

LOTH SITHOLE
and
ALICE SITHOLE
versus
MBCA BANK LIMITED
and
THE SHERIFF

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 5 & 26 April 2017

Chamber Application

C. Chinyama, for the applicants
F. P. Machine, for the first respondent

ZHOU J: This is an application in terms Order 40 r 348A (5a) for an order suspending the sale in execution of the immovable property known as 2061 Bluffhill Township of Stand 1180 Bluffhill Township, Harare pursuant to a judgment granted against the applicants in Case No. HC 8106/15. The applicants also pray that the sale be postponed for a period of fifty months during which they hope to have cleared the debt owed to the first respondent. The judgment was granted in favour of the first respondent. In terms of the judgment the applicants were ordered to pay a sum of US\$59 361-32, together with interest thereon at the rate of 30% *per annum* and costs of suit.

The basis of the application is that the immovable property which has been attached is the only residence for the applicants and their children. If it is sold, according to the applicants, the family will suffer great hardship if they are evicted from their only dwelling. The applicants are husband and wife. They have attached to their founding affidavit copies of birth certificates of their four children. In the chamber application the applicants offered to liquidate the judgment debt in monthly instalments of US\$1 000-00 from 1 July 2017. At the hearing of the application the applicants offered to increase their monthly instalment to US\$1 800-00. They have attached a

copy of a letter in terms of which the first applicant has been offered employment by a South African company with effect from June 2017. The offer of employment is subject to the first applicant being given a work or residence permit to enable him to work in South Africa.

The application is opposed by the first respondent which, in the opposing affidavit alleges that the immovable property in question is not occupied by the applicants and members of their family but is being leased to one Edward Moyo. The respondent attached a copy of a lease agreement to support its averments. The respondent also submitted that the offer made by the applicants is not reasonable when regard is had to the amount of the debt.

Sub-rule (5e) of r 348A provides the following:

“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.”

In his submissions Mr *Chinyama* for the applicants stated that the applicants occupy the cottage at the property under attachment while the main house is being leased to Edward Moyo. I am prepared to accept that the applicants are in occupation of the property together with their children. The Sheriff’s return of service and notice of seizure and attachment show that they were served upon one Amanda Sithole who, according to the applicants, is their relative. That would confirm the applicants’ version that they reside in the cottage at that property, and use the rentals received from leasing out the main house for their sustenance.

The applicants have stated that they have no other alternative accommodation if they were to be evicted from the dwelling. Given that both applicants are not employed and rely on the rentals from the main house, they will no doubt be exposed to great hardship if they were to

be evicted from the dwelling. The question of the great hardship which the applicants will suffer must, of course, be considered together with the reasonableness of their offer to liquidate their indebtedness to the first respondent or any of the other factors set out in subrule (5e) (b) (ii) and (iii). See *Terence Makupe v ZB Bank Limited* HH 257-16 at p. 5.

The applicants offer a sum of US\$1 800-00 per month from July 2017. They want to be allowed to pay that amount over a period of fifty months. Given that the debt due is US\$59 361-32 with interest at 30% *per annum* which started to run from 1 July 2015, it is clear that by 1 July 2017 the applicants' debt will be in excess of US\$100 000-00. Their instalment of US\$1 800-00 per month will only enable them to pay a total sum of US\$90 000-00 over a period of fifty months. They are therefore unable to clear the debt over that period by making a monthly payment of US\$1 800-00. Given that the interest is being capitalized monthly according to the judgment, the monthly instalment is not even sufficient to cover the interest which accrues on the debt per month. Thus, no real purpose will be served by stopping the sale in execution of the property. The applicants might be better off getting the balance which remains from the purchase price of their immovable property after the judgment debt has been paid and use it to secure alternative accommodation. The offer made is clearly not reasonable in the circumstances of this case. It would therefore not be a proper exercise of the powers given under r 348A (5e) to postpone or suspend the sale of the dwelling house.

Section 74 of the Constitution of Zimbabwe which has been referred to by the applicants' counsel has no application in the instant matter, as what is being sought is the sale in execution of the dwelling house pursuant to an order of court in which the property was declared to be executable. This is not a case of arbitrary eviction of the applicants from the property.

In the result, IT IS ORDERED THAT:

1. The application be and is hereby dismissed.
2. The applicants shall pay the first respondent's costs jointly and severally the one paying the other to be absolved.

Chinyama & Partners, applicants' legal practitioners
Chikuni & Associates, first respondent's legal practitioners