HB 128/16
HC 603/15

DEAN JULIAN WYNGARD

And

JANINE VERONICA WYNGARD

Versus

CENTRAL AFRICA BUILDING SOCIETY
t/a CABS

and

SHERIFF OF ZIMBABWE N.O.

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 20 & 26 MAY 2016

Opposed Application

1st applicant in person
Mrs C. Bhebhe for the 1st respondent

MAKONESE J: This is an application for an order suspending the sale in execution of stand 2885 Bulawayo. The property was placed under judicial attachment by the Sheriff of the High Court on 3rd September 2014. The grounds for the application are that the 1st applicant and five other occupants of the property would suffer great hardship in the event of the property being sold. The applicants contend that if the property is sold all the occupants would be destitute as they have no alternative residential property.

The application is opposed by the respondents who contend that the application is an abuse of court process and ought to be dismissed on an attorney and client scale. At the hearing of this matter the 1st applicant appeared in person and persisted in his argument that the court should suspend the sale in execution to afford him an opportunity to make arrangements for the settlement of the debt.

Factual background

On or about 16th December 2011, at the special instance and request of 1st respondent, applicants guaranteed a loan in terms of which 1st respondent lent and advanced to Familiar Marketing (Pvt) Ltd a sum of US$33 000. The loan agreement was reduced to writing and signed by both parties. In compliance with the agreement, applicants signed sureties and co-principal debtors for the due and proper fulfillment of the obligations cast upon Familiar Marketing and acknowledging that any indebtedness by Familiar Marketing to 1st respondent would be binding on them and would be their indebtedness. Applicants are legally jointly liable with Familiar Marketing for the sums due to 1st respondent inclusive of interest, collection commission and legal costs as well as all costs of execution.

In further compliance with the loan agreement, a First Surety Mortgage Bond was registered for the sum of US$33 000 plus additional US$6 000 over certain piece of land situate in the district of Bulawayo being stand 2885 of Bulawayo Township. It is a material term of the Surety Bond that applicants accepted that any costs incurred in the recalling of the Bond will be payable on the attorney and client scale as well as collection commission and that the Bond would be recalled in the event of Familiar Marketing defaulting in its obligations. As things turned out, Familiar Marketing has failed to repay the loan and applicants have done nothing to settle the outstanding amounts. As at 1st August 2012 the total sum outstanding was US$33 000 plus interest in the sum of US$4 591. Summary judgment was obtained against Familiar Marketing on 29th August 2014 and subsequently a warrant of execution was issued. Faced with the imminent sale of the mortgaged property, applicant filed this application in terms of Order 40 Rule 348 A 5 (b) of the High Court Civil Rules.

At the hearing of this matter 1st applicant conceded that he had not paid anything towards the reduction of the judgment debt. He further conceded that he had no means to settle the debt as he was unemployed. He averred that if given time he could make arrangements with "his family" to settle the debt. What is clear is that the applicants' promises are nothing but empty promises meant to postpone the day of reckoning. No plausible payment plan was put forward by the applicant and there is no genuine desire to settle the debt.

Whether applicants satisfied the requirements of Rule 348 A 5 (e)

Rule 348 5 (e) provides as follows:

"If, on the hearing of an application in terms of sub-rule (5a), the judge is satisfied –

(a) that the dwelling concerned is occupied by the execution debtor or his family and it is likely that he will suffer great hardship if the dwelling is sold or they are evicted from it, as the case may be; and
(b) that –
    (i) the execution debtor had made a reasonable offer to settle the judgment debt; or
    (ii) the occupants of the dwelling concerned require a reasonable period in which to find other accommodation; or
    (iii) there is some other good ground for postponing or suspending the sale of the dwelling concerned or the eviction of its occupants, as the case may be;

the judge may order the postponement or suspension of the sale of the dwelling concerned or the eviction of its occupants, as the case may be;

the judge may order the postponement or suspension of the sale of the dwelling concerned or the eviction of its occupants, subject to such terms and conditions as he may specify." (emphasis mine)

It is clear that in terms of Rule 348 5 (e) of the High Court Rules, the sale of immovable property can be suspended if the court is satisfied that the dwelling concerned is occupied by the execution debtor or his family and that it is likely that he or they will suffer great hardship if the dwelling house is sold. The applicant has failed, in my view to meet the requirements of this rule. In the first instance, the applicant merely avers that the dwelling house is occupied by the applicant's family members, namely:

(a) Neville Wyngard
(b) Jean Wyngard
(c) Calvin Wyngard
(d) Logan Wyngard
(e) Lorrel Wyngard

It is contended that the occupants of the property will suffer great hardship because the said dwelling is their permanent home. First applicant, Dean Julian Wyngard deposed to an affidavit in support of this application and contends that the rest of the applicants are family members. 1st applicant is not the judgment debtor. His involvement in this matter is that he gave the Title Deeds for his property to Familiar Marketing to use as collateral for a loan. There is no dispute that the loan remains unpaid to date and that the debtor and the applicants have not placed before the court ay credible payment plan. The 1st respondent has therefore been left clinging to a mortgage bond which cannot be enforced. The rest of the occupants mentioned in the 1st applicant's founding affidavit have not stated under oath how the sale of the property would affect them. The fact that the applicants may be calling the property their only home does not mean that they cannot secure alternative accommodation. The applicants have simply parroted the provisions of sub-rule 5 (e) (a) without taking the court into their confidence by stating what great hardships would befall those occupants if the sale was not suspended.

See *Masendeke* v *Central Africa Building Society and Another* 2003 (1) ZLR 65 (H) where CHINHENGO J, state at page 68H to 69B as follows:-

> "It is not enough that the execution debtor or his family will suffer hardship if the dwelling is sold. The judge must be satisfied that the hardship is great. In my view, the hardship must be more than the ordinary hardship which persons deprived of their place of residence ordinarily suffer such as the attendant inconveniences in finding and paying for alternative accommodation or the need to relocate to another residential place such as a rural home or rented accommodation. The hardship must be great in that it results in the execution creditor being rendered homeless or destitute."

The applicants have not alleged that they cannot secure alternative accommodation. In his submissions in court 1st applicant stated that he needed more time to settle the debt. It has not escaped the court's attention that judgment was obtained against the debtor in August 2014, and that since then no attempt has been made to settle the debt. Further, in terms of the sub-rule (5 e) (b) of Rule 348 A, the court can also suspend the sale if the applicants have made a reasonable offer to settle the judgment debt. The applicants have failed to make any reasonable offer to settle the debt and the only conclusion is that the application was filed to buy time.

I entertain no doubt that the application is an abuse of court process. If there was any serious intention to settle the debt the applicants or the judgment debtor would have made some form of payment towards reduction of the judgment debt. It is evident that the applicants have no case on the merits and that what they seek is to use the court to secure an extension of time to pay.

In the result, the application is dismissed with costs on an attorney and client scale.

Messrs Coghlan & Welsh, 1st respondent's legal practitioners