

**IN THE SUPREME COURT OF ESWATINI**

**JUDGMENT**

**HELD AT MBABANE**

**Case No.: 22/2023**

In the matter between:

**AG THOMAS (PTY) LTD**

Appellant

**PHOENIX OF SWAZILAND**

**ASSURANCE COMPANY LTD**

Intervening Party

And

**HEPTAGON CIVILS (PTY) LTD**

Respondent

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

**AFRICAN MUTI**

Intervening Party

**Neutral Citation:** *AG Thomas (Pty) Ltd and Another vs Heptagon Civils (Pty) Ltd and Another (22/2023) [2023] SZSC 60 (18/12/2023)*

**Coram:** **J.M. VAN DER WALT JA; M.J. MANZINI AJA AND  
L.M. SIMELANE AJA.**

**Date heard:** 12 October, 2023.

**Date Delivered:** 18 December, 2023.

**SUMMARY:**     *Civil procedure – Appeal against High Court Judgment rescinding and setting aside an earlier Order on the basis that it was erroneously granted in the absence of a party affected thereby – Whether proper grounds existed warranting rescission – Appellant failing to challenge High Court’s main reason for granting rescission.*

**Held:**     *The facts established, firstly, that Appellant failed to disclose that there was a party who had a direct and substantial interest in the outcome of an application brought ex parte – and, secondly, that the High Court was correct to rescind and set aside an Order affecting a party who was not cited in ex parte proceedings before that Court – Appeal dismissed.*

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## JUDGMENT

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**M.J. MANZINI, AJA:**

- [1] This is an appeal against a Judgment of the High Court handed down on the 10<sup>th</sup> March, 2023 rescinding and setting aside an Order it had earlier issued on the 16<sup>th</sup> August, 2019.

- [2] At the commencement of the appeal hearing the parties applied for, and were granted, condonation for the late filing of their respective Heads of Argument and Bundles of Authorities.
- [3] In addition, one of the intervening parties raised a preliminary objection to the appeal, contending that Appellant ought to have applied for leave to appeal in terms Section 14 of the Court of Appeal Act. Arguments were heard on the preliminary objection, and the Court concluded that it ought to fail. The reasons appear later on in the Judgment.
- [4] The genesis of the dispute between the parties is a Komatsu Grader bearing registration numbers KSD 408 BH.
- [5] Appellant in these proceedings is AG Thomas (Pty) Ltd ("*AG Thomas*"), a company who obtained Judgment against Heptagon Civils (Pty) Ltd ("*Heptagon*"), the Respondent, for payment of an amount of E1, 046, 520.28 (One Million and Forty Six Thousand, Five Hundred and Twenty Emalangeneni and Twenty Eight Cents). Appellant's primary interest is to attach the Komatsu Grader in satisfaction of the Judgment debt.

- [6] Respondent and two intervening parties are challenging Appellant's efforts to place the Komatsu Grader under attachment.
- [7] The First Intervening Party is Phoenix of Swaziland Assurance Company Ltd ("*Phoenix*"), who joined the proceedings on account of what it claimed to be a "*financial interest*" in the Komatsu Grader. Phoenix filed an affidavit to support its contentions but ended up not participating in the hearing before the Court *a quo*. In these appeal proceedings Phoenix elected to abide by the decision of this Court.
- [8] The Second Intervening Party is Phindile Group (Pty) Ltd t/a African Muti ("*Phindile Group*") who claim ownership of the Komatsu Grader. Their primary interest is averting attachment of the Komatsu Grader.
- [9] In order to put this Judgment into perspective, a brief excursion into the facts giving rise to the appeal is necessary. Appellant approached the High Court on an *ex parte* and urgent basis seeking an Order directing the Royal Eswatini Police (REPS) to assist the Deputy Sheriff for the Manzini District in attaching and removing the Komatsu Grader from wherever it may be situate. Appellant further sought to prevent and/or stop the

registration of the Komatsu Grader into the name of any other person by Respondent.

[10] In the *ex parte* application Appellant alluded to the fact that it had an unsatisfied Judgment against Respondent. Appellant further alleged that the Deputy Sheriff for the Manzini District, a certain Mciniseli Zwane, had, on the 26<sup>th</sup> June, 2019 attached the Komatsu Grader and placed it at Appellant's premises in order to save storage costs. This was the first attachment of the Komatsu Grader. Appellant went on to allege that pursuant to the first attachment a third party, WESBANK, emerged to claim ownership of the Komatsu Grader; on the basis that it had been leased to Respondent, and in terms of the lease agreement, which was then in subsistence, it (WESBANK) remained owner until the lease consideration was fully paid. According to Appellant the Komatsu Grader was subsequently released to WESBANK with a request that the "*attachment is maintained despite the release*".

[11] Appellant further alleged that it was informed by the Deputy Sheriff, on the 14<sup>th</sup> August, 2019, that the Komatsu Grader had been released by WESBANK to Respondent, who was now keeping it in a "*walled homestead at Lugaganeni, Manzini*". Hence, the need for the Royal

Eswatini Police Service to assist the Deputy Sheriff “*in reattaching and removing the vehicle from the walled homestead in which it is now being hidden or from wherever same may be found*”. It was further alleged that the Deputy Sheriff harboured “*a reasonable fear of entering a private and unknown residence for the purpose of effecting this Court’s Order*”.

[12] The Order was granted by the Court *a quo* (on the 16<sup>th</sup> August, 2019), no doubt influenced by the allegations of “*reasonable fear*”.

[13] On the 20<sup>th</sup> August, 2019 Respondent launched an urgent application seeking an Order to rescind and set aside the Order of the 16<sup>th</sup> August, 2019. Respondent set forth ~~several~~ reasons for the rescission. Firstly, Respondent contended that the Order was final in nature and effect; that Respondent and any other person who may have had an interest in opposing the application had effectively been shut out. Secondly, Respondent contended that the attachment effected on the 26<sup>th</sup> June, 2019 was a nullity, on the bases that at the time of the purported attachment the Komatsu Grader belonged to WESBANK, and that the Deputy Sheriff who effected the attachment had no authority as his term of appointment had expired on the 10<sup>th</sup> April, 2019. His application for renewal of the

appointment was said to be pending before the Sheriff at the time of the purported attachment.

- [14] Thirdly, Respondent alleged that subsequent to an Order of the Court *a quo* dated 12<sup>th</sup> July, 2019 ownership of the Komatsu Grader (together with two other vehicles) had been transferred to Phindile Group. Respondent gave details of its loan arrangements with Phindile Group, and how these culminated in a Deed of Settlement which was made an Order of Court, effectively transferring ownership of the Komatsu Grader.
- [15] More pertinently, Respondent alleged that on the 14<sup>th</sup> August, 2019 the Deputy Sheriff (who had by this time obtained his letter of appointment or renewal, as the case may be) had visited the premises ("*the walled homestead at Lugaganeni*") where the Komatsu Grader was kept, in attempt to attach it, whereupon the position regarding the transfer of ownership to Phindile Group was explained by Mr Marco De Sousa, the Managing Director of the company. The latter filed a confirmatory affidavit. Mr Fakudze, who appeared for Respondent, also filed a confirmatory affidavit attesting that on the said date the Deputy Sheriff had attempted to effect an attachment and that he had also explained the transfer of ownership to Phindile Group.

[16] Respondent contended that on account of the foregoing Phindile Group ought to have been cited and joined as a party to the application. Respondent alleged that Appellant had “*full knowledge*” that Phindile Group had a “*substantive interest in the matter*”.

[17] Although Phindile Group filed a Notice to Intervene, they did not file a separate affidavit. Understandably so, as Mr. Marco De Sousa had already filed a confirmatory affidavit attesting to the events of the 14<sup>th</sup> August, 2019 and to the transfer of ownership.

[18] Appellant resisted the application for rescission on several grounds. First, Appellant claimed that Respondent deliberately sought to avoid a lawful Court Order, and was approaching the Court with unclean hands. Appellant alleged that Respondent had “*deliberately and with a settled intention to render the Order of the above Honourable Court nugatory sought to alienate the Grader and dispose of it to a third party through stealth*”. Second, Appellant alleged that although the Order was obtained on an *ex parte* basis it was deliberately made final in its effect due to the fact that Respondent “*cannot be heard at execution*” stage. Appellant alleged that properly construed the Order only sought “*to provide the*



*Deputy Sheriff with assistance in executing a lawful Order” of the Court a quo.*

[19] Third, Appellant alleged that the Komatsu Grader had been released to WESBANK on a “without prejudice” basis, and the Deputy Sheriff was entitled to place it under attachment, as the banks’ interest was “*monetary as opposed to pure ownership*”. Appellant contended that WESBANK’s interest was not a bar to attachment, nor would it render attachment irregular.

[20] Fourth, Appellant alleged that it was “*widely common practice that a Deputy Sheriff continues to act in that capacity even when the appointment is awaiting a renewal. It certainly does not invalidate any acts carried out by a Deputy Sheriff during the brief period of a pending renewal*”.

[21] Lastly, Appellant alleged that the agreement between Respondent and Phindile Group was invalid and unlawful, insofar as it sought to divest the former the legal interest it had in the Komatsu Grader. The purported agreement of settlement, so the argument went, was ineffectual as its effect was to unlawfully prefer one creditor over others. Appellant alleged that

the settlement agreement was an elaborate scheme to defeat claims by other creditors of the Respondent. Appellant denied that it was made aware of Phindile Groups' interest in the Komatsu Grader.

- [22] The Court *a quo* found in favour of Respondent and issued an Order to the effect that *"The Order of this Court of the 16<sup>th</sup> August, 2019 is hereby rescinded and set aside"*. Each party was directed to bear its own costs. Hence, the present appeal.

- [23] Two issues called for determination by this Court. First, at the preliminary stage of the hearing, whether Appellant ought to have obtained leave to appeal. This Court found that obtaining leave to appeal was not necessary, and the reasons appear below. Second, whether proper grounds existed for rescission of the Order.

**Whether leave to appeal ought to have been obtained.**

- [24] Section 14 of the Court of Appeal Act provides that –

***"14(1) An appeal shall lie to the Court of Appeal-***

***(a) from the 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."*

[25] Counsel for Phindile Group, Mr Phakathi, strongly urged the Court to find that the impugned Order was not final because it "*does not define the rights of the parties in final and definitive effect on the main action, which is actually the rights of the parties involved to the grader.*" He submitted that the Order was merely procedural, in that it merely gave Phindile Group an opportunity to state their case in the main application.

[26] On the contrary, Ms Charamba, appearing for Appellant, contended that the Order was final, as the Court *a quo* had made a definitive finding that the grader belonged to WESBANK, who could deal with it at its pleasure. It was submitted that this "*had the effect of disposing of the matter in its entirety*".

[27] The test for determining whether a judgment or order is final or interlocutory has been considered by this Court in numerous judgments and is now well settled. The main attributes of a final judgment or order are that it must be final in effect and not susceptible of alteration by the Court

of first instance; it must be definitive of the rights of the parties; and, it must have the effect of disposing at least a substantial portion of the relief claimed in the main proceedings. However, these attributes are not cast in stone. See: Mfanuzile Vusi Hlophe vs The Ministry of Health and Two Others (20/2016) [2016] SZSC 38 (30 June, 2016); Skhumbuzo Dlamini vs The Quadro Trust and Others (01/2018) [2018] SZSC 51 29 November 2018); Good Shepherd Mission Hospital vs Sibongile Bhembe (36/2020) [2020] SZSC 32 (22/10/2020); Dumisani Kunene vs Director of Public Prosecutions (03/2019) [2019] SZSC 43 (09 October 2019).

[28] Appealability is a vexed issue. As correctly observed in Health Professions Council v Emergency Medical Supplies 2010 (6) SA 469 (SCA) at 473 -

*“... even if an order does not have all three attributes, it may be appealable if it disposes of any issue or part of an issue. Conversely, however, even if an order does have all three attributes it may not be appealable, because the determination of an issue in isolation from others in dispute may be undesirable and lead to a costly and inefficient proliferation of hearings.”*

[29] The Order which was rescinded authorised the Deputy Sheriff to attach the Komatsu Grader wherever it may be situate. This authority was successfully challenged and set aside by the rescission Order. Although the rescission Order did not dispose of any substantial portion of the dispute in the main application, it disposed of all issues pertaining the Deputy Sheriff's entitlement to execute against the Komatsu Grader. Furthermore, the rescission Order is not susceptible to being altered by the Court *a quo*. For these reasons the Court concluded that the rescission Order was appealable.

**Whether proper grounds existed for rescission of the Order.**

[30] On a proper analysis of the Judgment of the Court *a quo*, the Learned Judge took the view that the Order of the 16<sup>th</sup> August, 2019 was granted erroneously in the absence of a party affected thereby. The Learned Judge concluded that as a result of the Deed of Settlement between Respondent and Phindile Group, which was made an Order of Court on the 12<sup>th</sup> July, 2019 the Komatsu Grader lawfully belonged to Phindile Group. The Learned Judge found that the Komatsu Grader could not be the subject matter of an attachment to satisfy the Judgment of AG Thomas against Heptagon. Crucially, the Court concluded that "*AG Thomas was under a legal duty to cite and join Phindile Group in these proceedings*".

[31] Notably, Appellant has ~~made~~ no attempt to challenge this conclusion by the Court *a quo*, yet it is the main reason why the rescission application was granted. Thus, Appellant's failure to challenge the Court *a quo*'s conclusion that Phindile Group ought to have been cited in the proceedings is fatal to the appeal.

[32] Moreover, the facts clearly established that the Deputy Sheriff on whose report the *ex parte* application was premised, deliberately withheld material information and/or facts, that is, he had been expressly informed by Mr. De Sousa (Phindile Group Managing Director) and Mr. Fakudze (Heptagon's Attorney) that ownership of the Komatsu Grader had been transferred to Phindile Group. The above information came to his knowledge prior to the *ex parte* application being launched. Yet, the Deputy Sheriff reported that the Komatsu Grader was being "*hidden*" behind a "*walled homestead*"; and that he harboured "*a reasonable fear of entering a private and unknown residence*".

[33] Appellant's problem was further compounded by the Deputy Sheriff's failure to file an affidavit and dispute the allegations that he was expressly informed about ownership of the Komatsu Grader prior to the *ex parte* application being launched.

[34] In light of the foregoing, I find no basis, factual or legal, for tampering with the Judgment of the Court *a quo*. On this basis alone, the appeal ought to fail.

[35] I now turn to deal, albeit briefly, with the stated grounds of appeal, which read as follows:

1. The Court *a quo* erred in law and in fact in finding that the Komatsu Grader (the Grader) belonged to Wesbank (the lessor) and was therefore not subject to a judicial attachment by the Appellant for the debt owed by Heptagon (lessee) when in actual fact Wesbank only had a financial interest in the grader and not the grader itself;
2. The Court *a quo* erred in law and in fact in finding that the release of the grader to Wesbank was in law unconditional and that therefore Wesbank had real rights despite that the grader was under judicial attachment by the Appellant and also in light of the letter wrote by the Appellant to Wesbank setting out the conditions for the release;

3. The Court *a quo* erred in law and in fact in finding that the execution of the Grader was defective in light of the fact that the Deputy Sheriff's appointment at the time of the execution had lapsed despite the fact that the Deputy Sheriff had already applied for a renewal of his appointment (which appointment was renewed) and it has become a common practice for Deputy Sheriffs to continue with their duties pending an anticipated renewal;

4. The Court *a quo* erred in law and in fact in not recognising that the transfer of the Grader from Wesbank to Phindile Group was an act to defraud the Appellant with the intention to evade and defeat the execution of the Court Order in favour of the Appellant.

[36] In the first two grounds of appeal Appellant is fixated with the Court *a quo*'s findings as regards WESBANK, who, as the facts clearly establish, no longer had an interest in the Komatsu Grader. In my view, whatever was said by the Court *a quo* regarding the lapsed interest of WESBANK does not detract from the fact that Appellant failed to disclose material facts pertaining the direct and substantial interest of Phindile Group in the Komatsu Grader.



[37] What was communicated by the Managing Director of Phindile Group and Heptagon's legal representative to the Deputy Sheriff regarding the ownership of the Komatsu Grader are material facts, which ought to have been disclosed by Appellant, or by the Deputy Sheriff himself, as an officer of the Court. I have no doubt that had these material facts come to the attention of the Court *a quo*, the impugned Order would not have been granted.

[38] The third ground of appeal pertains to the Deputy Sheriff's authority to effect the first attachment (on the 26<sup>th</sup> June, 2019). There is clear evidence that the appointment of Mciniseli Zwane commenced on the 10<sup>th</sup> April, 2018 and expired on the 10<sup>th</sup> April, 2019. At the time he effected the attachment he had applied for renewal of his appointment. His appointment was subsequently renewed for the period commencing 5<sup>th</sup> August, 2019 to 5<sup>th</sup> August, 2020. Appellant's contention is that notwithstanding Mciniseli Zwane's lapsed or expired appointment, he still had legal authority to carry out the duties of a Deputy Sheriff.

[39] There is clearly no legal sense in Appellant's contentions. A deputy sheriff is appointed in terms of Section 4 (1) of the Sheriff's Act of 1902. He/she derives authority to execute writs and other legal processes from the letter

of appointment, without which there is no legal basis to carry out any of the duties and functions set out in Section 4 (1).

[40] The third ground of appeal lacks any merit and ought to fail.

[41] The fourth (and last) ground of appeal equally lacks merit. Appellant's contention that the transfer of the Komatsu Grader from WESBANK to Phindile Group "*was an act to defraud the Appellant with the intention to evade and defeat execution of the Court Order in favour of the Appellant*" is not supported by sufficient factual averments. It is trite that allegations of fraud must be supported by facts which clearly establish fraudulent intent. Absent such a showing a Court should be loathe to uphold any allegations of fraud.

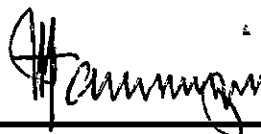
[42] In the circumstances, the appeal cannot succeed.

[43] There is no basis to depart from the general principle that costs follow the cause.

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[44] The Court issues the following Order:

1. The appeal is dismissed.
2. Appellant is ordered to pay the costs of the appeal.



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M.J. MANZINI

ACTING JUSTICE OF APPEAL

I agree

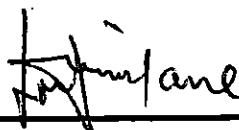


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J.M. VAN DER WALT

JUSTICE OF APPEAL

I agree



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L.M. SIMELANE

ACTING JUSTICE OF APPEAL

**For the Appellant:** MS. CHARAMBA (WARING ATTORNEYS)

**For the Respondent:** MR. FAKUDZE (FAKUDZE ATTORNEYS)

**For the First Intervening Party:** MR. MASEKO (MASEKO  
ATTORNEYS)

**For the Second Intervening Party:** MR. PHAKATHI (PHAKATHI JELE  
ATTORNEYS)