

IN THE COURT OF APPEAL OF LESOTHO

Held in Maseru

C of A (CIV) 32/2013

In the matter between:

DU PREEZ, LIEBETRAU AND COMPANY **1ST APPELLANT**

and

RAMOHAHLI 'MUSI **2ND APPELLANT**

and

PEETE MOLAPO **RESPONDENT**

CORAM: HOWIE JA
FARLAM JA
THRING JA

HEARD: 2 OCTOBER 2013

DELIVERED: 18 OCTOBER 2013

SUMMARY

Rule 47(11) of High Court Rules - necessity for notice of application by Deputy Sheriff for cancellation of sale in execution to be given to person who took cession of purchaser's rights under the sale.

JUDGMENT

FARLAM JA:

[1] This is an appeal against a judgment delivered by Molete J in the High Court on 5 June 2013 in which he set aside an order he had granted on 23 November 2012 under rule 47 (11) of the High Court Rules.

[2] Rule 47 (11), which is in substantially the same terms as Rule 46 (11) of the Uniform Rules applicable in South Africa, reads as follows:

‘(11) If the purchaser fails to carry out any of his obligations under the conditions of sale, the sale may be cancelled by a Judge on the report of the deputy-sheriff after due notice to the purchaser and the property shall then be put up for sale. If the defaulting purchaser is in possession of the property, the deputy-sheriff may on seven days notice, apply to a Judge for an order ejecting him or any person claiming to hold under him therefrom.’

[3] The order which was set aside was for the cancellation of a sale in execution which took place on 15 June 2007 in terms of which plot 12282-041 Maseru West was sold to one F van Heerden for M2.5m and for the ejectment of the purchaser as well as the respondent (who was named in the order) or any other person in possession of the property. This word was clearly omitted from the subrule in error: if subrule 46 (11) of the corresponding South African rule.

- [4] The report by the second appellant, the deputy sheriff who conducted the sale in execution, was served on the purchaser, Mr Van Heerden, but not on the respondent. To the knowledge of the second appellant and of Mr SC Buys, a consultant in the first appellant, which is a firm of attorneys, notaries and conveyancers practising in Maseru, the respondent had taken cession of Mr Van Heerden's rights in respect of the sale of the property and paid M1.5m to the first appellant, which was acting for the second appellant in respect of the transfer as well as for Mr Van Heerden and the execution creditor. Mr Buys and the second appellant were also aware that the respondent was in occupation of the property sold.
- [5] The appellants were accordingly also aware that if the judicial sale were to be cancelled this would directly impact on the respondent as cessionary of the rights Mr Van Heerden acquired under the sale. Despite this they did not serve a copy of the second appellant's report on the respondent nor give him any notice of the second appellant's intention to apply to a judge in chambers for the order sought.
- [6] Counsel for the appellants conceded in argument that if the application brought by the second appellant had been an

ordinary one which came before the High Court in the normal way, notice to and joinder of the respondent would have been necessary. He contended, however, that this was not required in proceedings brought under Rule 47 (11), which he submitted were *sui generis*. All that was required under the sub-rule, he submitted, was notice to the purchaser and any other person, such as the respondent whose rights would be directly affected was not entitled to notice of the application.

- [7] The learned Judge in the court *a quo* did not agree that this was the law and held, *inter alia*, that in the circumstances the second appellant should have served his report on the respondent before bringing his application under the subrule before the judge.
- [8] I agree with the Judge in this regard. I do not think that the requirement in the subrule that due notice of the deputy sheriff's report must be given to the purchaser before an application is made under the subrule is to be read as indicating an intention on the part of the framer of the rule to exclude any requirement of notice to any other party having a direct and substantial interest in the sale in execution sought to be cancelled. I say this because of the clear injustice that might follow if such notice were not required.

[9] It follows from what I have said that the appeal must fail.

[10] The following order is made:

The appeal is dismissed with costs.

I.G. FARLAM

JUSTICE OF APPEAL

I agree

C.T. HOWIE

JUSTICE OF APPEAL

I agree

W.G.G. THRING

JUSTICE OF APPEAL

For Appellants : T.R. Mpaka

For Respondents : Q. Letsika