SCOTT CHIRIPAMBERI
and
TENDAI CHIRIPAMBIRI
versus
BLUE RIDGE SPAR TRADING LIMITED
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE, 24 January 2017 and 7 June 2017

Opposed Matter

N.T Mazungunye, for the applicants
Ms *K. Mukanhairi*, for the 1st respondent

MUREMBA J: On 24 January 2017 I heard this application and delivered an *ex tempore* judgment dismissing it with costs. I have now been asked for the written reasons which I do hereby furnish.

The first respondent obtained a court order against the first applicant who is husband to the second applicant. In terms of the court order the first applicant owes the first respondent US$171 458-12. The first respondent obtained a writ of execution and instructed the second respondent, the Sheriff to attach the applicants' matrimonial home being Stand 2255 Mabelreign Township, Harare. Pursuant to the attachment the applicants made the present application in terms of r 348A (5a) of the High Court Rules, 1971, but their draft order was confused as to the order they wanted, whether it was a postponement or suspension of the sale. The order was couched as follows.

"It is ordered that:

1. The sale in execution of the said dwelling is suspended and or postponed until further notice.
2. The sale in execution of the said dwelling is suspended on condition the applicant carries out fully the terms of the offer of settlement made above.
3. There be no order as to costs."

Only the first applicant deposed to the founding affidavit. There was no affidavit by the second applicant. The first applicant averred in his founding affidavit that the immovable property that was attached by the Sherriff is the sole immovable property the family has and that is where it stays. He said that if it was sold the family would suffer great hardship as it has no other alternative accommodation. He said that he has minor children who have a constitutional right to shelter which would be infringed by the sale thereof. Although he did not indicate in the affidavit how much he was offering to pay periodically for the sale to be suspended, he made an offer to pay the debt at the rate of $1000-00 per month in the grounds for the application. The papers showed that they had been prepared by the first applicant personally as a self-actor. Mr. *Mazungunye* only assumed agency at the time of the hearing.

The first respondent opposed the application and raised a point *in limine* that the second applicant could not be a part to these proceedings as she was not a party to the proceedings which gave rise to the court order which resulted in the attachment of the property. At the hearing the applicants' counsel, Mr. *Mazungunye* conceded that the second applicant had no *locus standi* to institute these proceedings in terms of r 348 A (5a) which states that the person who is entitled to make this application is the execution debtor. The concession was properly made. In any case, the second respondent had not even filed an affidavit in support of her application. So apart from lacking *locus standi,* she was not even before the court. Consequently, I upheld the point *in limine* and the hearing proceeded in respect of the first applicant only.

On the merits the first respondent raised the defence that the attached property was bought using the proceeds of the debt. The first applicant heavily disputed it in his answering affidavit. I did not take this to be a valid point because firstly, this was not proven when the first respondent obtained its order against the first applicant. Secondly, the present application was not the platform to determine that issue.

The second defence that was raised by the first respondent was that on 4 June 2013 the first applicant signed an acknowledgment of debt and offered to pay $10 000-00 per month which he failed to do. If that had been done the debt would have been paid by September 2014. The summons was issued in March 2014 and an order was granted by consent. The first applicant offered to pay $8 000-00 by 23 May 2014 and thereafter $10 000-00 per month, but he only paid the first US$8 000.00 and failed to pay the balance as agreed.

The first respondent averred that the payment proposal of US$1000-00 which the first applicant was now making was unreasonable as it would take him 160 months which

translates to 3 years to pay the debt. It further averred that this proposal was not even genuine because if it was, there was no reason why the first applicant had not been paying this little amount from the time the parties entered into the deed of settlement upon his failure to pay the US$10 000.00 per month that the parties had agreed on. The first respondent averred that whilst the first applicant drives nice cars and lives a luxurious life, he did not want to pay the debt. The first applicant responded to this by saying that the issue that he drives nice cars was not the issue before the court. The first respondent further stated in his answering affidavit that he had since issued legal proceedings in this court under HC 8451/16 challenging the acknowledgement of debt which gave rise to the court order saying that he was made to sign it under duress and undue influence. He said that those proceedings were still pending.

At the hearing Mr. *Mazungunye* did not seek to amend the draft order, but he submitted that this was an application for a suspension of the sale of the dwelling on condition that the first applicant paid instalments of $1000.00 per month until the debt was liquidated. He further submitted that if the suspension of the sale was not granted then the pending proceedings challenging the acknowledgement of debt which gave rise to the court order would be rendered useless. This submission was without merit because the pending case was not the basis of bringing this application, but the attachment of the dwelling. Moreover, it is an issue which the first applicant only raised for the first time in the answering affidavit. An application stands on the founding affidavit and not on new issues that are raised in the answering affidavit. So the issue of the pending matter was neither here nor there in this matter.

In terms of r 348 A (5e) for the court to suspend or postpone the sale of a dwelling the execution debtor should satisfy the judge that he or his family is in occupation of the dwelling that has been attached and that they will suffer great hardship if execution is allowed to proceed. Over and above that, the execution debtor should make a reasonable offer for the suspension of the sale. See Rule 348 A (5e) (b).

In *casu* the first applicant apart from just stating that the property was his family's sole immovable property, he did not show that his family would suffer great hardship. He did not explain how it would suffer. He did not dispute that he bought the house as recent as 2011. He did not explain how the family was surviving before then and why it could not go back to its old ways of survival. It is not enough for the execution debtor to simply say the family will suffer great hardship without explaining in detail how that will be occasioned.

The offer of US$1 000.00 per month for a debt of US$171 000-00 was not a reasonable offer at all. It would take the execution debtor more than 13 years to clear the debt which is just unreasonable. Moreover, he never bothered to explain to the court how he had arrived at that very little offer considering that previously he had made offers as high as US$10 000.00 per month. He did not disclose how he earns his living, how much he earns and his monthly expenditure. Over and above the unreasonable offer that the first applicant made, the first respondent chronicled the history of this case which showed that the first applicant is not a person to be trusted. He made an offer to pay the debt in 2013 under an acknowledgment of debt but he failed to keep to his word. This prompted the first respondent to issue summons in March of 2014. This resulted in the parties entering into a deed of settlement, but again the first applicant failed to adhere to the terms of the deed of settlement. With this history, I was not convinced that he was serious about paying the debt. There was no guarantee that the first applicant would pay the debt even if he was given another chance to do so. He is not a man of his word. It was clear that the first applicant had made the application in order to buy time.

It is for these reasons that I dismissed the application with costs.

Mazhande-Mazhande Legal Practice, applicants' legal practitioners
Mukanhairi-Makodza Attorneys, 1st respondent's legal practitioners