this Court is of the opinion, for whatever reason, that the application for review is irregular, the Court must, perforce, rule that it is unnecessary to grant the stay. This would be the case based on the reasoning that there is no pending application for review.

- [8] As a general rule, this Court has the power to regulate the execution and enforcement of its own Orders. In *Simhlo Investments (Pty) Ltd and 3 Others v Eswatini Development Finance Corporation (62/2021) [2022] SZSC 62 (02 December, 2022)* this Court had occasion to observe as follows:

‘[7] In terms of the Common Law, there is no rule that the noting of an application for review of a judgment automatically suspends its operation or enforcement. See *United Reflective Converters (Pty) Ltd v Levine 1988 (4) SA 460 (W) at 463-464B*. Where the Court stated the rule in the following terms:

‘The authorities are not harmonious. What does, however, emerge is that there is no substantive rule of law that an application to vary or rescind an order or judgment automatically suspends its operation. Counsel could not refer me to any such substantive rule of law nor could I find any indication that it exists. Certainly a Court is empowered to assist a litigant by ordering the suspension of an order or judgment pending an application to vary or rescind it. I am aware that such orders have been granted to avoid an injustice. A proper application must be brought to obtain such relief. The relief will only follow if the Court grants the order.’

I am, however, alive to the fact that the review in this case is a special one and not your run-of-the mill type and it may well be that because it obtains in the Apex Court, which primarily deals with appeals, such a rule as operates regarding the noting and filing of an appeal may be applicable. (In the very limited and constrained time I have had to deal with this matter, I have been unable to make any meaningful research on this topic or issue).

[8] The application for review is opposed by the respondent and so is this application for interim relief. It is not the duty of this Court at this stage to determine the merits of the review application. However, this Court may as of necessity enquire whether or not there are any reasonable prospects of success in the application for review. If for instance, this Court is of the view that there are no reasonable prospects of success in the main application or that the application itself does not pass the first hurdle of showing or asserting the jurisdictional or foundational issues such as for instance, exceptional circumstances which result in a total or manifest failure of justice, the Court would be perfectly correct to refuse to grant the interim relief.

[9] In *Edmund Mazibuko N.O. and 5 Others v Total Swaziland (Pty) Ltd (44B)/2020* [2021] SZSC 32 (04 November, 2021), summarising the jurisdictional facts that must be alleged and supported, the Court stated as follows:

‘[17] In the matter of *President Street Properties (Pty) Ltd v Maxwell Uchechukwu and 4 Others (11/2014) [2015] SZSC 11*, it was held that in an application for review, the applicant must allege ‘rare and compelling or exceptional circumstances [and]

[18] In the recent matter of *Henwood and Another v Henwood (10/2018) [2018] SZSC 64* the Court found that:

“Where a litigant relies on exceptional circumstances as a ground of review, these must be clearly set out in the founding papers to enable the other party to put up facts in opposition or counter argument.”

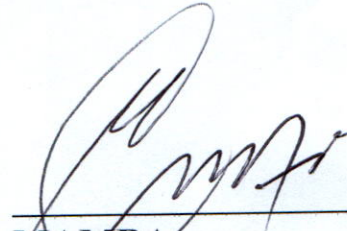
These remarks are apposite in this case.

[9] It is not insignificant in my view, that the properties involved in this case are immovable. In view of this fact, I do not think that any irreparable harm or damage would be suffered by either party as a result of a transfer of the property to the Respondent which may later be followed by a re-transfer to the Applicant. Admittedly, there would

be time and costs involved in this exercise but, such costs and inconvenience are not irreparable. It is, in my view, one of the issues or expenses that the unsuccessful side would be expected to be aware of and be prepared to meet. Again, the loss of rental already referred to above, although real or significant, would be by no means irreparable or irrecoverable.

[10] For the foregoing reasons, the Applicant has failed to satisfy this Court that a stay of the execution of the Court Order must be granted. The Applicant has not shown that it would suffer irreparable harm in the event that the stay is not granted. In the event that the Applicant is successful on review, the properties would, if already transferred to the Respondent, be re-transferred to the Applicant. Consequently, I make the following Order:

- (a) The application for a stay of the execution of the Order of this Court dated 31 July, 2023 is refused.
- (b) The costs of this application shall be the costs in the review application.



MAMBA
JUSTICE OF APPEAL

FOR THE APPLICANT:

MR. B. ROUX SC
(Instructed by Bongani G. Mdluli & Associates)

FOR THE RESPONDENT:

M. F. JOUBERT SC
(Instructed by Henwood & Company)