

**IN THE INDUSTRIAL COURT OF
SWAZILAND**

HELD AT MBABANE

CASE NO. 437/07

In the matter between:

ELITE MOTORS

Applicant

and

MHLELI FAKUDZE

1st Respondent

THE DEPUTY SHERIFF FOR MANZINI

2nd Respondent

In re:

MHLELI FAKUDZE

Applicant

and

LIVE MOTORS

Respondent

CORAM:

P. R. DUNSEITH : PRESIDENT

JOSIAH YENDE : MEMBER

NICHOLAS MANANA: MEMBER

FOR APPLICANT : NGCAM PHALALA

FOR RESPONDENT: MKOKO

J U D G E M E N T - 21/12/07

1. At commencement of arguments in this matter, the court struck certain hearsay evidence from paragraphs 7, 9 and 12 of the Respondent's answering affidavit. This left very little substantive content in the answering affidavit apart from bald admissions and denials.

2. The Applicant Elite Motors (Pty) Ltd has applied for an interdict restraining the Respondent from attaching property belonging to the Applicant in execution of a judgement obtained against a different company called Live Motors (Pty) Ltd.

3. It requires no argument that in law execution may only be levied on the assets of the judgement debtor. Since the judgement debtor is Live Motors (Pty) Ltd, it follows that execution may not be levied on the Applicant's assets.

4. It appears from the founding affidavit that the judgement creditor and the Deputy Sheriff attempted to attach a vehicle in the possession of the Applicant in the belief that this vehicle belonged to Live Motors (Pty) Ltd. This belief was not unreasonable, as may be seen from the following chronology of events:

4.1. The 1st Respondent obtained an award by default against Live Motors after his dispute was referred to arbitration on 2 August 2007. The default award required Live Motors to pay the Applicant a sum of E5580-00. This award was served on the director of Live Motors, a certain Chodhurry Wariach, on 24 August 2007 and made an order of the Industrial Court on the 5th November 2007.

4.2. Elite Motors (Pty) Ltd was incorporated on the 6th August 2007. Chodhurry Wariach is a director of this company.

4.3. A new lease in respect of the very same premises occupied by Live Motors was signed by Elite Motors. The lease purports to commence on 1st July 2007, a date prior to Elite Motors coming into existence.

4.4. A trading licence permitting Elite Motors to operate the

same business as that previously carried on by Live Motors at the same premises was issued on 25th September 2007.

4.5. A Toyota Corolla SD 235 SN registered in the name of Live Motors was transferred to the name of Elite Motors on some date not legible from the registration document but apparently around the time that Elite Motors took over the trading premises of Live Motors.

5. There is no evidence before court that the business of Live Motors was sold or transferred to the Applicant, yet the Applicant purports to have somehow acquired the trading premises and assets of Live Motors at the very time that Live Motors was required to pay its judgement debt to the 1st Respondent. It is not surprising in the circumstances that the 1st Respondent regards the sudden appearance of the Applicant at the business premises and the registration of SD 235 SN in the name of the Applicant as a collusive ruse calculated to avoid payment of Live Motors' creditors, including the 1st Respondent.

6. Where there are conflicting claims with respect to property which a Deputy-Sheriff seeks to attach in execution, he may attach the property and issue an interpleader notice in terms of the procedure provided in Rule 58 of the High Court Rules of court. In this matter, the Deputy-Sheriff did not follow this procedure, but instead chose to engage in an argument with the Applicant's director, causing a public spectacle and threatening randomly to attach property in the premises.

7. The Applicant is entitled to be protected against attachment of property which is its bona fide lawful property. This does not preclude the Deputy Sheriff, if he is satisfied on reasonable grounds that property in the possession of a third party belongs to the judgement debtor, from attaching the property and referring any conflicting claims to court for adjudication by way of the interpleader procedure.

8. The writ of execution which the Deputy-Sheriff sought to execute is a nullity because it was not duly issued by the Registrar of the High Court. No execution can be levied on this defective warrant.

9. The court hereby orders as follows:

- (a) The writ of execution dated 29th November 2007 is hereby set aside.
- (b) The Respondents are restrained from attaching property belonging to the Applicant.
- (c) There is no order as to costs.

The members agree.

**PETER R. DUNSEITH
PRESIDENT OF THE INDUSTRIAL COURT**