

CYNDRELLA MASIMBE
versus
RAINBOW TOURISM GROUP

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 4 February 2016 and 24 February 2016

Urgent Chamber Application

Applicant in person
Miss *C Malaba* for the respondent

MUREMBA J: On 21 January 2015 the respondent obtained judgment in its favour against the applicant under case number HC 1548/13. The judgment is for the payment of \$35 873-00 with interest at the rate of 5% per annum from 1 January 2013, and legal costs in the sum of \$2 500-00. The judgment debt led to the attachment of the applicant's dwelling namely, Stand 907 Mt Pleasant Heights, Mt Pleasant Harare. The applicant received the notice of attachment on 18 January 2016 and filed this application on 29 January 2016.

The applicant wants the sale of the dwelling suspended because, firstly, if the sale is allowed to proceed her family will suffer great hardship. Secondly, the applicant says she is making a reasonable offer to settle the debt at the rate of \$1 000-00 per month. The following is the relief that she is asking for.

“Terms of final order sought

That you show cause to this Honourable court why a final order should not be made in the following terms:

1. 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 and if applicant defaults on any one instalment, execution shall proceed.
2. No order as to costs.

Interim relief granted:

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

1. The Deputy Sheriff shall suspend the action towards the sale in execution of the said dwelling
2. A copy of this order shall be served on the respondent's legal practitioners."

The history of the case is as follows. The applicant was in the employment of the respondent as Human Resources Director for 12 years before 2010. In 2010 she sought to leave the respondent's employment due to harsh economic conditions that were prevailing at the time. On 10 September 2010 she made an application to the respondent for a voluntary retrenchment package which was being offered by the respondent which she found attractive. In response, the respondent persuaded her to stay with a staff retention proposal of a housing loan of \$120 000-00. The same offer was extended to the Chief Executive Officer and the Finance Director. According to the housing loan offer, the title deeds of the house that she would purchase would be surrendered to the respondent as security. The repayment of the loan was going to be upon separation, in other words, upon the applicant's termination of employment. During her tenure she was only supposed to pay interest of \$600-00 per month. Upon termination of employment the applicant was supposed to repay the loan using her terminal benefits. The applicant was persuaded to stay by the housing loan offer and took the loan on 23 October 2010. This staff retention proposal was signed by the Chief Executive Officer, C Mutasa and the Board Chairman, P.F Timba.

The applicant stated that in 2012, there was a change of management at chairman and CEO levels of the respondent. She said that relations were not good between herself and them. She further stated that it became clear to her that the employment relationship could not continue. On 17 December 2012 she tendered her resignation from employment in acknowledgement of the breakdown of the relationship. She said that upon her resignation her terminal benefits went towards settling the loan, but it was not extinguished. It was only reduced from \$67 124-00 to \$ 35 172-00. She said that she failed to agree with the respondent's new managers as to how the balance was to be settled. As a result, litigation ensued resulting in the parties signing a deed of settlement in December 2014, and the respondent obtaining judgment which gave rise to the attachment of her dwelling.

The applicant stated that if the house is sold her family will likely suffer great hardship. She said that she has always acknowledged her indebtedness to the respondent and has always

intended to pay the debt, but because she was not employed from January 2013 to June 2015 she was unable to pay anything. She said that now that she is in employment she is making an offer to pay off the debt at the rate of \$1000.00 per month which offer she says is reasonable. The applicant attached proof to show that from July 2015 when she took up employment with Pan African Mining (Pvt) Ltd she had only managed to pay \$4 000-00 to the respondent. The amount was not disputed by the respondent.

PROCEDURE

Although the applicant does not state in her application that she is making this application in terms of Order 40 r 348A (5a), I do agree with the respondent that looking at the nature of the application it is indeed being made in terms of order 40 r 348A (5a) which deals with applications for the postponement or suspension of the sale of a dwelling where that dwelling has been attached and is occupied by the execution debtor or members of his family. The execution debtor is empowered to make a chamber application for the postponement or suspension of the sale of the dwelling or eviction of its occupants. The application should be made within 10 days of notice of attachment of the dwelling. Once such an application is made the Registrar of this court shall submit the chamber application to a judge who shall consider the papers forthwith¹. In terms of r 348A (6), an application made under r 348 (A) (5a) shall be treated as urgent and set down urgently, without delay. However, even if the application is treated urgently, the order that is granted by the court is a final one. This is supported by r 348A (5e) which states that if the judge is satisfied that there is good ground for postponing or suspending the sale of the dwelling concerned or postponing or suspending the eviction of the occupants, he may order the postponement or suspension of the sale or eviction subject to terms and conditions he may specify. The rule does not say that the order that is granted is a provisional one. Even the Form 45 upon which this chamber application is made shows that the order which is sought by the applicant is final in nature. The relevant portion of the form reads as follows:

“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)

¹ R 244 of the High Court Rules, 1971

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.”

It is apparent therefore that in this matter the applicant ought to have made a chamber application and not an urgent chamber application as she did. It will be futile to grant a provisional order suspending or postponing the sale. Once this is done there will not be anything to confirm on the return day as the provisional order that she is seeking is final in nature and has the effect of a final order. In fact, there will not be any need for confirmation of the provisional order on the return day.

Considering that the applicant is a self-actor who is not well versed with the rules of this court, I will condone her adoption of the wrong procedure. This is in light of the fact that the respondent did not make it an issue. It is just an observation that I made as the court. In any case the applicant made her application within 10 days of having been served with the notice of attachment of the dwelling. The respondent has not suffered any prejudice because before the hearing, it was served with the application and got the chance to file its notice of opposition and opposing affidavit. The requirement of r 348A (5C) (b) which says that upon the filing of the chamber application the Registrar shall without delay serve a copy of the application on the judgement creditor was therefore complied with. So in the event that I am satisfied that the applicant has made a good case for herself I will award an order in terms of r 348A (5e) which order will be final.

Merits of the case

The meaning of Order 40 r 348A (5e)

Where a judgment debtor applies under Order 40 r 348A (5a) for the postponement or suspension of the sale in execution or eviction the judge may grant the application in terms of r 348A (5e) which 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.”

What it means is that the judge may postpone or suspend the sale of the dwelling if he is satisfied that the execution debtor or his family are in occupation of the house and will likely suffer great hardship if the dwelling is sold. In addition to showing that great hardship is likely to be suffered, the execution debtor should make a reasonable offer to settle the debt. If a reasonable offer is made the judge will postpone or suspend the sale to enable the execution debtor to pay off the debt. If the execution debtor cannot make a reasonable offer to settle the debt, he should, in addition to showing that he or his family will likely suffer great hardship, show that he or his family needs a reasonable period to secure alternative accommodation. In that case the judge will postpone or suspend eviction for a reasonable period to enable him or his family to find alternative accommodation before they can vacate the dwelling. If the execution debtor, after showing that he or his family will likely suffer great hardship, neither offers a reasonable offer to settle the debt nor shows that he or his family needs a reasonable period to acquire alternative accommodation, but advances some other good ground which persuades the judge, the judge may postpone or suspend the sale or the eviction on conditions he thinks fit. Put differently, for a judgment executor to succeed in his application it is imperative in every case that he shows, firstly, that there is occupation of the dwelling by him or his family, and secondly, that he or his family will likely suffer great hardship. This is the first requirement the execution debtor has to satisfy or meet in terms of r 348A (5e) (a). After satisfying the first requirement, the second requirement that he ought to satisfy is in terms of r 348A (5e) (b) under subparagraph (i) by making a reasonable offer to pay the debt or under subparagraph (ii) by showing that he or his family needs a reasonable period to find alternative accommodation or under subparagraph (iii) by advancing some other good ground which persuades the judge to find in his favour. It is my understanding that r 348A (5e) (a) and r 348A (5e) (b) should be read conjunctively because of the use of the word ‘and’ instead of ‘or’ between them.

In *casu*, is not disputed that it is the applicant who is the execution debtor who is in occupation of the dwelling together with her family. She has averred in her application that the family will likely suffer great hardship if the sale is allowed to proceed and she has made an offer to settle the debt which she says is reasonable. I have to make a determination on whether she has shown that the family will likely suffer great hardship and whether her offer is indeed reasonable.

Great hardship

On great hardship which will be suffered by her family if the house is sold and they are evicted, the applicant made the following submissions. They will be rendered homeless and end up on the streets as she will not be able to spare any money for rentals since the family is operating on a very tight budget. The children, especially the two who are in school, will be affected in their studies. The trauma of losing a home and friends will leave or cause permanent psychological scars that may affect their mental health and development. She said that the one in form 4 will be affected the most since he will be sitting for his examinations this year. She also said that since the house was constructed by her husband the sale will put a strain on their relationship as he is already blaming her for the loss that they are about to suffer.

The applicant said that the house's estimated open market value is \$300 000-00, but a forced sale will cause it to fetch much less. She said that this will be worsened by the harsh economic conditions prevailing in the country which make potential buyers unable to offer fair value. The applicant said that the family will therefore suffer a huge financial loss.

The husband attached a supporting affidavit stating that he is the one who borrowed money from Time Bank to finance the construction of the dwelling and subsequently caused the title deeds to be issued in both his names and the applicant's. He said that they never use this house as security in borrowing money because it is their only dwelling house. He said that he is currently unemployed and has been trying to establish a farming business for the past few years, but unfortunately the business has not performed well and he has lost money. He attached proof to show that he indeed took a loan from Time Bank in respect of the property. By 6 November 2003, the loan was paid up.

In response, the respondent citing the case of *Masendeke v CABS* 2003 (1) ZLR 65 (HC), submitted that great hardship is hardship which is more than the ordinary hardship faced by individuals who have been deprived of their dwelling. The respondent said that an inconvenience in finding and paying for alternative accommodation or the need to relocate to another residential place is just ordinary hardship which cannot be categorised as great hardship.

The respondent further stated that if the open market value is around \$300 000-00, a forced sale value may be slightly less. It further said that the proceeds thereof are likely to far exceed the judgment debt and the surplus from the sale will be available to the applicant to seek alternative accommodation. It said that the fact that the applicant is now employed means that she can afford to seek alternative rented accommodation whilst she secures an alternative property to buy with the net proceeds. The respondent further stated that in any case the applicant ought to have used the loan to purchase a house and secured the loan with the title deeds of the purchased house. It said that it is now suffering because the applicant did not use the loan for its intended purpose.

In *Masendeke v CABS* 2003 (1) ZLR 65 (HC) at 69 A-B Chinhengo J said,

“In my view the hardship must be more than ordinary hardships which persons deprived of their place of residence ordinarily suffer such as the attendant inconveniences in finding and paying for alternative accommodation or the need to relocate to another residential place such as a rural home or a rented accommodation. The hardship must be great in that it results in the execution debtor being rendered homeless.”

The same sentiments were echoed by Makoni J in *Zwidza & Anor v Mudoti & Anor* HH 349/15.

In the circumstances of this case I make a finding that if the sale is allowed to proceed the applicant and her family will suffer great hardship. This is in view of the following reasons. The applicant is the sole breadwinner. Although she has secured another job and is earning a salary of \$5 000.00 per month the letter of confirmation of employment from her new employer states that it (the new employer) is experiencing cash flow problems. As a result, it cannot pay its employees their full salaries at once at the end of the month. It has resorted to paying them in cycles. The applicant gets her salary every 3 weeks and even then, she does not get her full salary, but \$1 800-00 per cycle. The letter further states that, as it is, the employer already owes the applicant salary arrears of 2 months' salary. The applicant produced a breakdown of her family expenses which shows that they use \$1 800-00 per month. This is clear evidence that

indeed the applicant and her family are operating on a very tight budget as she said. As things stand, the applicant cannot afford rented accommodation.

I do not find the respondent's argument that the applicant can afford to buy another house using the surplus from the sale of the house appealing for the following reasons. To begin with, this is a house which is registered in the names of both the applicant and her husband. The husband therefore has his half share. The sale of the house basically means that the husband is forced to sell his share, even if he will recover his share from the net proceeds of the sale. The bottom line however, is that he would have lost his house. When the applicant obtained the loan she did not register a mortgage bond over this house in favour of the respondent. In other words, she did not use this house as collateral security. When the applicant took the loan she never anticipated that she was putting her family house at the risk of being sold for she was supposed to use her salary and terminal benefits to repay it. If the respondent's managers had not forced the applicant out of employment, the applicant would have continued servicing the debt using her salary. Now, if the house is going to be sold in a forced sale, it is going to fetch much less especially in view of the prevailing harsh economic conditions. Chances of getting fair value for the house are very slim. The family is therefore likely to suffer a huge financial loss even if it will remain with a surplus after the debt has been paid. Finding alternative accommodation with the surplus will present its own challenges. Whilst this might be viewed as ordinary hardship consequent to losing a house, it ought to be weighed against the fact that the applicant estimates the open market value of the house to be \$300 000-00. The question is, is it fair to dispose of a house worth this much just to recover a debt of \$36 000-00 in a situation where the execution debtor has since secured employment and is willing to pay the debt? The other question is will this not cause unnecessary great hardship to the family? In my considered view, in a situation such as the current one, where the execution debtor has since secured employment and is willing to pay off the debt, a debt of \$36 000-00 does not warrant the disposal of a house worth \$300 000-00. The inconveniences that the applicant's family will suffer, taken cumulatively, will in my view constitute great hardship. The inconveniences include looking for rented accommodation, which from the look of things, the family cannot afford; relocating; suffering a huge financial loss from the forced sale of the house in the current harsh economic conditions and trying to purchase another house.

Reasonable offer

Having been satisfied that the family will suffer great hardship, I have to consider if the offer to settle the debt is reasonable. The applicant said that she only took up employment with Pan African Mining (Pvt) Ltd in July 2015, and is earning a monthly salary of \$5 000-00. She attached a letter of confirmation of employment and salary. She said that having taken up employment she is now in a position to service the judgment debt. The letter of confirmation of employment and salary from Pan African Mining (Pvt) Ltd which was signed by the Chief Executive Officer states that due to inadequate cash flows, the company is currently owing the applicant almost 2 months' salary arrears. The letter further states that the company is currently paying 50% of salaries in cycles of 3 weeks, and that salary transfers to the applicant's bank are at a rate of approximately \$1 300-00 per payment cycle. The applicant also attached a breakdown of her monthly expenses which stands at \$1 800-00. It is in light of the foregoing that the applicant is offering to extinguish the debt at the rate of \$1 000-00 per month. During the hearing she said that if she is stretched to the limit in order to save her dwelling she can offer to pay a maximum of \$1 300-00 per month to the respondent. She said that she is unable to pay anything beyond that amount as she is the sole breadwinner of the family. She said that she has 3 children aged 20, 16 and 8 years old, 2 of whom are still in school. She attached their birth certificates. She said that she also stays with her mother in law and attached her national identification document. She said that she also stays with her husband who is unemployed at the moment.

In response, the respondent said that the total debt inclusive of interest and costs of suit now stands at \$36 166. 65. It said that if the applicant is going to be paying \$1 000-00 per month it will take her 36 months, which is 3 years, to pay the debt in full. It argued that, that cannot be said to be a reasonable offer considering that this debt has already been outstanding for the past 3 years. It argued that if the applicant is allowed to settle the debt at the rate of \$1000-00 per month it means that all in all it would have taken the respondent a total of 6 years to get its money back, which is too long a period. The respondent even refused to accept the increase of the offer from \$1 000.00 to \$1 300-00 which the applicant made during the hearing. It stated that it can only accept an offer to settle the debt at the rate of \$3 000-00 per month. The respondent

said that the balance of convenience favours it since the debt has been outstanding since February 2013.

What is pertinent about the present matter is that the applicant did not borrow money from a bank, but from her then employer. To begin with, she is not the one who took the initiative to ask for the money. She had decided to resign and get a retrenchment package at a time when the respondent, her then employer, was offering retrenchment packages to those who wanted to take the offer. In a bid to keep her for her services, the respondent offered her a loan as an incentive to retain her. She was not the only one, the Chief Executive Officer and the Finance Director were offered the same incentive.

Shortly after the applicant had taken the loan there was new management staff for the respondent who made working conditions for the applicant unbearable to the extent that she opted to resign. Although the respondent says that she resigned *mero motu*, I buy the applicant's story that the working conditions had become very difficult for her and this forced her to tender her resignation. This is evidenced by the fact that having taken the loan on 23 November 2010, on 7 December 2012 she tendered her resignation, just 2 years later. When she did so, she had not found alternative employment. From January 2013 to June 2015 she was not employed. I do not believe that if all was well at the respondent's, the applicant would have resigned without having obtained alternative employment especially when she knew that she had not yet paid up the loan. The loan agreement that she had signed in 2010 stipulated that in the event of termination of her employment with the company, for whatever reason, the company would withhold any monies due to her from her terminal benefits and pension fund. At the time of termination, her terminal benefits were indeed withheld and her balance on the loan came down to \$35 172-00 from \$67 124-00. Therefore, when she left employment she knew that she still owed the respondent that much. She also knew that she had no job from which she could get a salary and pay off the balance of the debt with. With this, I do not believe that she is a person who can be said to have left employment on her own volition, freely and voluntarily. Circumstances at work forced her to leave.

It is clear that with no job for 2 ½ years the applicant found it difficult to service the debt. Her failure to pay it off even though she had signed a deed of settlement in 2014 promising to have paid it off by May 2015 is understandable. It cannot be said that she willfully chose not to

pay. Her unemployment explains why 3 years went by with her having failed to pay it off. Now that the applicant is employed, she is asking to be given a chance to pay the debt using her salary to save her house which was attached by the Sheriff. Whilst I agree that a total period of 6 years is indeed too long, what are worth considering are the circumstances which caused the applicant to fail to service the debt in the first place. If the respondent's new management had not made the working conditions difficult for the applicant, this matter would not have come to where it is today. The applicant would have continued in employment and serviced her debt using her salary. With the offer the applicant has made, yes it might take her another 3 years to pay off the debt, but these 3 years are going to be different in the sense that this time around it will be 3 years towards the liquidation of the debt. Monthly, the applicant will be paying some money towards extinguishing the debt. 3 years to repay a debt of \$36 000-00 is in my view not unreasonable. Generally, for this amount of money that is the repayment period the banks normally give. In any case the respondent is not a bank whose business depends on lending money to clients and getting profits therefrom. The respondent is into tourism and survives on tourism, so the delay in getting its money back from the applicant does not in any way affect its operations or business. Moreover if the applicant had continued in employment she would have been repaying the debt at the rate of \$ 600-00 per month which is much less than what she is offering now. The respondent cannot really cry foul for the other 3 years that the applicant spent without paying the debt because it was due to its managers that the applicant had to quit employment when the debt still owed and when she did not have an alternative source of income with which she could service the debt.

In her application the applicant said that she wants the sale suspended on condition that she carries out fully the terms of the offer of settlement and that if she defaults on any instalment execution should proceed. Here she is showing total commitment to paying the debt. She is putting her head on the block. I am persuaded by her attitude that she needs to be given a chance to save her family home. Once she loses it, the family will not be able to purchase a similar house. My sense of justice disallows me from sanctioning the sale of this house at this moment in time when things have just turned for the better for the applicant who happens to be the sole breadwinner of her family.

During the hearing the applicant increased her offer to \$1 300-00 I will hold her to that amount. The applicant did not ask for costs. This is a case where I believe that each party should bear its own costs.

In the result, it is ordered that

- 1) The sale in execution of Stand 907 Mt Pleasant Heights. Mt Pleasant, Harare be and is hereby suspended on condition the applicant pays to the respondent monthly instalments of US\$ 1 300-00 with effect from 31 March 2016 until the outstanding debt is extinguished.
- 2) If the applicant defaults on any one instalment the respondent shall be entitled to proceed with the sale in execution of the property mentioned in paragraph 1 above.
- 3) Each party is to pay its own costs.

Kantor & Immerman, respondent's legal practitioners