

IN THE HIGH COURT OF LESOTHO

In the matter between:

PEETE MOLAPO

APPLICANT

AND

**DUPREEZ, LIEBETRAU & CO
DEPUTY SHERIFF ('MUSI)
ABDUL RAZAK DAMBHA
LAND ADMINISTRATION AUTHORITY**

**1ST RESPONDENT
2ND RESPONDENT
3RD RESPONDENT
4TH RESPONDENT**

RULING

**Coram : Hon. Molete J
Date of hearing : 22 April 2013
Date of judgment : 5th June 2013**

SUMMARY

*Rules of Court – Deputy Sheriff giving report to the Court in terms of rule 47(11)
– It is essential that such report must be substantially correct and true in its contents – Failure to set out, or omission of relevant facts may lead to setting aside of order – Sheriff found to have omitted relevant information in his report – Order set aside on Application.*

ANNOTATIONS

CITED CASES

STATUTES

High Court Rules – Rule 47(11)

BOOKS

[1] This matter comes before Court under the provisions of rule 47(11) of the High Court rules. The rule provides that in respect of sales in execution;

“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 be put for sale.”

[2] The Deputy Sheriff; Mr R Musi made a report to the Court that he had attached the debtors property and sold it in execution after having complied with all required procedures. The sale was on 15th June 2007. He sold the immovable property on plot NO.12282-041 Maseru West to one F.Van Heerden of Bloemfontein.

[3] He complained that after selling the property; Mr F. Van Heerden of Bloemfontein failed to pay the agreed price of 2.5 Million. The purchaser; he reported, also failed to comply with the following conditions of sale;

- (a) He failed to pay the deposit of the purchase price as provided for in the conditions of sale.
 - (b) The Deputy Sheriffs fees were not paid within the time set act in the rules.
 - (c) The auction was also not confirmed by the judgment creditor which was a requirement and condition of sale which applied at the auction.
 - (d) The Court of Appeal had confirmed in CIV/APN/222/2009 that the rights of the Deputy Sheriff outweighed the rights of the purchaser or Peete Molapo who became the cessionary.
- [4] The matter had a long history; which on the face of it was not relevant because the Deputy Sheriff's report seemed to be sufficient for the relief sought.
- [5] I then made the order cancelling the sale in execution, authorising the Deputy Sheriff to re-auction the property in terms of the rules and ejectment of Van Heerder or Peete Molapo from the plot NO: 12282-041 Maseru West.
- [6] The result of my order was this application in which Peete Molapo applied to Court for urgent relief that the order be set aside and proceedings be stayed pending finalisation of proceedings in CIV/APN/222/2009. He sought that the Deputy-Sheriff be prevented from holding a resale of the property; and that the order I granted on the basis of the Sheriff's report be

set aside. Peete Molapo was the cessionary of the rights, title and interest of Van Heerden to the sale agreement.

[7] The matter was opposed on behalf of the Respondents by Du Preez Liebetruë & Co. The Deputy Sheriff, R. Musi and Mr Buys filed answering affidavits. It was eventually argued before me by counsel and attorney on the 22nd April 2013. It is not necessary to examine in any detail the contents of the Affidavits for purposes of this ruling. It will be based on the mere report of the Deputy Sheriff and the fact that it had the effect of misleading the Court by omission of some important and relevant information facts.

[8] It is a well accepted principle of law that where an order is sought affecting the rights of another, that other person must be served; and that the person seeking the relief must make full disclosure of the material facts. It is especially so in a case which is intended wholly to be based on a report by the Deputy-Sheriff such as the present.

[9] The same rule 47(11) provides further with regard to notice that;

“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.”

[10] Even though the Deputy Sheriff knew that the person in possession of the property was the Applicant under an agreement of cession, he chose to serve the papers on Van Heerden in Bloemfontein, and ignored to serve the Applicant when he knew was in possession of the property as cessionary.

[11] It is highly probable, and perhaps should have been anticipated by himself that Van Heerden would not respond to the papers because he would have ceased to be an interested party; and that Peete would be unaware of the order for his ejection which he certainly would oppose regard being had to the history of the matter.

[12] It was therefore wrong for the Deputy Sheriff to fail to serve the report on Peete. He knew that he was the cessionary and had taken possession of the property as will appear more fully hereunder. That omission was significant.

[13] The Deputy Sheriff in making his report and approaching the Court in the manner he did was encouraged by the Court of Appeal in its judgment in referring the case back to the High Court for oral evidence, that;

“The further proceedings in the litigation are all subject to the rights of the Deputy Sheriff in terms of rule 47 of the High Court rules.”

[14] **Mr Mpaka** in argument emphasised this and submitted that “subject to” in the judgment must be interpreted to mean that the Deputy Sheriffs report would be given priority and ought to supercede other considerations in this litigation. That may be so, but in my view it places an obligation on the Sheriff to be open in his report and reveal all the relevant information to enable the Court to make a proper decision.

[15] Essentially the report of the Deputy Sheriff omitted to mention that;

- (a) A dispute existed on the price of the property. Mr Molapo denied that it was M2,500,000-00 and insisted that it was M1,500,000-00 that was agreed, hence the referral to oral evidence by the Court of Appeal to establish the parties' intention.
- (b) That a total amount of M1,500,000-00 was already paid by Molapo who insisted it was the full purchase price, such payment having been made to Plaintiff's attorneys because he as Deputy Sheriff did not have a Bank Account.
- (c) That on his instruction the offices of Du Preez Liebetrau & Co were attending to the transfer and had actually sent the initial documentation to Mr Molapo for signature which did not demand any outstanding balance.
- (d) That soon after the sale Du Preez Liebetrau & Co wrote a letter to Nedbank Lesotho confirming that

“ the property was sold by public auction..... The conditons of sale, at the auction and return of service..... constitutes the sale contract. Transfer is passed by the Deputy Sheriff and he has appointed our offices to attend to this formality.”

No mention was made of any outstanding amounts.

- (e) It is not denied that the Bank paid the amount on behalf of Mr Molapo, so it was factually incorrect for the Deputy-Sheriff to say in his report that *“ Neither the Deputy Sheriff's fees nor the deposit was paid in terms of the conditions of sale”* because he knew of the

arrangement for payment by; and transfer to Peete Molapo which he had authorised.

[16] In all the circumstances of this case I consider that the Deputy Sheriff's report in the contemplation of rule 47(11) should be able to stand alone and be true and correct in all important respects. In this case it was not and it is sufficient cause for me to set aside my order cancelling the sale and authorising him to re-auction the property.

[17] The conclusion I came to is therefore as follows;

- (a) The order granted on the 23rd November 2012 on the basis of the report of the Deputy Sheriff is set aside.
- (b) The order authorising the Deputy to re-auction the property is also set aside including the ejection order.
- (c) The matter is referred to oral evidence in the terms already stipulated by the Court of Appeal.
- (d) Costs of this Application are awarded to the Applicant.

L.A. MOLETE
JUDGE OF THE HIGH COURT

For Applicant - **Mr Q. Letsika**
For Respondent - **Mr T. Mpaka**