

CLOPAS ZWIDZA
and
MAVIS ZWIDZA
versus
ELVIS MUDOTI
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 26 March 2015 and 1 April 2015

Court Application

Applicants in Person
Mrs J Zindi, for the 1st Respondent

MAKONI J: This is an application brought in terms of Rule 348A sub rule 5a of the High Court Rules 1971 for the suspension of the sale of applicants' immovable property, namely the remaining extent of lot 204 Greendale (The Property).

The facts of the matter are common cause. Sometime in 2012 the applicants and the first respondent entered into an agreement of sale whereby the applicants sold to the first respondent a certain piece of land, in Chegutu, for USD 26000-00. A boundary dispute arose on the piece of land and the first respondent instituted proceedings to cancel the agreement. On 7 February 2014 an order by consent was granted by this court in favor of the first respondent. On 23 January 2015 the property was attached pursuant to writ of execution issued by the Registrar. The applicants then instituted the present proceedings.

The basis for the application is that the property is their dwelling house and if it is sold their family will suffer great hardship as they would be left homeless and destitute. The applicants have come up with a payment plan that the judgement debt be extinguished by December 2016. The applicants also aver that the property is their principal and their only residence. It is their major source of income which is necessary for the survival and the educational needs of their four minors. The first applicant is unemployed and the second

applicant is the only one with a stable income in the family. She supplements this income by the rentals collected from letting out part of the property to tenants. They further aver that the piece of land in issue was acquired by the government.

The application is opposed. The first respondent avers that when the order by consent was granted, the parties agreed on a payment proposal. The order was stayed for a period of three months to allow the applicants to pay the judgement debt. No payment was made. The applicants were invited to sign a deed of settlement and they refused to do so. Instead they filed a “Request For The Extension On The Deed of Settlement” with the Registrar of this court on 20 May 2014. No payment was made in respect of their document. When no payment was received the first respondent informed his legal practitioners to attach the property. When the property was attached, the applicants on 08 August 2014 filed an urgent chamber application seeking to recant from their order by consent. The application was dismissed with costs on a higher scale. From the period to date the applicants have not made any payment. They approached the first respondent’s legal practitioners and offered to pay the sum of \$5000-00. They were given the banking details and they disappeared.

The property is occupied by a tenant who instituted interpleader proceedings when his property was attached. The applicants must be carrying out farming activities in Chegutu as they averred in a founding affidavit in another matter between the parties. He also averred that the applicants can rent alternative accommodation from the net income in the sum of \$500-00. The property was likely to be sold at a price higher than \$26 000-00. The applicants can purchase another property with the net proceeds. He further averred that he liquidated his assets with a view to start projects on the piece of land that he had bought.

Rule 348 A (5A) provides:-

“Without derogating from subrule (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 subrule (5b) for the postponement or suspension of-

- (a) the sale of the dwelling concerned, or
- (b) the eviction of the occupants.”

In *Masendeke v Central Africa Building Society & Anor* 2002 (1) ZLR 69, which was referred to by both parties, Chinengo J (as he then was) had occasion to define the circumstances under which Rule 348 A may be relied upon by an applicant. He made the following remarks at page 68H – 69B.

"It is necessary to underline the requirements of Rule 348A (5e) in regard to the aspects on which the judge must be satisfied. 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 a rented accommodation. The hardship must be great in that it results in the execution creditor being rendered homeless or destitute.** The second requirement relevant to this application is whether the execution debtor has made a reasonable offer to settle the judgment debt. Subrule (5e) (b) (iii) of Rule 348 a also empowers the judge to postpone or suspend the sale of the dwelling for “some other good ground.” (Our emphasis)

To the above I would want to add the remarks made by Ndou J in *Media v Home Link (Pvt) Ltd* 2011 (2) ZLR 516 (H) and 520 D-E when he stated:-

“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.”

The legislature had to intervene in the form of R 348 A, to provide for the exception to the general rule regarding execution of judgements. The court must therefore balance the interest of the creditor who has a judgement in favor against those of an applicant who might suffer great hardship if their home were to be sold.

In *casu*, I have deliberately mentioned the averments made by the first respondent at length as they will assist in the determination of the matter.

Great Hardship

The applicants’ contention is that if their house is sold they will be rendered homeless and destitute. On this point, I agree with the submissions made on behalf of the first respondent. The judgment debt is in the sum of \$26 000-00. The property to be sold is in an upmarket location and a substantial amount is likely to be realized at the sale. From the proceeds the applicants can settle the judgement debt and still secure alternative accommodation. The sale of the property will by no means result in the applicants being homeless and destitute. The only hardship that they will suffer is moving to a location of a lesser status. This is ordinary hardship which persons deprived of their homes ordinarily suffer. It cannot be described as great hardships. The applicants have therefore not established the first requirements of great hardship.

In any event it appears the applicants are not being candid with the court. They aver that the piece of land in question was acquired by the government . The applicants did not

place the relevant evidence in the form of documents before the court. At the initial attempt to execute the property interpleader proceedings were instituted by a tenant who is leasing the property. From the lease agreement, the tenant was also managing the tenants occupying the out buildings. In their submissions the applicants contended that they were leasing the main house and living in a cottage on the property. They also contended for the first time that the property had a mortgage bond over it. No proof of such mortgage bond was submitted.

Offer of Settlement

In Masendeke case (*supra*), Chinhengo J held that the requirements for rule 348 (5b) are not conjunctive. The two requirements of the existence of hardship and an offer of settlement are capable of mutual existence, the presence of the one being sufficient for the order to be granted despite weaknesses in the other.

The applicants' offer is to settle the debt over a period of 24 months. This is after they have made various other offers which they have not honored. They do not explain what happened to the \$5000-00 that they had undertaken to pay to the first respondent's legal practitioners. The circumstances of the case can be distinguished from those in the Masendeke case (*supra*). In the case the debtor had paid a substantial part of the amount owed. He offered to clear the balance in the period of four months. He also managed to place evidence before the court that he was resident at the property in issue.

In *casu*, it appears the applicants are set on frustrating the first respondent in enjoying the benefits of his judgements. They have hoped from one lawyer to another. They filed various applications before the court which the first respondent has had to defend. Their offer of settlement is manifestly unreasonable. It is clear that applicants are not the sort of persons that the legislature had in mind when rule 348 A was inserted in the rules.

The applicants in their heads of argument have raised the issue of the constitutionality of the impending sale of execution of their property. A basis has not laid out in the founding affidavit, the vehicle by which a cause of action is established. It is settled in our law that this they cannot do. In *MDC v Minister of Justice & Ors* 2007 (2) ZLR 151 (S) at 153 E-F, the Chief Justice stated:-

“It is now settled law that in a Court application the founding affidavit in support of the application sets out the applicant's cause of action. The applicant's case stands or falls on the founding affidavit. Consequently it can never be over-emphasized that care must be taken by legal practitioners representing applicants when drafting the founding affidavit. The founding affidavit must succinctly set out the cause of action. The cause of action should be clearly stated so that the respondent is left in no doubt as to what case he has to meet and the relief sought. The relief is usually contained in the draft order which forms part of the application.

It is equally important that the opposing affidavit be sufficiently clear so that it informs the applicant and the Court of the defence the respondent is raising.” (Our emphasis)

I entirely agree with the first respondent’s conclusion in his heads of argument, the applicants have had their merry dance driving circles around the first respondent, making numerous offers of settlement and failing to abide by them. As has stated in *Industrial Equity Ltd v Walker* 1998 (1) ZLR 269 (HC) at 308:-

“Things that go around come around. Walker has had a merry dance. But he would, to my mind, be well advised to realise that the music has stopped and the time has come to pay the piper.”

In view of the above I have no hesitation in dismissing the Applicants case. I will therefore make the following order:

1. The applicants’ application is hereby dismissed.
2. The applicant is to pay the 1st Respondents costs on higher scale.

Mtewa & Nyambirai, 1st Respondent’s Legal Practitioners