OWEN VERE
versus
TAPIWA SHIRI
and
SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHAREWA J
HARARE, 24, 27 February 2020 & 11 March 2020

Urgent Chamber Application

Mr *K Maeresera*, for applicant
Respondent, in person

CHAREWA J: This is an urgent chamber application for postponement/suspension of a sale of a dwelling in terms of r 348A (5b) pending the determination of an application for rescission of judgment filed under HC 10155/19.

Background

On 31 May 2018, the respondent, in HC 5035/18, issued summons claiming adultery damages in the total amount of USD300 000.00 against the applicant. Applicant defended the claim. Prior to the matter being set down for pre-trial, respondent obtained, on 9 May 2019, an order, in chambers, compelling applicant to make discovery within five days of service of the order. Applicant apparently failed to comply with that order, his discovery affidavit only being filed on 29 May 2019. Therefore, respondent sought and obtained, on 10 October 2019, another order in chambers striking out the applicant's defence (including his appearance to defend and plea) and declaring the main matter unopposed, for failure to comply with the order on 9 May 2019. Armed with this latter order the respondent set down the matter in HC 5035/18 on the unopposed roll and obtained default judgment for adultery damages totalling RTGS$40 000.00 on 28 November 2019.

On 10 December 2019, applicant became aware of the default judgment and filed an application, under HC10155/19, for rescission of the default judgment on the grounds that it

was granted in error as the judge was not aware that there was improper service of the order of 9 March 2019. Consequently, applicant was not aware of the order compelling discovery because of such improper service and was subsequently unaware of all proceedings thereafter until he was served with the order for damages on 10 December 2019.

The application for rescission was set down for 7 February 2020, on which date respondent successfully sought its removal from the roll to enable him to seek leave to file a supplementary affidavit. However, instead of doing so, respondent instructed the Sheriff to proceed with attachment, hence this application.

On the date of hearing of this matter, on 24 February 2020, respondent sought a postponement to enable him to file his opposing papers.

Analysis

During their submissions on 27 February 2020, both parties adhered to their pleadings filed of record. These documents reveal that there is no dispute that the attached property is a family dwelling house, and that applicant has no other immovable property his family can call home. It is also not disputed that applicant only owns a half share in the property, which is the subject of sale in execution. The notice of attachment of the dwelling was effected on 4 February 2020. Applicant initially filed, on 11 February 2020 and under HC 1009/2020, an ordinary urgent application for stay of execution which, on 12 February 2020, I ruled as not urgent for the reason that it ought to have been filed at the time applicant became aware of the judgment when he filed his application for rescission in December 2019. He then filed this application on 19 February 2020.

There is no dispute that the matter is urgent in terms of the requirements of r 348A. In fact, the respondent makes no submissions at all that the matter should not jump the queue and be disposed of urgently. I therefore find that the matter meets the requirements of urgency.

Applicant submits that there is good cause why the sale should be postponed or suspended: that there is a pending application for rescission of judgment which could have been resolved earlier, and thus obviating this application, were it not for the respondent's attitude. I must agree with applicant. That there is a pending application for rescission which is ready for determination is good cause to suspend or postpone the sale of a dwelling.

Further applicant contends that he has good prospects of success in the application for rescission as he was not in wilful default and I must agree with him. The judgment compelling him to effect discovery was "served" on his erstwhile legal practitioner as an attachment to a letter written by respondent, contrary to the provisions of r 37 (1) which requires service of a court order to be effected by the sheriff, and r 39 (2) (c) which requires service of a court order to be effected on the person involved rather than his legal practitioner. Everything that transpired thereafter until the grant of default judgment on 28 November 2019 flows from that order compelling discovery.

Besides, I cannot ignore the fact that, though tardily, applicant did comply with the order compelling discovery and his discovery affidavit is filed of record. In my view, had the application to strike out his appearance to defend and plea been made in his presence, his tardiness would have been easily cured by an application for condonation. This would have enabled the main matter to be determined on the merits rather than on a technicality.

In addition, I note that respondent's notice of opposition in this case seems, primarily, to be addressing why rescission should not be granted, yet that is not the matter before me. Respondent makes no submissions on the merits of the application for postponement or suspension of the sale pending the determination of the application for rescission. In fact, he does not dispute that there is a pending application for rescission which determination was postponed at his behest. What he does argue about, extensively, is whether such application for rescission has merit and that the damages he has obtained have lost considerable value. Nothing in the opposing papers therefore persuades the court that the postponement of sale should not be granted pending the determination of the application for rescission.

I am particularly mindful of the fact that the opposition to this application appears to be not *bona fide*, given that respondent sought removal of the application for rescission from the roll in order to do something which he has simply not done: he has not filed his supplementary affidavit despite applicant consenting to the application for leave for him to do so. His explanation is that he must first await the order of the court for leave, but in his opposing papers, he does not provide any evidence of what he has done to obtain such leave. He does not even confide in the court whether he has indeed filed the chamber application for leave, and at what stage it now is. Instead, the record shows that he has gone and instructed the sheriff

to attach and sell applicant's property. It would appear that the applicant's fear that the removal from the roll was a clandestine attempt to obtain execution by hook or crook is justified.

Respondent further argues that his pursuing execution is a natural consequence of having obtained judgment and therefore that applicant should not be granted suspension of sale as he is delaying just satisfaction of a judgment. It is my view that respondent's submissions miss the point of this application: that since he is the one who made it impossible for a judgment on rescission to be expediently rendered, he should not seek to continue with execution, thus rendering whatever decision will be made on the rescission application nugatory.

Note must be made that applicant has not sought removal of his dwelling from attachment, but only that the ensuing sale should await the decision on rescission. I can find no fault with that position, particularly since the reasons for applicant's default are well articulated, viz, that he was not served with the order of 9 May 2019 and was therefore unaware of the terms of that order to enable him to give proper instructions to his legal practitioners to comply. In the circumstances I find that the application for postponement/suspension of sale is well made.

Costs

Applicant submits that though he had not sought costs as he had not anticipated opposition to this application, in the circumstances he ought to be granted legal practitioner and client costs for the following reasons:

a) that respondent having sought removal of the application for rescission from the roll to enable him to seek leave to file a supplementary affidavit, and applicant having consented to the application for leave so as to expedite processes, it was unreasonable of respondent to then proceed with execution instead of pursuing the proceedings for which he had caused the application for rescission to be removed from the roll.
b) Further, opposing this application reveals that respondent is not *bona fide* in resisting rescission but is only doing so to enable him to continue to hold on to the default judgment and execute upon it.

I must admit that I am inclined to agree with the applicant. This is an application which respondent ought not to have opposed, he being the author of the non-determination of the

application for rescission. As we speak, this matter might have long since been put to bed had the application for rescission been dealt with as scheduled. That respondent, having caused the removal of the application for rescission from the roll, proceeded to continue with execution, well knowing that if rescission were to be granted, unnecessary challenges would have been created, is conduct which the court must censure. In the premises I agree that this is a case where an order for costs on the higher scale is merited.

Disposition

Consequently, it is ordered that the application for postponement/suspension of sale of a dwelling pending the determination of an application for rescission in HC10155/19 is granted with costs on the legal practitioner and client scale.

Chizengeya Maeresera & Chikumba, applicant's legal practitioners
First Respondent, in person