

IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE

CASE NO. 650/2019

In the matter between:

HEPTAGON CIVILS (PTY) LTD

Applicant

**PHINDILE GROUP (PTY) LTD
t/a AFRICAN MUTI**

Intervening Party

and

AG THOMAS (PTY) LTD

Respondent

**PHOENIX OF SWAZILAND
ASSURANCE COMPANY LTD**

Intervening Party

In re:

AG THOMAS (PTY) LTD

Applicant

And

HEPTAGON CIVILS (PTY) LTD

1st Respondent

THE STATION COMMANDER

MANZINI POLICE STATION

2nd Respondent

**THE NATIONAL COMMISSIONER
OF POLICE**

3rd Respondent

THE CENTRAL MOTOR REGISTRY

4th Respondent

THE ATTORNEY GENERAL

5th Respondent

In re:

AG THOMAS (PTY) LTD

Plaintiff

and

HEPTAGON CIVILS (PTY) LTD

Defendant

Neutral Citation: *Heptagon Civils (Pty) Ltd & Another v AG Thomas & Others*
(650/2019) [2023] SZHC 43 (10 March 2023)

CORAM: **N.M. MASEKO J**

FOR THE APPLICANT: **MR. P. FAKUDZE**

FOR THE RESPONDENT: **MR. M. TSAMBOKHULU**

FOR 2ND INTERVENING PARTY: **MR. B. PHAKATHI**

DATE OF HEARING: **06/19/2020**

DATE OF DELIVERY: **10/03/2023**

Preamble

Civil Procedure – Urgent and ex-parte application – Duty of the Applicant to fully disclose material facts in ex-parte applications – Rescission of judgment erroneously granted by the Court in the absence of any interested party who has a direct and substantial interest – Where goods and/or assets are on lease or hire purchase from a financial institution, those goods or assets remain the property of that financial institution unless and until the terms of the contract are fully complied with by the Lessee(s), and such goods and/or assets shall not be subject of a judicial attachment for purposes of a sale in execution to satisfy the debt of another party against the aforesaid Lessee(s) to the financial prejudice of the financial

institution which is the lawful owner of these goods and/or assets.

Held: that the Order of the 16th August 2019 is hereby rescinded and set aside.

JUDGMENT

MASEKO J

- [1] On the 20th August 2019, the Applicant Heptagon Civils (Pty) Ltd who is the Defendant in the main matter instituted proceedings against AG Thomas for a rescission of the order of this Court issued on the 16th August 2019 granting the Deputy Sheriff for District of Manzini the authority to attach a heavy plant machinery, to wit, Komatsu Motor Grader, Engine No. 26613520, Chassis No. KMT 408 BH, from where-ever it may be found.
- [2] It is common cause that on the 3rd May 2019, this Court granted a **judgment by default** against Heptagon for the amount of E1 046 520.28 (One Million and Forty Six Thousand Five Hundred and Twenty Emalangeni Twenty Eight Cents). This order was duly signed by the Registrar on 6th May 2019.
- [3] The Applicant's prayers are framed as follows in the Notice of Motion:-

1. That the above Honourable Court dispenses with the normal and usual requirements of the Rules of Court relating to service of process, time limits and notices and that the matter be heard as a matter of urgency;
2. That a *rule nisi* returnable on a date to be determined by this Honourable Court do issue as follows:-
 - 2.1 Rescinding and/or setting aside the order of this Honourable Court granted in favour of the Applicant on the 16th August 2019 under Case No. 650/2019;
 - 2.2 Staying execution of the order referred to in prayer 2.1 above pending the finality of this matter
3. That prayer 2.1 and 2.2 above should operate
 - 3.1 The rule nisi should not be made a final order of this Court;
 - 3.2 1st Respondent should not be ordered to pay costs of suit on the scale as between attorney and own client.
4. Granting Applicant any further and/or alternative relief.

[4] The Founding Affidavit of Ntombifuthi Zwane annexed hereto is used in support of these proceedings. She is the Director of the Applicant and

duly authorised to depose to the affidavit. For ease of reference, in *casu*, the Applicant shall be referred to as Heptagon and the Respondent as AG Thomas, and the Intervening Party as Phindile Group.

- [5] She states that she received information that a heavy plant machinery, to wit, a Komatsu Grader has been attached by Deputy Sheriff Mciniseli Zwane on behalf of AG Thomas. She states further that the said Deputy Sheriff was not supposed to attach the aforesaid Komatsu Grader because **“his appointment”** by the Registrar as Deputy Sheriff has expired and at the time he attached the Komatsu Grader he was still pursuing the renewal of this appointment as Deputy Sheriff through correspondence dated the 5th June 2019. She argues that at the time when he attached the Grader he had no authority to do so hence his actions were unlawful. She argues that the purported attachment by the Deputy Sheriff is non-existent for lack of authority on his part to do so.

- [6] She states that Heptagon Civils is indebted to AG Thomas and Phindile Group. At some point in time Heptagon made settlement proposals to both AG Thomas and Phindile Group, however, AG Thomas rejected the settlement proposal and on the other hand Phindile Group accepted the proposal.

[7] She states that the deed of settlement between Heptagon and Phindile Group was made an order of Court on the 12th July 2019. She further states that the Grader in question belonged to Wesbank and was being used by Heptagon on a **lease agreement**, and that AG Thomas was indeed advised by Wesbank that the aforesaid Komatsu Grader belonged to it after the bank was advised that the aforesaid Grader had been attached by AG Thomas. Since Heptagon was in arrears in payments for the Grader, Wesbank instituted proceedings against Heptagon for the cancellation of the lease involving the Grader and two other vehicles.

[8] She states further that it was at this stage that Phindile Group settled the Wesbank debt on behalf of Heptagon Civils and thereby assumed ownership of the aforesaid Grader. She states further that the Grader belongs to Phindile Group and not Heptagon, and that this fact is very well-known to AG Thomas who for some unknown reasons did not cite Phindile Group in its *ex-parte* urgent application.

[9] She argues further that this Court would be justified to rescind the order of the 16th August 2019 because same was obtained *ex-parte* and on urgency when AG Thomas did not fully disclose before Court that the Grader in question did not belong to Heptagon but belongs to Wesbank, a fact which is very well known to AG Thomas.

[10] In opposition to Heptagon's application, Mr Keith Thomas the Director of AG Thomas (Pty) Ltd deposed that Heptagon has approached this Court with dirty hands because he seeks to prevent the execution of a lawful order and also to render the default judgment obtained by AG Thomas nugatory by alienating the Grader and dispose of it to a third party.

[11] He argues further that the Order sought to be rescinded is final because Heptagon cannot be heard at execution stage. He argues further that it is bizarre for Heptagon to seek to rescind an execution order and not the substantive order for the payment of the sum of E1 046 520.28 to AG Thomas.

[12] He argues further that the ownership of the Grader by Wesbank is not a bar to attachment in execution as long as Wesbank is guaranteed to recoup or recover whatever amount is due to it.

[13] He argues further that the attack on the Deputy Sheriff has no merit because once appointed as such he could continue exercising his functions even when awaiting renewal of his appointment.

[14] He argues further that Phindile Group is on a same footing with Heptagon in their bid to divest from AG Thomas the legal interest it has in the attached Grader. Further that the purported agreement between Heptagon and Phindile Group is nothing but an elaborate scheme to defeat claims by Heptagon's numerous creditors.

ISSUES FOR DETERMINATION

[15] The issues for determination are in my view as follows:-

- (i) Whether it was proper for AG Thomas to institute the *ex-parte* urgent proceedings culminating to the order of the 16/08/2019;
- (ii) Whether the Komatsu Grader owned by Wesbank could be the subject of a judicial attachment by AG Thomas for a debt owed by Heptagon who has leased the aforesaid Grader from Wesbank;
- (iii) Whether the Deputy Sheriff has lawful authority to execute Court processes when his appointment had lapsed and at the time he executed such Court Process he had applied for renewal;
- (iv) Whether it was proper for AG Thomas not to cite Phindile Group in these proceedings, because Phindile Group has a direct and substantial interest in this matter.
- (v) Whether Heptagon has approached this Court with unclean hands in applying to rescind the order of the 16/08/2019.

[16] Before I deal with the matter in the manner herein set above, I must point out that Phindile Group is the Intervening Party primarily in its capacity as the owner of the aforesaid Komatsu Grader which is the subject matter in these proceedings as per the Deed of Settlement Agreement it entered into with Heptagon on the 11th July 2019 when it paid off Heptagon's debt with Wesbank and assumed ownership of the Grader in issue.

[17] I now deal simultaneously with the first and second issues to be determined, namely whether the *ex-parte* urgent proceedings were properly instituted, and whether the Komatsu Grader could be the subject of a judicial attachment by AG Thomas.

[18] I am conscious of the fact that these *ex-parte* urgent proceedings were launched to secure an execution order to attach Heptagon's property which the Plaintiff firmly believes is in the process of being alienated by the Defendant to defeat the satisfaction of the Plaintiff's judgment. In my view it was not improper for AG Thomas to launch the *ex-parte* urgent application to secure the satisfaction of its judgment in the main matter.

[19] I must state however that when AG Thomas moved the urgent application on the 16/08/2019, it annexed correspondence addressed to Wesbank

dated 12/08/2019 and marked as Annexure D wherein it authorised the release of the Grader from judicial attachment to Wesbank. This therefore is an indication that AG Thomas was aware that the aforesaid Grader is the property of Wesbank. I say this because at that time it was in the possession of the Deputy Sheriff and it was released because Wesbank had obtained judgment against Heptagon.

[20] During the period when this Grader was released to Wesbank by the Deputy Sheriff, Phindile Group and Heptagon had already concluded the Deed of Settlement wherein Phindile Group paid Wesbank the full amount(s) owed by Heptagon for the Grader and other motor vehicles.

[21] The Deed of Settlement between Heptagon and Phindile Group was entered into on the 11th July 2019 and was subsequently declared an order of Court on the 12th July 2019. The essence of this order is that the Grader now lawfully belongs to Phindile Group after the settlement of the debt on behalf of Heptagon. It is my considered view that this Grader therefore cannot be the subject of an attachment to satisfy the judgment of AG Thomas against Heptagon. It is therefore also my view that AG Thomas was under a legal duty to cite and join Phindile Group in these proceedings.

- [22] It is trite law that when financial institutions lease assets to individuals and juristic persons alike, those assets belong to those financial institutions until the lease agreement is fully serviced and complied with by the lessee, then the asset or assets' ownership can then pass on to the lessees. *In casu* the Komatsu Grader was leased by Wesbank to Heptagon and at the time AG Thomas attached it for the main debt against Heptagon it was still under the lease agreement and still the property of Wesbank, it is for that reason that on the 12th August 2019 AG Thomas released same to Wesbank's Deputy Sheriff.
- [23] The arrangement between Heptagon, Phindile Group and Wesbank cannot be viewed as an attempt to alienate the Grader and dispose of it to Phindile Group. This is because Wesbank has a right to deal with its property in a manner it sees fit. It is for that reason why on the 12th August 2019 AG Thomas released the Grader to Wesbank because Wesbank has a better title by virtue of being the owner thereof.
- [24] The third issue for determination is whether the Deputy Sheriff had lawful authority to attach the Grader when his appointment as Deputy Sheriff of Manzini had expired. I do not accept the argument that a Deputy Sheriff once appointed by the Sheriff he/she automatically carries on such duties even when his/her appointment has lapsed. It is common cause that

Deputy Sheriff Mciniseli Zwane was appointed as such by the Sheriff of Eswatini on the 10th April 2018 until 10th April 2019. Again he was appointed on the 5th August 2019 to 5th August 2020. This therefore means that he was appointed to execute such duties for a period of twelve (12) months. It follows therefore that when he executed the Writ of Attachment on the 26th June 2019, he had no authority to do so, and therefore such attachment or execution of the Court process is null and void. The fact that he had applied for a renewal does not bestow any right on him to execute any Court process during the period when he had no valid appointment from the Sheriff of Eswatini to perform such duties.

- [25] This Court must emphasize that the Sheriff and her deputies perform an extremely important role in the administration of justice. They enforce Court orders and processes under the most difficult and often dangerous circumstances. They are law enforcement officers and must therefore ensure that they perform these duties bestowed upon them within the perimeters of the law and be fully licenced to do so by making sure that their authorities or appointments are valid at all material times. Where the appointment has expired then the deputy sheriff must make sure that he/she does not execute Court processes until such time the sheriff has renewed his/her appointment.

[26] If the deputy sheriff executes orders and processes of the Court when his/her appointment has expired, such execution is deemed unlawful and thus *void ab initio* because of lack of authority. The deputy sheriffs are therefore called upon to conduct their duties with integrity and honour because of their sensitive role of enforcement and/or execution of Court orders and processes.

[27] In these circumstances of this matter, I cannot find any fault with Heptagon for having approached the Court in the manner it launched these proceedings to the extent that the doctrine of unclean hands is not applicable herein because there is no-where any facts or evidence that Heptagon has approached this Court with dirty hands. In my view these proceedings are above board, transparent and justified. In hindsight I realize that when I granted the *rule nisi* on the 16/08/2019 Wesbank had already obtained an order to attach its property, to wit, the Grader from Heptagon, and most importantly even though AG Thomas had attached it first and it was in the possession of their Deputy Sheriff, it was prudent for AG Thomas's attorney to instruct their Deputy Sheriff to release it to Wesbank, after Wesbank had obtained the Order to attach its Grader

[28] I must point out that the release of the Grader to Wesbank was in law unconditional because the owner of the property thereof being Wesbank

has real rights over the aforesaid Grader despite it having been attached by AG Thomas, it is for that reason why AG Thomas released it to Wesbank. The rights of financial institutions where they have leased assets or where assets are on mortgage bond are sacrosanct and should be upheld as such by the Courts in instances where parties, or a party places their properties under judicial attachment for a debt with other parties. Assets of whatever nature which are on lease or hire purchase can never and should never be attached to the prejudice of financial institutions who retain such ownership of the property or properties until fully paid up by the lessee.

[29] This is the position *in casu* and therefore Wesbank remained the owner of the Grader despite the attachment by AG Thomas until the Grader was fully paid for by Phindile Group on behalf of Heptagon, in which case Wesbank passed ownership thereof to Phindile Group.

[30] In my view there is no way by which AG Thomas can successfully contest the issue of these rescission proceeding because of the facts which clearly emerge from the pleadings herein. The rescission, as rightly pointed out by Mr T. Fakudze for Heptagon, is in respect of the order of the 16/08/2019 and not the main judgment. This is a judgment erroneously granted by this Court and where there was no full disclosure by AG

Thomas that the Grader is the lawful property of Wesbank and should not have been the subject of judicial attachment to satisfy the judgment of AG Thomas against Heptagon.

- [31] **Hebstein and Van Winsen** in their authoritative book titles *THE CIVIL PRACTICE OF THE HIGH COURTS OF SOUTH AFRICA Volume 2, 5th Edition, Juta*, states as follows at page 933 when dealing with the issue of rescission of judgments erroneously granted in the absence of any party affected thereby:-

“It has been held that if the Court holds that an order or judgment was erroneously granted in the absence of any party affected thereby, it should without further enquiry rescind or vary the order on the application of such party.”


- [32] At p 931, the learned Authors state as follows:-

“The question of what constitutes an error for the purposes of Rule 42 has been the subject matter of a number of decided cases. It has been stated that it seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge, if aware of it, not to grant the judgment.”

[31] Consequently I hereby hand down the following order:-

1. The order of this Court of the 16th August 2019 is hereby rescinded and set aside.
2. Each party is to pay its own costs.

So ordered.



N.M. MASEKO
JUDGE