

PRISCILLA MEDA

Versus

HOMELINK (PVT) LTD

And

DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 30 SEPTEMBER & 15 DECEMBER 2011

Advocate L. Nkomo for applicant
P. Ncube for respondent

Opposed Application

NDOU J: The applicant seeks an order in the following terms:

“It is ordered that:

1. The sale in execution of the said dwelling being stand 2096 Bulawayo North of Bulawayo Township, Bulawayo held under Deed of Transfer number 1563/2006 be and is hereby suspended until the fulfillment of the debt by way of payment of GBP800,00 per month with effect from the 30th of August 2011.
2. The 2nd respondent be and is hereby ordered to put in abeyance the sale in execution pursuant to paragraph 1 above and in terms of Order 40 Rule 348a.
3. The 1st respondent pays costs on an attorney-client scale if the relief sought is opposed.”

The background facts are the following. In or about June 2006, at the special instance and request of the applicant 1st respondent lent and advanced to the applicant a sum of GBP28 659,25 (Twenty eight thousand six hundred and fifty-nine British Pounds and twenty-five pence). As security for the loan, 1st respondent specially hypothecated certain immovable property as a first mortgage, being stand 2096 Bulawayo North of Bulawayo Township, Bulawayo otherwise known as number 12 Plummer Street, Northend, Bulawayo (hereinafter called the Northend house). The said loan was payable by way of instalments as stipulated by the 1st respondent from time to time but at any rate, within a period of five (5) years, that is, on or before the 2nd July 2011.

The applicant failed to pay the instalments due since 2008 and as a result, on the 25th November 2010, 1st respondent issued summons against the applicant claiming a sum of GBP 22 898,98 plus interest thereon and an order declaring the Northend house specially executable. On the 6th December 2010, through her current legal practitioners of record, applicant entered appearance to defend. Thereafter, on the 12th January 2011, 1st respondent filed an application for summary judgment and served it on that same day on the applicant's legal practitioners of record. On the 21st January 2011, a roundtable conference of the parties was held at the 1st respondent's legal practitioners where all outstanding issues were clarified and applicant was left in no doubt as to what was owed. On the 27th January 2011, as shown in annexure "E 1" to this application, applicant made an offer to pay an unquantified "substantial" deposit within three (3) months and to pay off the whole balance outstanding by 2nd July 2011. Because the initial deposit was unquantified, a counter offer was proposed to the applicant as shown in annexure "E 2" on the 31st January 2011 and despite applicant stating that they would revert to the 1st respondent by 18 February 2011, applicant never did so. After warning applicant that summary judgment would be proceeded with as shown in annexure "D 1" and "D 2", 1st respondent obtained judgment against the applicant and subsequently issued the warrant of execution. Faced with the warrant of execution and the attachment of the Northend house the applicant filed this application in terms of Order 40 Rule 348A (5a) of the High Court Rules 1971, on the 2nd August 2011. On the 5th August 2011, 1st respondent opposed the same. It is significant, as well as common cause that, since 2008 applicant has not paid any instalment to the 1st respondent to date. In other words, not only has applicant failed to pay the instalments as per her offer on 27th January 2011, she has failed to liquidate the whole balance due by the 2nd July 2011 and or to pay even a penny towards what she owes.

Rule 348A (5a) provides:

"5a Without derogation from sub rules (3) to (5), where the dwelling that has been attached is occupied by the execution debtor or members of his family, the execution debtor may, within ten days after the service upon him of the notice in terms of rule 347, make a chamber application in accordance with sub rule (5b) for the suspension of –

- (a) the sale of the dwelling concerned; or
 - (b) The eviction of its occupants." (Emphasis added)
- *Masendeke v CABS* 2003 (1) ZLR 65 (H).

In casu, the Northend property was laid under judicial attachment on the 8th July 2011. This application was filed on 2nd August 2011 i.e. well after the expiry of the ten days stipulated

in Rule 348A (5a) above. On this point alone, it would seem the application is not properly before me.

Be that as it may, this point was not averred so I will determine the application on the points raised in the papers and during the hearing.

In my humble view, execution of mortgaged property is different from the property being referred to in Order 40 Rule 348A. The difference is that we are dealing here with foreclosure proceedings. In foreclosure proceedings, the security which the mortgagor pledged is the one that is sold after institution of judicial proceedings for the amount of the debt, where after a writ of execution against the property is issued. In other words, if the mortgagor does not pay the capital when due, or if he commits any breach of the conditions of the contract entitling the mortgagee to foreclose then the latter is entitled to have the secured property sold and obtain the amount of his debt from the proceeds of the sale – *Benson v Hirschlorin* 1936 NPD 277. A mortgagor cannot claim a stay of execution in terms of Rule 348A supra. It has to be noted that as a general rule a creditor who has obtained judgment is entitled to enforce such judgment by levying execution and the court has no jurisdiction to restrain the judgment creditor from enforcing such legal right – *Sabena Belgian World Airlines v Vas Elst* 1981 (1) SA 1235 (T) and *South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544. Rule 348A should be viewed as an exception to this general rule. *In casu*, in the summons and the summary judgment application, the 1st respondent specifically sought an order allowing it to sell the Northend house. The applicant was served with all those processes and she was legally represented. She could have defended the matter even on that aspect alone. She did not. On 3rd March 2011 this court acceded to the prayer sought by the 1st respondent and ordered that the Northend house be sold. Having made an order directing the sale of the house, applicant, cannot now bring an application in terms of Rule 348A (5a) stopping the sale on the basis she has made a reasonable offer. She is thus precluded from doing so as allowing the application would have the effect of rescinding, through the back door, the order that has been made by a competent court. By declaring the house “specially executable” the court has given the 1st respondent the right to sell the house in execution to recover what is owed to it. The mortgagor’s first and foremost duty is to pay the debt secured and the mortgagee’s corresponding right is to “call up” or “foreclose” the bond. The significance of mortgage bonds and all other forms of hypothecation lies in the fact that they provide the creditor with a “real security” for the payment of his claim for if the debtor is unable to raise the necessary funds to pay the debt which is secured, the creditor is entitled to demand that the property, that being the thing which is subject matter of his security, be sold and that the proceeds of such sale are used for the satisfaction of his claim – *The Law of Property* (3rd Ed) Silberberg and Schoeman at 419 and 429. The rights of the judgment creditor

will enjoy relative primacy. If this were not so, it would bring about a situation in which debtors could borrow money to purchase immovable property and defeat their creditors' legitimate claims to repayment by using Rule 348A (5a). To put residential immovable property which is a person's home into that class of assets beyond the reach of execution would be to sterilize the immovable property from commerce thereby rendering it useless as a means to raise credit. Preventing debtors from using their homes as security to raise credit will create a class of homeless persons those who are unable to afford the full purchase price of their homes in a cash sale, but could afford to repay a loan for the purchase price. It would lock up capital and prevent the home owning entrepreneur from using his home as security to finance business initiative. Members of the poor communities will not be able to obtain finance from banks who will not advance money to purchase immovable property if the immovable property cannot be used as security for repayment – *Nedbank Ltd v Fraser & Anor* case number 2011/00418 (Republic of South Africa – South Gauteng High Court).

The situation *in casu*, was not the one contemplated by the legislature in drawing Rule 348A (5a). It is different from an ordinary debt as this one is inexorably tied to the house which has been declared by the court order to be specially executable. The only interpretation that makes sense rather than a mockery of justice is one which says Rule 348A is not applicable to foreclosure proceedings. In this regard I am guided by what McNALLY JA said in *S v Kachipare* 1998(2) ZLR 271 (S) at 283C –

“I take the view that one is entitled to look closely at the wording of the section in order to find an interpretation which achieves sense rather than injustice, in the application of the section in a situation almost certainly not contemplated by the legislature. This must be specially so in a statute which deals with procedure rather than with substantive law.”

For these reasons the application must fail.

Accordingly, the application is dismissed with costs on this preliminary point.

Cheda & Partners, applicant's legal practitioners
Coghlan & Welsh, 1st respondent's legal practitioners