

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO: 1175/2021

In the matter between:

SWAZILAND PROPERTY MARKET

(PTY) LIMITED

APPLICANT

AND

COSMOS INVESTMENTS (PTY) LTD

RESPONDENT

Neutral citation : *Swaziland Property Market (Pty) Ltd v Cosmos Investments (Pty) Ltd (1175/2021) [2024] SZHC 100 (22/05/2024).*

CORAM: B.S DLAMINI J

DATE HEARD: 12 March 2024

DATE DELIVERED 22 May 2024

Summary:

Land Lord's hypothec- Determination of whether or not an appeal can be made against an order authorizing leave to execute a High Court's judgment pending hearing of the main appeal.

Held;

The current position of the law is that a Court hearing a matter of this nature must not only consider whether the order is interlocutory or final in nature, but importantly, must also consider the interests of justice- Present dispute not properly placed before Court- Determination of land lord's hypothec application stayed pending proper interpretation of Court Order or hearing of two appeals by the Supreme Court.

JUDGMENT

INTRODUCTION

- [1] The Applicant approached this Court on a certificate of urgency, seeking to perfect the land lord's hypothec following an allegation of breach of a lease agreement between it and the Respondent. At the time of instituting the application, the Respondent was said to be indebted to the Applicant in the sum of **E 446,164.57 (Four Hundred and Forty Six, One Hundred and Sixty Four Emalangeneni and Fifty Seven Cents)**. This sum of money has doubled, if not tripled, due to other pending disputes associated with this matter.
- [2] When the application to perfect the land lord's hypothec was served on the Respondent, the latter raised several defences. Key to these defences is that the Respondent or its sister company, is a shareholder in the Applicant company (lessor), and that the Applicant owes to it a large sum of money i.e E 8,000,000.00 (Eight Million Emalangeneni) which has not been paid to date.
- [3] The dispute in relation to the shareholding or alleged shareholding held by the Respondent, or its directors, or its sister companies with the Applicant was dealt with under High Court Case No.1911/2021,

and was before the Honourable Maphanga J. At the time that the land lord's hypothec application was instituted before me, the matter before Maphanga J was still pending or awaiting judgment. It thus became clear, and this was accepted by the parties, that the determination of the land lord's hypothec application had to be put on hold until judgment was delivered in High Court Case No: 1911/2021. The Court thus made an endorsement that determination of the land lord's hypothec application shall be put on hold pending the outcome in High Court Case No: 1911/2021.

[4] On the 16 June 2023, the Court delivered its judgment in High Court Case No: 1911/2021 and, in essence, set aside the allocation of shares to the Respondent or its sister companies with the Applicant. The Respondent, being dissatisfied with the judgment of the Court, noted an appeal to the Supreme Court. This appeal is still pending before the Supreme Court.

[5] The Applicant in High Court Case No.1911/2021 applied to the High Court for leave to execute the judgment of the Court. The application for leave to execute the High Court's judgment pending determination

of the appeal was granted by the High Court. The Respondent however filed another appeal to the Supreme Court against the order granting Applicant leave to execute.

- [6] Against these developments, the Applicant in the present matter proceeded to set the matter down and sought to argue the application to perfect the land lord's hypothec. The Respondent on the other hand argued that the application to perfect the land lord's hypothec is not ripe for hearing because there are pending appeals before the Supreme Court.

APPLICANT'S ARGUMENTS

- [7] In urging the Court to hear and finalize the application to perfect the land lord's hypothec, the Applicant submitted as follows;

“[4] Once the court has granted the leave to execute the judgment, there is no further appeal against that judgment. The nature of the order that is issued by the court is of an interlocutory nature. This point was determined in the case of *L v L* [2020] JOL 26488 where the court at paragraph 16 stated, relying on a judgment of the Constitutional Court in

the matter of N and Others v Government of the Republic of South Africa and Others 2006 (6) SA 575:

“[16] It is significant that that the Constitutional Court unambiguously stated that in terms of the common law and the Supreme Court Act, an order granting leave to execute pending appeal is considered to be purely interlocutory and not appealable and refers to the leading cases in support of the statement.”

- [8] In its submissions, the Applicant placed reliance on several other cases including the case of **Livanos v. ABSA Bank Ltd 1999 (3) All SA 221**, referring to the case of **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd 1977 (3) SA 534**, in which the Court stated that;

“The order of 2 June 1987 was interlocutory, and the question is then whether it has final and definitive effect on the main suit. In the South Cape case, supra at 551B-C, it was held that an order granting leave to execute (which is substantially the same thing as the order in this case) relates to a matter incidental to the main dispute: ‘it relates to, and

is incidental to' the very matter which is the subject of the main dispute in that it permits effect to be given to the a judgment on the main dispute despite the fact that the dispute is to be canvassed before an appellate tribunal. It makes interim arrangements in regard to the subject of the main dispute pending the final determination of the matter on appeal. It is clearly interlocutory in the wide sense."

[9] In summing up its case, the Applicant submitted that;

"[8] The argument by the respondent that this court must not consider the validity of the notice of appeal and the appealability of the judgment granting leave to execute, is also without merit. This proposition was considered and dismissed by this Court in the matter of *Minister for Housing and Urban Development v Dlamini and Others*, High Court Case No: 1356/2008. The Court in that matter was dealing with the appealability of an interlocutory order."

RESPONDENT'S ARGUMENTS

[10] On behalf of the Respondent, it was submitted that the order granting Applicant leave to execute is a final order, and that there is nothing interlocutory about it. The Respondent submitted that;

“[6] It is common cause that the above Honourable Court dealt to finality with the issue of leave to execute and made a final and definitive decision to execute, which is pending before the Appellate Court hence the consideration is whether or not the above Honourable still has jurisdiction in the matter.

[7] What is clear is that the Order of [sic] relating to execution pending appeal is subject itself to a pending appeal and likewise the issue of whether or not the said order was interim or final (and appealable) is pending before the Supreme Court.”

[11] It is further contended on behalf of the Respondent that;

“[18] Banda CJ (as he then was), in the case of *Minister of Housing and Urban Development v Sikhatsi Dlamini and*

Others, Civil Appeal No: 31/2008, in reference to the case of Botswana Bank Employees Union, Bontle Motsepe, Keolopile Gaberone v Barclays Bank of Botswana, Civil Appeal No: 1/1995, Industrial Court Case No: 40/95, stated the following:

“The case and other cases referred to therein give an instructive illustration of what is a final order or judgment. Cases in that judgment state that a final judgment or order which is appealable is one where the dispute between the litigants has a final and definitive effect on the main action and that an order which is mainly preparatory or procedural is not a final order or judgment...”

[19] Masuku J, in *Greth Williams Evans v Lisa Evans*, High Court Case No: 261/09, had this to say:

“... The immediate question for determination is whether it is within this Court’s province to determine the status of the said Notice of Appeal. Put differently, is the question of the validity of the said Notice of Appeal not one to be determined by the Supreme Court to which the appeal has been noted...?”

What is abundantly obvious, from the nomenclature employed, is that whereas the appeal noted is against a judgment of this Court, that appeal is directed to and lies with the Court of Appeal...

For that reason, it would appear on first principles that this Court ordinarily has no business in deciding on any matter which is placed before the Supreme Court on appeal. That appeal, lying as it does with the Supreme Court, it is my view that it is that Court that should deal with the issue of validity or otherwise of any notice or document by which an appeal is noted... It is also that Court that will decide whether or not a proper notice has been filed..."

ANALYSIS AND FINDINGS

[12] The parties in this matter are not agreed as to the applicable legal principles in circumstances where an appeal has been lodged against an order granting a party leave to execute, in the face of a pending appeal to a higher Court. The position taken by the Applicant is that

the order authorizing leave to execute pending an appeal is interlocutory in nature, and does not constitute a final or definitive order. The Respondent, on the other hand, argues that the order issued by the High Court is final and definitive in nature, and that being the case, such order is appealable.

[13] It is clear therefore that the primary duty of this Court is to determine whether or not the order granted by the Court under High Court Case No: 1911/2021 is interlocutory in nature, or whether it is final and definitive. Interestingly, none of the parties herein availed the pleadings and the relevant Court order or judgment to enable this Court to embark on its own exercise of independently assessing the true nature and spirit of the order or judgment. On this ground alone, I would be justified in declining to entertain the matter on the ground that there is a pending appeal to the Supreme Court.

[14] The Court notes that ideally, it would not have been enough to simply place the pleadings (for leave to execute) and the Court Order granted pursuant thereto for this Court's consideration. A substantive

application ought to have been filed to properly address all the issues arising in this matter namely;

- (a) The question of why this Court should ignore the notice of appeal filed against the order granting leave to execute;
- (b) Identification of the relevant facts rendering the Court's order interlocutory in nature as opposed to being final; and,
- (c) Pointing out why this Court should entertain the application to perfect the land lord's hypothec when there are pending matters that could directly affect the outcome of the present matter i.e the Respondent in the other matter is arguing that it owns the Applicant and therefore directly or indirectly, not liable to pay rental, or that if the Applicant had paid to it the money owed (in terms of its shareholding), it could have settled the rental money owed.

[15] The Applicant, being the main party interested to have this matter urgently heard prior to the determination of the two appeals serving

before the Supreme Court, should have been the one party to file the said application. There being no such application, and there being no pleadings and the relevant Court order, this Court is unable to determine the issues arising in this matter. A simple set down for hearing in such circumstances is not ideal.

- [16] Otherwise the position of the law was well articulated by the Court in the case of **Doola v First Rand Bank Ltd t/a RMB Private Bank and as FNB (2020/13723) [2023] ZAGPJHC 1419 (7 November 2023)**, in which the Court stated;

“[12] Interlocutory orders that are not final in effect are incidental to pending proceedings and are orders made in the course of the progress of the litigation through the court and without determining the main issue in the action. Such orders are generally not appealable. The policy considerations underlying the principle include discouraging piecemeal appeals. Orders for discovery or the production of documents are not appealable for this reason- these are interlocutory orders in effect as well as in form.

[13] In *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*, Corbett JA distinguished between simple interlocutory orders that are not appealable and other interlocutory orders that are or may be appealable. The distinction was described as follows by Schreiner JA in the majority judgment in *Pretoria Garrison Institutes v Danish Variety products (Pty) Ltd* with reference to the judgment of the Appeal Court in *Globe and Phoenix G.M Company v Rhodesian Corporation*;

“From the judgment of WESSELS and CURLEWS, JJA, the principle emerges that a 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’. The earlier judgments were interpreted in that case and a clear indication was given that 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 put right, but to whether the order bears directly upon and in that way affects the decision in the main suit.”

[14] The majority held that an order by the magistrate directing the furnishing of further particulars was not appealable.

[15] The principle that appealability hinges on whether the order sought to be appealed is definitive of the rights of the parties and disposes of at least a substantial portion of the relief grant [granted] in the main proceedings is of long standing, but the older authorities must be read with the caveat that Constitutional values have introduced the more “*context-sensitive standard of the interests of justice favoured by our Constitution*” when considering appeals against interlocutory orders.

[16] The judgement of the Supreme Court of Appeal in *Philani-Ma-Africa and Others v Mailula and others*, provides an illustration of the operation of Constitutional interest of

justice principles. The High Court granted leave to appeal and granted leave to execute pending the outcome of the appeal. The question arose whether the order granting leave to execute was appealable. Farlam JA said in the Supreme Court of Appeal;

“[20] It remains for me to deal with the issue referred to this Court by the Constitutional Court. The application was brought in the Constitutional Court because it was believed that the execution order was not susceptible to appeal to the full bench of the High Court or to this Court. That belief was erroneous. It is clear from such cases as S v Western Areas Ltd and Others 2005 (5) SA 214 (SCA) (2005 (1) SACR 441) in paras 25 and 26 at 226 A-E that what is of paramount importance in deciding whether a judgment is appealable is the interests of justice. See also Khumalo and Others v Holomisa 2002 (5) SA 401 (CC) [2002] ZACC 12; (2002 (8) BCLR 771) in para 8 at 411A-B. The facts of this case provide a striking illustration of the need for orders of the nature of the execution order to be

regarded as appealable in the interests of justice. Counsel were agreed that if the appeal on the merits of the eviction order were to succeed no further attention need be paid to the application for leave to appeal against the execution order-the latter being premised on the former. In any event, in view of the suspension of the execution order by the Constitutional Court, the point, as counsel agreed, became moot. In the circumstances, no order is required in respect thereof..."

- [18] In deciding this application for leave to appeal one must therefore not look at the interlocutory nature of the order in isolation, but decide whether it is in the interests of justice to grant leave based on the facts of the case read with the legislation and the authorities. For the reasons set out below I hold that there are no interests of justice considerations that would merit an order granting leave to appeal."

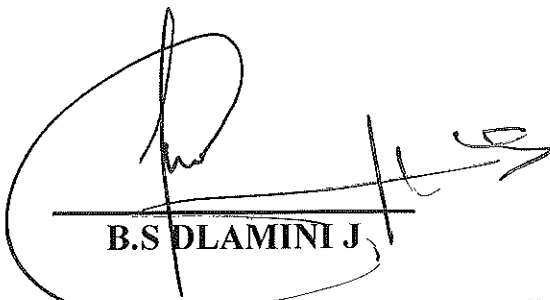
[17] The prevailing position of the law therefore, is that a Court seized with a matter of this nature is required to determine, not merely whether the order in question is interlocutory or final in nature, but is required to go beyond this legal enquiry and determine whether or not, it is in the 'interest of justice' to allow or disallow an appeal against an order authorizing execution of judgment. Depending on the facts of a matter, it is settled that there could be an appeal against an order authorizing execution pending the hearing of the main suit.

[18] As already pointed herein above, this Court does not have the necessary facts or pleadings to make a proper assessment of this issue in the present matter. A firm practice adopted in this jurisdiction is that the issue of interpreting, or deciding whether or not the order issued in High Court Case No:1911/2021, constitutes an interlocutory or final order or, whether it is in the interests of justice to allow or disallow such appeal, is a task vested upon the particular Judge who issued the order in question.

[19] This Court therefore needs to thread carefully and not issue an order that could be tantamount to indirectly reviewing or rendering hollow

the judgment issued by the High Court in Case No.1911/2021. In conclusion, this Court hereby issues the following orders;

- (a) Pending interpretation of the order for leave to execute granted in High Court Case No.1911/2021, or determination of the two appeals serving before the Supreme Court, hearing of the application to perfect the land lord's hypothec is stayed.
- (b) Costs to be costs in favour of the successful party under paragraph or order (a) above, taxed at the ordinary scale.



B.S DLAMINI J
THE HIGH COURT OF ESWATINI

For Applicant:

Attorney Mr. Z.D Jele

(Robinson Bertram Attorneys)

For Respondent:

Attorney Mr. M. Ndlovu

(M.T.M Ndlovu Attorneys)