

CRISWELL JOWA  
versus  
NMB BANK OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
MUSAKWAJ  
HARARE, 26 JANUARY and 4 FEBRUARY 2015

### **Chamber Application**

*A Nyamupfukudza*, for the applicant  
*D Ndawana*, for the respondent

MUSAKWA J: The applicant is seeking an order for the suspension of the sale in execution of stand 652 Bluffhill Township, 12 of Lot L Bluff Hill measuring 4 516 square metres.

The background to this application is that Achs Logistics (Private) Limited secured an overdraft facility from the respondent. As security for the facility stand 652 Bluff Hill Township, 12 of Lot L Bluff Hill was mortgaged. Achs Logistics (Private) Limited subsequently defaulted in servicing the facility. The respondent instituted proceedings and obtained default judgment against Achs Logistics (Private) Limited and the applicant.

The chamber application is not backed by a supporting affidavit. Instead, there is a statement signed by the applicant in his capacity as execution debtor. In that statement it is stated that the property that was attached is occupied by the applicant and his family. A list of the occupants is given. It is claimed the occupants will suffer great hardship as they do not have an alternative dwelling. Some of the occupants are attending school and would need 'massive' relocation. It is further explained that Achs Logistics (Private) Limited failed to pay the amount claimed because it is owed money by the Reserve Bank of Zimbabwe. The applicant offers to settle the judgment debt in instalments of US\$1 500-00 per month commencing in July 2015.

In an opposing affidavit deposed to by *Webster Nyamuripa* on behalf of the respondent it is averred that the applicant cannot seek the present relief when the consequences of

mortgaging a property are known. He further contends that with such risk being obvious this application is disguised to seek rescission of judgment. Lastly, it is averred that the amount being offered in settlement has not been paid.

Mr *Nyamupfukudza* for the applicant submitted that the applicant has always been desirous of fulfilling his obligations as surety. The applicant did not contest the suit giving rise to the default judgment because the amount claimed by the respondent was owed. Commenting on r 348 he submitted that it is meant to ameliorate hardship that may be visited on a family when a dwelling is attached. He further submitted that it is clear that if the amount claimed by the Reserve Bank of Zimbabwe is paid, the applicant will be able to discharge the judgment debt.

Ms *Ndawana* for the respondent submitted that the debt in issue arose in 2010. It has nothing to do with the Reserve Bank of Zimbabwe. It was rolled over and in December the applicant promised to dispose of a stand and use the proceeds to settle the debt. In 2013 only two payments were made.

Ms *Ndawana* further submitted that the requirements for successfully invoking r 348 are:-

- a) Whether or not the payment proposal being made is reasonable.
- b) Whether or not the applicant will suffer great hardship

In support of her submissions Ms *Ndawana* made reference to the decisions in *African Banking Corporation of Zimbabwe t/a BANCABC v PWC Motors & Ors* HH-123-13, *Masendeke v CABS* 2003 (1) ZLR 65 (H), *Priscilla Meda v Homelink (Pvt) Ltd* HB- 195-11.

A perusal of the file giving rise to the default judgment (HC 1124/14) shows that the plaintiff cited Achs Logistics (Private) Limited and the present applicant as defendants. Summons and declaration were served on the applicant on 26 April 2014. No appearance to defend was entered by both defendants.

When Achs Logistics (Private) Limited secured an overdraft facility from the respondent it offered security in the form of stand 652 Bluff Hill Township 12 of Lot L Bluff Hill which is registered in the applicant's name. The applicant represented Achs Logistics (Private) Limited in the transaction.

The judgment debt is US\$196 492-57 together with interest at the rate of 42% per annum. The default judgment also ordered that stand 652 Bluff Hill Township 12 of Lot L Bluff Hill is specially executable.

Order 48 r 348A (5e) of the High Court Rules provides that:-

“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 ten 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.”

Then r 348 (5b) provides that:-

“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 *Masendeke v CABS (supra)* CHINHENGO J held that the requirements in sub rule 348 (5b) are not conjunctive. This is because an order for suspension of a sale or suspension of eviction may also be granted on some other good grounds.

I have already noted that the default judgment granted against the applicant ordered that stand 652 Bluff Hill Township 12 of Lot L Bluff Hill is specially executable. On this aspect NDOU J had this to say in *Meda v Homelink (Pvt) Ltd (supra)* at p 3 of the cyclostyled judgment:-

“In my humble view, execution of mortgaged property is different from the property being referred to in Order 40 Rule 348A. The difference is that we are dealing here with foreclosure proceedings. In foreclosure proceedings, the security which the mortgagor pledged is the one that is sold after institution of judicial proceedings for the amount of the debt, where after a writ of execution against the property is issued. In other words, if the mortgagor does not pay the capital when due, or if he commits any breach of the conditions of the contract entitling the mortgagee to foreclose then

the latter is entitled to have the secured property sold and obtain the amount of his debt from the proceeds of the sale – *Benson v Hirschlorin* 1936 NPD 277. A mortgagor cannot claim a stay of execution in terms of Rule 348A supra. It has to be noted that as a general rule a creditor who has obtained judgment is entitled to enforce such judgment by levying execution and the court has no jurisdiction to restrain the judgment creditor from enforcing such legal right – *Sabena Belgian World Airlines v Vas Elst* 1981 (1) SA 1235 (T) and *South Cape Corp (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 544. Rule 348A should be viewed as an exception to this general rule.

*In casu*, in the summons and the summary judgment application, the 1st respondent specifically sought an order allowing it to sell the Northend house. The applicant was served with all those processes and she was legally represented. She could have defended the matter even on that aspect alone. She did not. On 3rd March 2011 this court acceded to the prayer sought by the 1st respondent and ordered that the Northend house be sold. Having made an order directing the sale of the house, applicant, cannot now bring an application in terms of Rule 348A (5a) stopping the sale on the basis she has made a reasonable offer. She is thus precluded from doing so as allowing the application would have the effect of rescinding, through the back door, the order that has been made by a competent court. By declaring the house “specially executable” the court has given the 1st respondent the right to sell the house in execution to recover what is owed to it. The mortgagor’s first and foremost duty is to pay the debt secured and the mortgagee’s corresponding right is to “call up” or “foreclose” the bond. The significance of mortgage bonds and all other forms of hypothecation lies in the fact that they provide the creditor with a “real security” for the payment of his claim for if the debtor is unable to raise the necessary funds to pay the debt which is secured, the creditor is entitled to demand that the property, that being the thing which is subject matter of his security, be sold and that the proceeds of such sale are used for the satisfaction of his claim – *The Law of Property* (3rd Ed) Silberberg and Schoeman at 419 and 429. The rights of the judgment creditor will enjoy relative primacy. If this were not so, it would bring about a situation in which debtors could borrow money to purchase immovable property and defeat their creditors’ legitimate, claims to repayment by using Rule 348A (5a). To put residential immovable property which is a person’s home into that class of assets beyond the reach of execution would be to sterilize the immovable property from commerce thereby rendering it useless as a means to raise credit.

Preventing debtors from using their homes as security to raise credit will create a class of homeless persons those who are unable to afford the full purchase price of their homes in a cash sale, but could afford to repay a loan for the purchase price. It would lock up capital and prevent the home owning entrepreneur from using his home as security to finance business initiative. Members of the poor communities will not be able to obtain finance from banks who will not advance money to purchase immovable property if the immovable property cannot be used as security for repayment – *Nedbank Ltd v Fraser & Anor* case number 2011/00418 (Republic of South Africa – South Gauteng High Court).”

Rule 348A does not provide that the application be supported by an affidavit. Nonetheless an applicant who wants to convince a judge to grant him the relief sought ought to be wise enough to either depose to an affidavit or provide adequate details in the unsworn statement. In the present application it was not canvassed whether the applicant does not own any other immovable properties. What emerged from the respondent's counsel is that the applicant previously offered to dispose of a stand and use the proceeds to settle the debt. This was not done and it was not disputed during the hearing. It is not clear if the stand still exists and whether any improvements have been made on it. Obviously if the stand still belongs to the applicant and some improvements have been made, it cannot be said the applicant and his family have no alternative accommodation. In addition the applicant did not explain if he cannot lease a dwelling for himself and the family. In short, the information given regarding the envisaged great hardship is woefully inadequate.

The offer of settlement is manifestly unreasonable. Taking into account the judgment debt it would take eleven years for it to be extinguished. The maximum tenure of loans being offered by financial institutions excluding mortgage loans is three years. This serves to demonstrate how unreasonable the applicant's offer is.

The hypothecation of immovable property should not be a routine exercise. The applicant ought to have borne this in mind before he mortgaged the property. It is immaterial that a third party's breach of contract ultimately placed the applicant in the present predicament. In *African Banking Corporation of Zimbabwe t/a BANCABC v PW Motors (Pvt) Ltd & Ors* (supra) MATHONSI J at p 5 of the cyclostyled judgment expressed the following sentiments-

"I find it utterly deplorable that business people are very quick to receive money from banks undertaking to repay on certain terms. When they have expended the money and enjoyed the benefits they cry foul when the lender demands its dues. We cannot allow a situation where business people grab loans and then refuse to pay. As they say, the time to pay the piper has come."

In the result the application is hereby dismissed with costs.

*Nyamupfukudza and Partners*, applicant's legal practitioners  
*Gill, Godlonton and Gerrans*, respondent's legal practitioners