

IRENE CHIWARA
versus
BORROWDALE BROOK HOME OWNERS ASSOCIATION
and
SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 25 April & 9 May 2019

Chamber Application – Rule 348A (5a) of the High Court Rules, 1971

Ms K. Muyangwa, for the applicant
M. Tshuma, for the first respondent

ZHOU J: This is a chamber application in terms of Order 40 r 348A(5a) for the suspension of the sale of a dwelling house, namely, Certain Piece of Land Situate in the District of Salisbury Called Stand 449 Borrowdale Brook Township of Stand 137 Borrowdale Brook Township measuring 1 435 square metres. The attachment for sale was made in execution of the order which was granted in Case No. HC 3681/17 for payment of a sum of US\$14 494 together with interest thereon, continuing levies in the sum of US\$200 per month from 1 May 2017, and costs of suit on the attorney-client scale. The instant application is opposed by the first respondent which is the judgment creditor.

Oder 40 r 348A(5a) of the High Court Rules, 1971 provides as follows:

“Without derogation from subrules (3) and (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.”

Subrule (5e) provides the following in relation to what is required for an application in terms of subrule (5a) to succeed:

- “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.”

The essence of the above provisions is to strike a balance between the need to guarantee the efficacy of judicial decisions and the prevention of extreme suffering to litigants who might find themselves homeless as a consequence of the sale in execution of their dwellings, see *Media v Homelink (Pvt) Ltd* 2011 (2) ZLR 516(H). This is a delicate balance which must be struck between the two competing considerations without undermining the efficacy of judicial processes yet at the same time being sensitive to the reality that behind the designations “plaintiff, applicant, defendant and respondent” are human beings and not particles of matter. The provision reflects the “human face” of the law which some would prefer to refer to as “justice”.

This court has held that ordinary hardship is not sufficient to justify reliance on the provisions of r 348A (5a). The hardship must be great in the sense of it being severe or extraordinary, see *Masendeke v Central Africa Building Society & Anor* 2002 (1) ZLR 69(H) at 68H-69B; *Makupe v ZB Bank Ltd* 2016 (1) ZLR 553(H) at 557C-D. The applicant stated, and it is not disputed, that the dwelling concerned is occupied by her and members of her family. The full names of the family members are stated in the applicant’s founding affidavit. She also states that the property is the only residence that she owns and that its sale would cause her and her family members great hardship. The respondent submits that applicant’s hardship is self-inflicted in that she chose to purchase a property in an up-market area yet she does not have the means to sustain it. There is no evidence that when the applicant acquired the property she had no means, otherwise she would not have been able to acquire it. Applicant states that she is unemployed and would have no means to acquire an alternative residence if the property is sold. Given that if the property is sold by auction it is unlikely to fetch a market price, and also considering the volatility

of the economy which cannot escape judicial notice, I accept that the sale of the property would in all probability result in great hardship to the applicant and her family who are likely to be rendered destitute by the sale. The prevailing economic realities place the instant case outside the ambit of the remarks made in the case of *Clopas Zwidza & Anor v Elvis Mudoti & Anor* HH 349 – 15 which Mr *Tshuma* for the first respondent cited. In that case the economy was stable, and one would in all probability realize the value of the balance of the proceeds of the sale after the judgment creditor had been paid.

I need, however, to inquire into the reasonableness of the applicant's offer to settle the judgment debt or, in the circumstances of this case, the existence of some other good ground for postponing or suspending the sale of the dwelling. The reasonableness of the offer must be judged by reference to its impact upon the judgment debt but without ignoring the applicant's means. It would be unreasonable to sanction a proposal which does not reduce the debt at all as this would make the judgment hollow. On the other hand, it would be unreasonable to impose a payment term which the applicant will not be able to meet thereby negating the intended purpose of the rule. Respondent's complaint in the opposing papers, which is properly founded, is that the applicant has previously made settlement offers which she failed to honour. In the deed of settlement which the parties executed the applicant through her legal practitioner offered to make monthly payments of US\$1 500 towards the judgment debt and US\$1 500 towards the legal costs. However, she failed to make payment in accordance with the deed of settlement and made another offer to pay \$300 per month. She offered the same amount in her application when it was filed. The first respondent rejects the offer. Clearly the applicant would require more than six years to liquidate the debt if she is to pay at the rate of \$300 per month, which would be an unreasonable period.

During argument the applicant, offered to increase her monthly instalment to \$500. Although this is on the lower side, it seems to me to be a reasonable offer when regard is had not just to the amount of the debt but also the fact that she is unemployed. Even if one was to say that the monthly offer of \$300 does not amount to a reasonable offer, there are other good grounds for suspending the sale in order to save the applicant and her family from destitution while at the same time ensuring that the first respondent is ultimately paid what is owed to it within a reasonable time. The debt involved is very insignificant when compared to the reasonable value of the attached property. Both parties conceded during argument that the judgment debt is significantly

lower than even the value of the property minus the dwelling on it. Given time the applicant should be able to make arrangements to increase the amount, as it is in her best interest to liquidate the debt. I therefore consider it fair that the monthly amount should be increased from \$500 to \$750 after a period of twelve months. This is in order to achieve fairness between the parties.

In the result, IT IS ORDERED THAT:

1. The sale of the immovable property known as a Certain Piece of Land Situate in the District of Salisbury called Stand 449 Borrowdale Brook Township of Stand 137 Borrowdale Brook Township measuring 1 435 square metres held under Deed of Transfer 5208/09 be and is hereby suspended on the following conditions:
 - 1.1 That the applicant pays a sum of \$500 per month on or before the last day of each month towards settlement of the judgment debt and costs awarded in HC 3681/17, commencing on or before 31 May 2019, up to 30 April 2020.
 - 1.2 Thereafter, from on or before 31 May 2020 the applicant shall pay the sum of \$750 per month until the debt is paid in full.
2. The second respondent shall suspend the sale of the property described in paragraph 1 hereof pending compliance by the applicant with the terms of this order as set out in paragraph 1.
3. There be no order as to costs.

Muyangwa & Associates, applicant's legal practitioners
Gill Godlonton & Gerrans, first respondent's legal practitioners