

MUNYARADZI DOBBIE
and
CONSTELLA DOBBIE
and
NORFRAX INVESTMENTS (PVT) LTD
and
FRED DOBBIE
versus
ZB BANK LIMITED
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 26 January & 17 February 2016

Urgent Chamber Application

Ms Z. *Takawira*, for the applicants
O. Mutero, for the first respondent

ZHOU J: This is an application in terms of Order 40 r 348 A of the rules of this court for a provisional order in the following terms set out in the draft annexed to the applicant's papers:

"TERMS OF THE FINAL ORDER SOUGHT

- (a) That the 1st and 2nd respondents be and are hereby ordered to stay execution against the immovable property of the 1st applicant perpetually.

TERMS OF INTERIM RELIEF

Pending the determination of this matter, the applicant is granted the following relief:

- (a) The sale in execution of the said dwelling is postponed until 31st December 2016.
OR ALTERNATIVELY
(b) The sale in execution of the said dwelling is suspended on condition that the applicant carries out fully the terms of the settlement made which are:
- (i) US\$10 000 (Ten thousand United States dollars) per month until the whole debt is amortised.
 - (ii) A global lump sum payment of the balance with all interest and costs on or before the 31st of December 2016.

SERVICE OF PROVISIONAL ORDER

The applicant or its legal practitioners or Deputy Sheriff be and is hereby ordered to effect service of this order on the respondents or his (*sic*) legal practitioners.”

The facts which can be gleaned from the very terse affidavit filed in support of the application show that the third applicant, which is incorrectly referred to as the third respondent in para 8.1 of the founding affidavit, was granted a loan facility by the first respondent to finance its business operations. The principal loan amount was US\$300 000-00. The third applicant failed to settle its indebtedness to the first respondent resulting in proceedings being instituted against it and the other applicants in Case No. HC 2840/13. Judgment was granted against the four applicants jointly and severally the one paying the others to be absolved in the sum of US\$600 000-00, together with interest at the rate of 30% *per annum*. The first applicant was also awarded costs on an attorney-client scale as well as collection commission in addition to the other relief which is set out in the order. In execution of that judgment a mortgaged immovable property, described as a Certain Piece of Land Situate in the District of Salisbury Being Stand 2171 Glen Lorne Township of Stand 4 of Kambanji of the Grange Measuring 4000 square metres and held under Deed of Transfer Number 8531/97 was attached. That is the attachment which triggered the instant application.

The manner in which the papers were prepared calls for some comment, as this application merely typifies many others which are filed in this court almost on a daily basis. The first issue is that the property to which the application relates is not mentioned in the applicants’ founding affidavit and draft provisional order. It is only mentioned in the notice of the urgent chamber application. As if that is not enough, the papers relating to the attachment are not even attached. Third, when one reads the terms of the draft provisional order it is apparent that no attention was given to how those terms were formulated at all. The main relief which is sought under the “terms of interim relief” shows that the applicants seek postponement of the sale in execution of the dwelling until 31 December 2016 without any obligation being placed upon the applicants to settle the debt. Under “service of the provisional order” there is reference to the “Deputy Sheriff” even though the applicants or, at least, their legal representatives, should know that that office does not exist anymore. Needless to say, the affidavit contains merely factual averments as if it is a declaration. It appears that in this jurisdiction the distinction between a declaration and an affidavit is fast disappearing at the instigation of legal practitioners who are expected to fully appreciate the

purpose of an affidavit. Whatever the explanation for that, the need for continuing legal education for practising legal practitioners is proving to be a necessity.

The first respondent filed a notice of opposition and an opposing affidavit in which it contests the relief which is being sought by the applicants. At the hearing of the application the applicants objected to the notice of opposition on the ground that the deponent to the opposing affidavit did not attach a resolution to show that she was authorised to depose to that affidavit. It has been held many a time that the mere failure to attach a resolution does not invalidate proceedings, including, as in the instant case, a notice of opposition. See *Banc ABC v PWC Motors (Pvt) Ltd & Others* HH 123 – 2013. A deponent to an affidavit is only a witness, and the competency of such a witness to depose to an affidavit must be assessed by reference to Order 32 r 227(4)(a) of the High Court Rules, 1971, which requires that such person must be a “person who can swear to the facts or averments” set out in the affidavit to which he or she deposes. In the present case the applicants do not suggest that the deponent has no knowledge of the facts to which she deposes in the affidavit. The question of whether the opposition has been authorised by the applicant is one that the court determines by reference to the circumstances of the case. In the absence of evidence that the legal practitioners acting for the respondent do not have instructions to represent the respondent company the mere suggestion that the deponent to an affidavit does not have the authority to represent the respondent is insufficient to invalidate the opposition. In the circumstances of this case the submission that the deponent to the opposing affidavit is not authorised to represent the first respondent in opposing the applicants’ application is therefore without merit.

Turning to the merits of the application, Order 40 r 348A (5a) of the High Court Rules provides the following:

“Without derogation from subrules (3) and (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 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 its occupants.”

Subrule (5e) of the same rule provides as follows:

“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 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 subject to such terms and conditions as he may specify.”

The first requirement for an application in terms of r 348 A (a) for the postponement or suspension of a sale of a dwelling or the eviction of its occupants to succeed is that the dwelling must be occupied by the execution debtor or members of his family at the time of service of the notice of execution. The second requirement is that the execution debtor or the members of his family will suffer great hardship if the dwelling is sold or they are evicted from it. The final essential to be established is that the execution debtor has made a reasonable offer to settle the judgment debt or the occupants require a reasonable period to secure alternative accommodation or that there exists some other good ground for the sale or eviction to be postponed or suspended. Although all the applicants are judgment debtors as envisaged by the rule, the papers do not disclose the basis upon which all of them other than the first applicant make the application in terms of r 348 A (5a). The first applicant states in para 7.3.1 of his founding affidavit: “we have (3) three minor children residing at the property”. The names of those children are not given. In para 10.1.1 he states, among other things, that: “The house is currently acting as a part warehouse of some of our business supplies, home and office as well”. He does not categorically state that he occupies the dwelling. The Sheriff’s return of service dated 24 September 2015 shows that the property is occupied by a tenant by the name Tanzwana Kasipo who advised the Sheriff that the applicant was residing at a place in the Westgate area. That return of service is further supported by the fact that goods belonging to the applicants were attached at 2340 Bluffhill Area D on 20 November 2015. The applicants do not state when, if at all, they moved from Bluffhill to the property concerned. The averments in the opposing affidavit which are supported by the Sheriff’s returns of service, have not been challenged by the applicants. I

am therefore satisfied that the dwelling in question is not occupied by the judgment debtor or any member of his family. The application must therefore fail on that account.

In any event, I am not satisfied that the applicants satisfy any of the other requirements for an application of this nature to succeed. The rules are very clear that what must be suffered must be “great” hardship. Put in other words, not every hardship is sufficient to justify the relief provided for under the rule, for hardship is an inevitable consequent of enforcement of any judgment. The hardship must be more than just the ordinary inconvenience of losing an immovable property which is used as a dwelling. In the present case it has been shown that the applicant was leasing the property to a tenant. He occupied another dwelling about which nothing has been said in the affidavits. Thus even if for some reason the applicants had taken occupation of the property in question after the execution by the Sheriff, which is clearly not the case, they have not shown that they would suffer any serious hardship as a consequence of the sale of the property or their eviction from it. It is insufficient for the applicants to just make a bald allegation that “there is a risk of serious hardship” without providing evidence of such serious hardship.

The offer made by the applicants to settle the debt lacks seriousness. Given the fact that when the judgment was given on 4 March 2015 the debt owed was US\$600 000-00 which attracts interest at 30% per annum, it is clear that the debt is now close to US\$800 000-00. The offer to settle that debt at \$10 000-00 per month is meaningless when considered in the light of the judgment debt. Ms *Takawira* for the applicant submitted that at some point the applicants offered to pay the first respondent a sum of US\$450 000-00 but decided not to pay it because the first respondent refused to accept the applicants’ demand for interest to be renegotiated. That submission shows lack of bona fides on the part of the applicants if they are to be believed. If they had made that payment it would have significantly reduced their indebtedness to the first respondent. Their decision to withhold the payment unless the first respondent accepted their own terms merely leaves them with no reasonable offer to settle the judgment debt. The averments relating to a joint venture with Engen Zimbabwe and RAM Petroleum are not supported by any document or some other evidence.

The first respondent prayed for costs on the legal practitioner and client scale on the ground that the application is frivolous and vexatious. It is an application which was made as a matter of course without any document being attached to it to prove any of the claims. As pointed out above, the applicants deliberately withheld payment because the judgment creditor refused to accept the payment on the conditions set by the applicants which

conditions are not based on the judgment. The applicants are not even offering to pay that \$450 000 now. Also, when the applicants were confronted with evidence in the opposing papers showing that the dwelling was occupied by a tenant and not by the judgment debtors or members of their family they did nothing to refute that evidence. Clearly, the present application is an abuse of the procedures of this court rather than an attempt at seeking genuine protection in accordance with the law. For those reasons, the special order of costs is warranted, as the first respondent has been put to unnecessary expenses by having to defend this application. See *TM Supermarkets (Pvt) Ltd v Chadcombe Properties (Pvt) Ltd* 2010 (1) ZLR 196 (H) at 200E.

In the result, it is ordered that:

1. The application be and is hereby dismissed.
2. The costs shall be paid on the attorney-client scale by the applicants jointly and severally the one paying the others to be absolved.

Takawira Law Chambers, applicants' legal practitioners
Sawyer & Mkushi, first respondent's legal practitioners