

YEYANI MOYO
versus
ZB BANK LIMITED
and
SHERIFF OF THE HIGH COURT OF ZIMBABWE
and
TAMBANASHE ENTERPRISES (PRIVATE) LIMITED
and
DOMINIC BENHURA
and
GOLD RECOVERY GROUP (PRIVATE) LIMITED
and
PAUL DIAMOND

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 20 March 2018 & 2 April 2018

Urgent Chamber Application

H Munhungowarwa, for applicant
O Mutero, for 1st, 2nd, 3rd, 4th, 5th and 6th respondents

TAGU J: The applicant invoked r 348A of the High Court Rules 1971 to stop the sale in execution of a dwelling house scheduled for 16th March 2018 that was purportedly attached on the 28th of February 2018 by the second respondent acting under the instructions of the first respondent. The attached property is a piece of land situate in the district of Salisbury called Stand Number 48 Emerald Hill Township 2 of Stand 26 B Emerald Hill measuring 2002 square metres. This application was brought as an urgent chamber application seeking the following relief-

“TERMS OF FINAL ORDER SOUGHT

That you show cause to the Honourable Court why a final order should not be made in the following terms-

1. The 2nd Respondent be and is hereby interdicted from selling the property belonging to the Applicant.
2. That 1st Respondent be and is hereby ordered to pay the costs of this suit at a higher scale.

INTERIM RELIEF GRANTED

Pending determination of this matter, the Applicant is granted the following relief-

1. That 2nd Respondent be and is hereby ordered to stay the execution scheduled for the 16th March 2018 pending the finalization of matter HC 2454/18.
2. In the event that the 2nd Respondent has proceeded with execution scheduled for 16th March 2018 the 2nd Respondent be and is hereby ordered to cancel any other steps towards finalization of the matter pending finalization of matter HC 2454/18.

SERVICE OF PROVISIONAL ORDER

This provisional order shall be served upon the Respondents by Applicant's legal practitioners."

At the hearing of the matter the first respondent opposed the application.

Mr *Mutero* for the respondents raised two major points *in limine*. The first point *in limine* was that the matter was not urgent as contemplated in the case of *Kuvarega v Registrar General & Anor* 1998 (1) ZLR 188 (H), and the second preliminary point was that this application is purported to be in terms of r 348A yet it is an application for stay of execution.

As regards the first point that this matter is not urgent Mr *Mutero* submitted that the fact that the day of reckoning has arrived does not create urgency if the following is to be taken into account. The first respondent obtained judgment against applicant, third, fourth, fifth and sixth respondents on the 13th of May 2014 as per copy of which is attached hereto marked "A". The first respondent then executed against applicant's movables in April 2015 whereby a sum of US\$37 477.96 was realized as more fully appears from annexure "B". Thereafter, a *nulla bona* return was rendered as per annexure "C". A writ of Execution against immovable property including the one in issue was issued on the 29th of May 2015 as more fully appears from annexure "D". The second respondent attached the property in issue at the deeds office and served a copy of a notice of attachment on applicant as per annexures "E" and "F" in July 2015.

Upon receipt of the notice of attachment applicant, Fred Moyo and Dominic Benhura requested a meeting which was held at the first respondent's legal practitioners' offices in August 2015. They indicated that they were looking for investors for their mines and first respondent agreed to suspend execution on condition that there was noticeable progress by the 30th of November 2015. Since

then no progress was made at all regarding the coming on board of investors and first respondent resumed execution. Therefore, applicant has been aware of the attachment of the property in issue since July 2015 (more than two and half years ago) and did not take any action since then. For these reasons this matter cannot be said to be urgent now and should be dismissed for want of urgency.

On the second point Mr *Mutero* submitted that this application has been brought as an urgent chamber application for stay of execution. He said even if it is taken as an application in terms of r 348 A this application is fatally defective for a number of reasons. Firstly, an application in terms of r 348A should be in Form 45 yet this application does not follow that format and no hardships have been alleged in the founding affidavit. The application is again hopelessly out of time since it was supposed to have been made within 10 days from the date of attachment and is being made more than three years later and no application for condonation was made. He therefore prayed that this application be dismissed without hearing the merits.

The first preliminary point has not been materially disputed. The facts as outlined by Mr *Mutero* were not disputed either. In my view there has been material non-disclosure of material facts by the applicant in that the history of the matter as outlined by Mr *Mutero* were not disclosed. An impression had been created that the dwelling had been attached on the 28th February 2018 by the second respondent and was due to be sold on the 16th March 2018 yet the attachment took place more than three years ago. For these reasons I agree with Mr *Mutero* that this application does not meet the requirements of urgency. Even if I may be wrong to so hold I am convinced that there mere mention of a dwelling house is neither here nor there because this application which is purported to be an application in terms of r 348A is fatally defective in that it does not comply with the rules. The Form in which it is brought is not in compliance with Form 45. Deliberate failure to comply with the rules is fatally defective. In the circumstances I will uphold the preliminary points and dismiss the application with costs.

IT IS ORDERED THAT

1. The application is dismissed with costs.

Mwonzora & Associates, applicant's legal practitioners
Sawyer Mkushi, 1st respondent's legal practitioners