

ALDAH CHEKENYERE
and
DZIMBANHETE CHEKENYERE
versus
FBC BANK LIMITED
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 13 November 2015 & 9 December 2015

Chamber Application

Ms Bwanali, for the applicant
K. Kachambwa, for the 1st respondent

MUREMBA J: This application is being made in terms of Order 40 r 348A (5a) of the High Court Rules, 1971. It is for the postponing or suspension of the sale in execution of a dwelling, namely a certain piece of land situate in the district of Salisbury, called stand 180 the Grange Township of the Grange. It was placed under attachment pursuant to this court's default judgment in HH 694/14 which declared the property specially executable and which according to the second respondent's advertisement in the Herald Newspaper, was scheduled to be sold in execution on 23 October 2015.

This application was filed on 22 October 2015. On 6 November 2015 it was allocated to me. A perusal of the file showed that the first respondent had filed its notice of opposition and opposing affidavit on 5 November 2015. In light of r 348A (6) which says that applications made in terms of r 348A (5a) shall be treated as urgent and that r 244 and the *proviso* to subrule (2) of r 247 shall apply accordingly, I set down the matter for hearing on 11 November 2015 on an urgent basis. On 11 November 2015 the applicants requested a postponement to 13 November 2015 to enable them to file an answering affidavit to the first respondent's notice of opposition. I granted the postponement.

The applicants' grounds for making this application are that the property in question is a dwelling which is being occupied by the first applicant's tenants and relatives. They aver

that the occupants will suffer great hardship if the dwelling is sold and they are evicted from it because they occupy the property together with their children and several other dependants and that property is their only home.

The applicants stated that there are good grounds for the suspension of the sale. They listed the following grounds. The property is the second applicant's sole asset and material possession. The default judgment was wrongfully granted against the second applicant when service of the notice of set down of trial had not been effected on him. The judgment creditor was at all material times aware that the second applicant resides outside this court's jurisdiction in the United States of America and required special service. Service was not effected at the second applicant's place of residence. The second applicant has since applied for rescission of the default judgment under HC 1305/15. If the application for rescission of the default judgment is granted, the second applicant will be able to contest the merits of the judgment creditor's claim to the property.

In the present application the applicants seek an order in the following terms:

- “1. The sale in execution of the said dwelling, namely certain piece of land situate in the district of Salisbury, called stand 180 the Grange Township of the Grange be and is hereby postponed until the final disposition of the cause in case number HC 1305/2015.
2. The 1st respondent / judgment creditor shall bear the costs of this application”.

In the founding affidavit, the first applicant avers that the second applicant is the registered owner of the property. He is her brother. He purchased the property with funds from his own business activities. She avers that he gave her the right to occupy the property and she leased that right to several persons. She said that she has also enabled her relatives to enjoy those rights. She said that they will suffer great hardship if the property which has been their home for long is sold, as it is their only home.

The first applicant averred that if the sale in execution goes ahead, her rights for occupation, notwithstanding the lease, would have been denied the protection of the law enshrined in s 56 (1) of the Constitution. She stated that since the application for rescission of the default judgment is still pending the balance of convenience favours the granting of the order being sought. She said that if the application fails, the first respondent will still be entitled to execute whereas if execution is not stayed and the application for rescission succeeds, she will not be able to revive her rights of possession of the property. She said that the prejudice to herself, her tenants, and relatives will be dire.

The second applicant in his supporting affidavit stated that he is the owner of the property in question. He said that when he purchased it, he gave the first applicant the right to occupy it coupled with the right to cede, donate or lease such right and the first applicant has leased such right. He said that the first applicant's relatives occupy the property by virtue of those rights. He said that the property is effectively the sole home of all those persons. He averred that stay of execution is necessary to preserve the first applicant's rights.

At the hearing of the matter on 13 November 2015, the first respondent raised 3 points *in limine* which are as follows:-

1). The chamber application is improperly before the court.

It was submitted that a chamber application in terms of rule 348A (5a) is applicable where (a) a dwelling house has been attached and (b) it is occupied by the execution debtor or members of his family. It was further submitted that in terms of Form 45, it is a requirement that the names of the occupants of the dwelling be given and their relationship to the execution debtor should be stated. The first respondent averred that the dwelling in the present matter belongs to the second applicant, Dzimbanhete Chekenyere who is the execution debtor, but he is not the one in occupation of the dwelling as he currently resides in the United States of America. The first applicant who is a sister to the second applicant is not occupying the dwelling herself. Instead it is being occupied by one Tapiwa Gurupira and his family. They are tenants who entered into a lease agreement with the first applicant and took occupation of the property on 1 September 2013. Tapiwa Gurupira deposed to an affidavit to this effect and it is attached to the first respondent's opposing affidavit. So the dwelling is not being occupied by members of the second applicant's family or the first applicant's.

The first respondent averred that because neither the execution debtor nor the members of his family occupy the dwelling, the applicants cannot make a chamber application in terms of r 348A (5a). The rule is not applicable to them. The first respondent further averred that the applicants have not been truthful in their founding and supporting affidavits respectively because they lied about the occupants of the dwelling. They lied that the dwelling is being occupied by the first applicant's relatives. The first respondent argued that the applicants acted in bad faith by their non-disclosure of the true occupants of the dwelling and this explains why they did not mention names of the occupants and their relationship to the second applicant.

In response to this point *in limine* the first applicant in the answering affidavit averred

that indeed the dwelling is physically occupied by Tapiwa Gurupira who is her tenant. She said that his occupation of the dwelling derives exclusively from the rights the second respondent ceded to her. She said that she has the right to occupy the property and she has leased and not ceded that right. The first applicant said that she is the second applicant's family member and therefore qualified to occupy the property. She said that occupation need not necessarily be taken by the property's registered owner. She said that even occupation by the owner's agent or nominee suffices for the purposes of suspending a sale in execution under r 348A (5a). She said that being the second applicant's family member, Tapiwa Gurupira is her nominee. The first applicant averred that the facts *in casu* do not require a list of the relatives of the second applicant as she is the relative. She said that being the first applicant she needs not to be further listed separately.

In arguing this point *in limine*, Mr *Kachambwa* argued that there is need for physical occupation by the execution debtor or by members of his family for an application of this nature to succeed. On the other hand Ms *Bwanali* argued that the word 'occupation' in r 348A (5a) is not defined. She argued that the word should not be taken in its simplistic or literal meaning, but the legal meaning must be resorted to. She argued that the first applicant being the relative of the second applicant, the execution debtor, she is the direct occupant of the dwelling. She said that as such the requirements of r 348A (5a) have been satisfied. Ms *Bwanali* submitted that Tapiwa Gurupira being the lessee of the first applicant is in occupation as a result of what she called 'immediate occupation' and as such has no right to approach the court seeking relief under r 348A (5a). Ms *Bwanali* was now arguing as if Mr *Kachambwa* had said that it is Tapiwa Gurupira who should have made the present application under r 348A (5a). This argument was rather misplaced as Mr *Kachambwa's* simple argument was that the applicants have no *locus standi* to make an application in terms of r 348A (5a) as they do not meet the requirements thereof.

Rule 348A (5a) reads:

- “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 10 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
- a) the sale of the dwelling concerned; or
 - b) the eviction of its occupants.” (my emphasis)

In *Electroforce Wholesalers (Private) Limited and Anor v FBC Bank Limited* HH 14/2015 MAKONI J referring to r 348A (5a) said:

“The rule is designed for individuals who would be in occupation of the attached property or whose family members are in occupation of the attached property”.

In *Divine Homes (Private) Limited v The Sheriff of Zimbabwe* SC 54/03 on p 17 GWAUNZAJA said:

“In any event, Rule 348 A is concerned with applications for the postponement or suspension of a sale in execution of a dwelling house occupied by a judgment debtor. The appellant, as the judgment debtor, was not in occupation of the houses in point” (my emphasis).

The rule itself and the above case authorities make it clear that in an application in terms of r 348A (5a) there has to be physical occupation of the dwelling by the execution debtor, or, by his family members. The rule is categorical about the occupants. It does not extend to include all other persons claiming occupation through the execution debtor or the execution debtor’s family members. In terms of r 348A (5e), the rule is meant to protect the execution debtor or his family members from great hardship if the dwelling is sold or if they are evicted from it. The Judge can postpone or suspend the sale in execution of the dwelling concerned or the eviction of its occupants if satisfied that (i) the execution debtor has made a reasonable offer to settle the judgement 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. Point (ii) clearly shows that the word ‘occupation’ means physical occupation because a person who is given time to find other accommodation can only be a person who is in physical occupation of the dwelling.

In *casu*, Tapiwa Gurupira is the one who is in physical occupation, and, he is not a family member of the second applicant who is the execution debtor. He is just a tenant who entered into a lease agreement and occupied the property. He is paying rent to occupy the dwelling. If the dwelling is sold he can easily look for alternative property to rent. His life and that of his family is not dependant on the house of the second applicant as they are not related. There is no great hardship that he and his family are going to suffer if the dwelling is sold or if they are evicted. The great hardship that is referred to in r 348A (5a) does not extend to cover people who are leasing the dwelling from the execution debtor or from the execution debtor’s family member as is the case in the present matter. It would have been different if the

dwelling was occupied by the first applicant who is a sister to the second applicant, the execution debtor.

Another issue which is worth noting although the first respondent did not raise it, is that in terms of rule 348A (5a) the only person who is qualified to make the application is the execution debtor and nobody else for it says,

“.....**the execution debtor may make a chamber application** in accordance with subrule (5 b) for the postponement or suspension of
a) the sale of the dwelling concerned; or
b) the eviction of its occupants.” (my emphasis)

Although the rule seeks to protect the execution debtor and his family members who are in occupation of the dwelling, it does not give the family members the right to approach the court and apply for the postponement or suspension of either the sale of the dwelling or their eviction from the dwelling. This therefore means that in the present matter, the first applicant not being the execution debtor and without having been given a power of attorney by the second applicant, has no *locus standi* in terms of r 348A (5a) to make the present application.

I thus uphold this point *in limine* on the basis that the application does not meet the second requirement of r 348A (5a) which says that the dwelling must be occupied by the execution debtor or by his family. Neither the execution debtor nor his family is in occupation of the dwelling.

2) The chamber application was made outside the time period required for filing of such application.

It was submitted that the application was not made within 10 days of service of the notice of attachment as is required by r 348A (5a). It was submitted that the notice of attachment was served at the dwelling, on Tapiwa Gurupira the tenant, on 23 April 2015. It was further submitted that Tapiwa Gurupira gave the notice of attachment to the first applicant who is the authorised agent of the second applicant. The first respondent averred that the chamber application was only filed after 125 working days had lapsed from 23 April 2015 and was therefore hopelessly out of time. In making these averments the first respondent relied on the supporting affidavit which was deposed to by Tapiwa Gurupira.

The first applicant in her answering affidavit, stated that it was not true that Tapiwa Gurupira brought the Notice of Attachment to her attention in April 2015 or any time

thereafter. She said that she only became aware of the attachment and intended sale on 16 October 2015 through an advertisement made by the second respondent in the Herald Newspaper. The first applicant also said that she denies that she is the duly authorised agent of the second applicant with the mandate to receive court process on second applicant's behalf. She averred that the chamber application was therefore not out of time as it was made on 22 October 2015 after the applicants became aware of the attachment on 16 October 2015.

Rule 348A (5a) says that such an application should be made by the execution debtor within 10 days after the service upon him of the notice upon him in terms of r 347.

In terms of r 347 (1) (a) the notice of attachment shall be served by the Sheriff or his deputy upon the owner of the property. Rule 347 (3) goes on to say that, "if the immovable property concerned is occupied by a person other than the owner, notice of the attachment shall also be served on the occupier."

Ms *Bwanali* argued that service was defective as there was no personal service on the second applicant. She also said that no service was effected on the first applicant. She argued that service on the lessee or tenant cannot be classified as proper service in terms of Order 5 r 39 (2) (a) or 39 (2) (b). I do agree with Ms *Bwanali* that service on a tenant cannot be classified as proper service in terms of r 39 (2) (b). A tenant is not a responsible person. It would have been a different matter if, although service had been effected at the dwelling in question, had been effected on some other person who has a duty of responsibility towards the execution debtor and not on Tapiwa Gurupira, the tenant. For this reason I will dismiss the point *in limine*.

3) The order does not comply with Form 29 C and is fatally defective.

It was submitted on behalf of the first respondent that in an application of this nature the applicants should seek a provisional order first and then a final order later on the return date. Mr *Kachambwa* submitted that the provisional order that is sought must be in Form 29 C which provides certain rights to the respondents which include the right to file opposing papers after a provisional order has been granted. It stipulates the time frame within which that should be done and the right to anticipate the return date. Mr *Kachambwa* further submitted that in applications made in terms of r 348A (5a), r 247 is applicable. Rule 247 (1) thereof is the one which talks of the need of the provisional order to be in form 29C.

The applicants did not address this point *in limine* in their answering affidavit. During the hearing Ms *Bwanali* submitted that the failure to comply with the requirements of r 247

(1) can be condoned by the court in terms of r 4 (c) of the rules of this court in the interests of justice. She also placed reliance on r 229 C which states that the fact that an applicant has instituted a court application when he should have proceeded by way of a chamber application or vice versa shall not itself be a ground for dismissing the application unless there is prejudice to the other party which prejudice cannot be cured by an appropriate order for costs.

However, despite the submissions made by both counsels, my reading of the rules does not indicate to me that an application under Order 40 r 348A (5a) is an urgent chamber application in the sense of an urgent chamber application which requires the granting of a provisional order first and a final order on the return date. In terms of r 348A (5a) the chamber application should be made within 10 days after service of the notice of attachment upon the execution debtor. Rule 348A (6) then says,

“An application under subrule (4) or (5a), and any proceedings for enrolment and hearing consequent upon the issue of a provisional order under subrule (4), shall be treated as urgent, and rule 244 and the proviso to subrule (2) of rule 247, as the case may be, shall apply accordingly” (my emphasis).

What rule 348A (6) shows is that it is not the whole of r 247 which is applicable to chamber applications made in terms of r 348A (5a), but the *proviso* to subrule (2) of r 247 only. This therefore means that r 247 (1) which talks of the provisional order being made in form 29C is not applicable. The *proviso* to subrule (2) of r 247 only talks about the court or judge directing that the matter be set down on an urgent basis disregarding the ordinary periods of notice to the registrar and any other party. Rule 244 which is also applicable in applications made in terms of r 348A (5a) talks about the Registrar submitting the chamber application to a judge, who shall consider the papers forthwith. In short r 244 and the *proviso* to subrule (2) of r 247 simply say that chamber applications made in terms of r 238A (5a) should be set down on an urgent basis. However, this does not in my view, mean that a provisional order should be sought by the applicant. The order that is granted in the circumstances is a final one.

Form 45 upon which a chamber application in terms of r 348A (5a) is made clearly shows that the order which is sought by the applicant is final in nature. The part thereof which deals with the orders that can be sought by the applicants reads,

“The applicant seeks an order in the following terms:

The sale in execution of the said dwelling is postponed until(date).

OR ALTERNATIVELY:

The sale in execution of the said dwelling shall proceed subject to the condition that

the above-mentioned occupants are permitted to remain in occupation until
(date).

OR ALTERNATIVELY:

The sale in execution of the said dwelling is suspended on condition that the applicant carries out fully the terms of the offer of settlement made above.”

Even r 348A (5e) which stipulates the orders that the court can grant upon hearing an application in terms of subrule (5a) strengthens my view that the order is final not interim. It reads,

“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”.

Once the judge is satisfied that the applicant has made a good case, he can grant an order postponing or suspending the sale of the dwelling or the eviction of its occupants. The rule does not say that order that is granted by the judge is a provisional order.

I therefore dismiss this point *in limine*.

Conclusion

Having upheld the first point *in limine* I hereby dismiss the application with costs.

Mvingi & Mugadza, applicants’ legal practitioners
Dube, Manikai & Hwacha, 1st respondent’s legal practitioners