NYASHA PUZA SIYABORA ZHOU
and
PATRICIA ZHOU
and
GIFT SHOKO
and
NYATRISH PROPERTY INVESTMENTS (PVT) LITD
and
SINCIA INVESTMENTS (PVT) LTD
versus
THE TRUSTEE OF TOMORROW TODAY YESTERDAY TRUST
and
THE SHERIFF FOR ZIMBABWE

HIGH COURT OF ZIMABWE
MATHONSI J
HARARE, 21 April 2015

Urgent Chamber Application

M Nkomo, for the applicants
V Muza, for the 1st respondent
Second respondent in default

MATHONSI J: This application, although it does not specify the rule of court in terms of which it is made, could only have been made on terms of r 348 A (5a) of the High Court of Zimbabwe Rules, 1971. I say so because the 5 applicants, who have come to court on a certificate of urgency, seek the following relief:

"FINAL ORDER SOUGHT

1. That the 1st and 2nd respondents be barred from selling in execution applicants' immovable properties, namely Stand 56 Rodel Township 3 of Rodel, measuring 4,1183 hectares; Stand 2032 Glen Lorne Township of Stand 322 Glen Lorne Township of Lot 3A, Glen Lorne, measuring 1,0219 hectares; Stand 2136 Mabelreign Township, measuring 971 square metres, for a period of four months from the date of this order.

2. That each party bears its own costs.

INTERIM RELIEF GRANTED

That pending the return date the following relief is granted;

1. The respondents be and are ordered to suspend the proposed sell (sic) in execution of applicants' immovable properties namely Stand 56 Rodel Township 3 of Rodel, measuring 4,1183 hectares; Stand 2032 Glen Lorne Township of Stand 322 Glen Lorne Township of Lot 3A, Glen Lorne, measuring 1,0219 hectares; Stand 2136 Mabelreign Township, measuring 971 square metres.

2. There be no order as to costs."

The applicants' properties have been advertised for sale in execution on 27 April 2014 and they would want the sale to be postponed for a period of 4 months to enable them to pay off the debt in terms of a payment plan they have put forward. Therefore there can be no doubt that the application is made in terms of r 348 A (5a) which provides:

> "Without derogation from subrules (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-
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> (a) the sale of the dwelling concerned; or
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> (b) the eviction of the occupants."

The first applicant states in his founding affidavit that the sale will result in the two families suffering loss and leave them destitute when they have "demonstrated unquestionable commitment" to settle the debt. They would want an opportunity to do so in a less painful way. Therefore if the application is made in terms of r 348A (5a), it must comply with that rule including the *dies inducae* of 10 days provided for in that rule.

Mr *Muza* for the first respondent has taken a point in *limine* that the application has been made outside the prescribed period without condonation of the departure from the rules. He submitted that the applicants were served with the notice on 20 March 2015 and when the application was filed on 16 April 2015 it was already out of time. It could not be made without condonation of the failure to act timeously.

In his founding affidavit the first applicant alleges that the notices were served on the first and second applicants on 28 March 2915 and on the third applicant on 2 April 2015. If that is the case then the first and second applicants had until 15 April while the third applicant had until 20 April 2015 during which to bring the application. When the application was filed

on 16 April 2015 the first and second applicants were out of time by one day while the third applicant had time to spare.

It is common cause that no application for condonation has been made for the late filing of the application. There is a catena of cases to the effect that for condonation to be granted, there must be a substantive application for it. In *Forestry Commission* v *Moyo* 1971 (1) ZLR 254 (5) 260 C-H and 261 A Gubbay CJ stated:

> "I entertain no doubt that, absent an application, it was erroneous of the learned judge to condone what was on the face of it, a grave non-compliance with rule 259. For it is the making of the application which triggers the discretion to extend the time. In *Matsambire* v *Gweru City Council* S-183-95 (not reported) this court held that where proceedings by way of review were not instituted within the specified eight weeks period and condonation of the breach of rule 259 was not sought, the matter was not properly before the court. I can conceive of no reason to depart from that ruling. One only has to have regard to the broad factors which a court should take into account in deciding whether to condone such a non-compliance, to appreciate the necessity for a substantive application to be made. They are:
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> (a) that the delay involved was not in ordinate, having regard to the circumstances of the case;
> (b) that there is a reasonable explanation for the delay;
> (c) that the prospects of success should the application be granted are good; and
> (d) the possible prejudice to the other party should the application be granted.
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> See *Director of Civil Aviation* v *Hall* 1990 (2) ZLR 354 (S) at 357 D-G. How can a court exercise a judicial discretion to condone when the party at fault places before it no explanation for the delay?
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> Moreover, in every such application the respondent is entitled to be heard in opposition. He must be permitted an opportunity to persuade the court, that the indulgence sought is not warranted. Without hearing him how can a court for instance, be satisfied that he will suffer no possible prejudice by the condonation?"

It has long been decided that an application for condonation must precede the main application. A party who finds himself out of time to make an application must first seek condonation before making the application; *Sibanda* v *Ntini* 2000 (1) ZLR 264 (S); *Viking Woodwork (Pvt) Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (S) 251 C-D.

As stated by Ndou J in *Sai Enterprises (Pvt) Ltd* v *Girdle Enterprises (Pvt) Ltd* 2009 (1) ZLR 352 (H) 254 D:

> "This court is bound by the precedents set by the Supreme Court. Arguing against such clear decisions of the Supreme Court is province of academics and not this court."

I conclude therefore that if the first and second applicants would like to save their property by a r 348A (5a) application they have to seek condonation first whichever way one reckons the time, be it from 20 March 2015 as advocated by the first respondent or 28 March 2015 which the applicants are relying upon. Until that is done successfully their application is improperly before me and would have to be struck off.

Mr *Muza* also took a second point in *limine* namely that there has been a misjoinder of the first applicant in that there is a clear distinction between the Trustee and the Trust itself. The Trust enjoys legal personality and can sue and be sued in its own right in terms of the trust Deed.

I do not intend to be detained by that argument at all because in terms of r 87 of the High court Rules, no cause or matter shall be defeated by reason of the misjoinder or non joinder of a party. While the rule applies to actions as opposed to application procedure this court has ruled that because there is no similar provision governing applications, it will relate to misjoinder or non-joinder having regard to r 87 and will borrow its concept: *Gold Driven Investments* v *Willemse Farming Enterprises (Pvt) Ltd & Anor* HH 138/15; *Confederation of Zimbabwe Industries* v *Mbata* HH 25/15.

In any event, it is trite that a trust is not a juristic person. See Honore's *South African Law of Trusts*, ed 5 at p 49. Clearly therefore it being composed of natural persons and not having corporate personality, it cannot appear as a party to an action. I associate myself fully with the sentiments of Smith J in *WLSA & Ors* v *Mandaza & Ors* 2003 (1) ZLR 500 (H) 505 E-H; where he said:

> "Mr Nherere took the point, in *limine*, that WLSA being a trust, is not a corporate body and therefore cannot appear as a party. That contention is legally sound. In *Commissioner for Inland Revenue* v *MacNeillie's Estate* 1961 (3) SA 833 (A) at 840 F-H, Steyn CJ said:
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> > 'Like a deceased estate, a trust, if it is to be clothed with juristic personality, would be a *persona* or legal entity consisting of an aggregate of assets and liabilities. Neither our authorities nor our courts have recognised it as such a *persona* or entity. ----------. It is trite law that the assets and liabilities in a trust vest in the trustee. The introduction of another *persona* consisting of these assets and liabilities for the purposes of the imposition and collection of a tax, where there is a trustee ready to hand, would be an extra ordinary measure which would call for some adjustment, the nature of which is by no means obvious, and of which there is no trace in the Act, between the legal position of such a *persona* and that of the trustee?

> The views expressed above were cited with approval in *Crundall Bros (Pvt) Ltd* v *Lazarus NO & Anor* 1990 (1) 290 (h) AT 298 E -----"

See also *Gold Mining & Minerals Development Trust* v *Zimbabwe Minerals Federation* 2006 (1) ZLR 174 (H) 177 F.

I conclude therefore that there is no merit in the point in *limine* taken by Mr *Muza* relating to the citation of the first respondent. It is accordingly dismissed.

Mr *Muza* correctly abandoned his assertion that a sale may have occurred on 17 April 2015. If the second respondent, who did not bother to appear or submit a report, had indeed attempted to sell the properties on that date such a sale would have been invalid for 2 reasons namely that he had already been served with this application on 16 April 2015 and would have known that the matter awaited determination. Secondly, the notice of sale in terms of r 347 served upon the applicants set the date of sale as 27 April 2015. Any sale before that date would be invalid.

That only leaves the application of the third respondent whose dwelling in Mabelreign is also under the threat of execution. He has stated in his affidavit that his family will suffer great hardship if it is sold because it is their only home. He associates himself fully with the contents of the first applicant's affidavit in which it is stated that a genuine offer to clear the debt owed to the first respondent has been made and that if all the efforts being made to raise the money achieve the results the debt will be liquidated within the time that they request. A payment of $200 000-00 is expected from the applicant's debtor which will significantly reduce the debt when paid to the first respondent. The applicants are committed to clear the debt and if allowed to sell the property in Nyanga by private treaty the debt will be cleared.

In opposition the first respondent asserts that the applicants' proposals are nothing but "hot air." They have in the last few months been making commitments which have not been honoured and for that reason they are not entitled to any further indulgence. In addition to that the money owed by the applicants is for the benefit of minor children who are now being prejudiced by the delay in settlement.

In terms of subrule (5e) of r 348A

"If, on the hearing of an application in terms of subrule (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 or they 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 has 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 ground for postponing 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."

In *Masendeke* v *Central Africa Building Society & Anor* 2003 (1) ZLR 65 (H) Chinhengo J stated that the requirements set out in subrule (5e) are disjunctive even though in r 348 (5a) they are linked by "and." If one requirement is eminently met then the fact that the other requirement has not been fully met does not debar the applicant from obtaining an order for postponement or suspension. At 68 H and 69 A-B the learned judge said:

> "It is necessary to underline the requirements of r 348 (5e) in regard to the aspect 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 that the ordinary hardships which persons deprived of their place of residence ordinarily suffer as the attendant inconveniences in finding and paying for alternative accommodation or the need to relocate to another residential place such as rural home or a rented accommodation. The hardship must be great in that it results in the execution (debtor) 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 r 348A also empowers the judge to postpone or suspend the sale of the dwelling for 'some other good ground.'"

The third applicant has not elaborated on the kind of hardship he and his family will be subjected to as a result of the sale of the dwelling. What has however swayed me is the fact that the judgement debtor appears to have made a reasonable offer to settle the debt. Granted the amount owed being $344 323-00 is a substantial amount of money. However I am mindful of the fact that the positions the parties currently occupy only came about by virtue of a cession signed 2 months ago on 16 February 2015. Since then the debtor has made payments amounting to $75 000-00 and appears to have been relentless in trying to find ways to settle the debt. More importantly, they are not asking for a long stretch of time to settle the debt, but only four months.

I am therefore satisfied that a reasonable offer has been made. Even if the judgment debtor does not honour it, a delay of four months in execution is not, in my view, an earth

shattering occurrence or a train smash as would unduly prejudice the judgment creditor, who will still be at liberty to proceed with the execution.

In the result, it is ordered that

1. The application of the first and second applicants is hereby struck off as being improperly before me.
2. The application of the third applicant succeeds in that the provisional order is granted in favour of the third applicant as amended.

Donsa-Nkomo& Mutangi Legal Practice, applicant's legal practitioners
Muza & Nyapadi, 1st respondent's legal practitioners