MUNYARADZI TAWONEZVI
versus
CENTRAL AFRICAN BUILDING SOCIETY
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MATANDA-MOYOJ
HARARE, 28 July 2015

Urgent Chamber Application

Ms *S. Takawira,* for the applicant
L. T. Kafesu, for the 1st respondent

MATANDA-MOYOJ: On 8 July 2015 I dismissed the urgent application. The applicant has requested the reasons thereof and these are they;

Applicant sought the following relief on an urgent basis;

"1. TERMS OF FINAL ORDER SOUGHT

a) That the 1st and 2nd respondent be and are hereby ordered to stay execution against the immovable property of the applicant perpetually.

2. TERMS OF INTERIM RELIEF

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

a) The sale in execution of the said dwelling is postponed until 31 December 2016

OR ALTERNATIVELY

b) The sale in execution of the said dwelling is suspended on condition that the applicant carries out fully the terms of the settlement made which are:

1) Monthly instalment in the sum of $10 000 starting from 30 September 2015 and a consecutive payment of same amount to the 31 December 2015 and final payment will……..

2) Payment of the outstanding balance on or before 31 December 2015 OR

3) A once off payment on all owing on 31 December 2015

……"

The brief background to this matter is that the respondent herein issued summons against the applicant for payment of $103 035,13. A judgment by consent was granted in the matter in the following:

"1. That the defendant pays plaintiff the sum of $166 375,54.

2. That the defendant pay interest on the above sum at the rate of 15% per annum calculated monthly and

3. That the defendant pays costs of suit on a legal practitioner and client scale and the sum of $16 637,55 as collection commission."

The judgement arose from a loan received by the applicant from the respondent. As security for the loan the applicant mortgaged the property which forms the subject of this matter known as stand T439 Mutare T/ship of Umtali Township Lands in favour of the plaintiff. The mortgage bond was registered in the Deeds Office at Harare on 30 March 2011 – mortgage bond number 19050/2011 refers.

On 17 March 2015 the Registrar of the High Court issued a writ of execution of movables, failing which the attachment of the above immovable property was authorized. On 2 June 2015 the applicant filed an urgent chamber application in terms of r 348A of the High Court rules. On 10 June 2015 such application was found by this court to be defective as it contained no basic information on which a court could exercise its discretion. Such application I am advised was subsequently withdrawn.

On I July 2015 the applicant again filed an urgent application in terms of r 348A. In terms of r 348A subrule 5(a) a person whose dwelling has been attached must within ten days after the service upon him of the notice of attachment of immovable property under r 347, make a chamber application for postponement a suspension of the evictions of its occupants. I found that the applicant was out of time in filing the present application. Such notice of attachment of immovable property was served upon applicant on 20 May 2015. On 1 July 2015 well after the ten day the applicant filed this application in terms of Order 40 r 348A. The applicant argued that he initially filed a defective application on 2 June within the ten day period provided for by the

rules and the filing of the present application should be viewed as an extension of the 2nd June filing. Such submission did not find favour with me. A defective application is a nullity. It is like no application was ever filed. See *Macfoy* v *Untied Co. Ltd* (1961) 3 ALL ER, *Wand Smith London Benough Council* v *Winder* (1985) A.C. 461, *Bellinger* v *Bellinger* (2003) UKHC 21.

The present application is a fresh application where the applicant was enjoined to apply for condonation. I would have easily accepted the applicant's explanation had he made such application for condonation. The present application was lodged without condonation having been granted and was improperly before me. See *Sibanda* v *Ntini* 202 (1) ZLR 264(5) *Viking Woodwork Pvt Ltd* v *Blue Bells Enterprises (Pvt) Ltd* 1998 (2) ZLR 249 (5).

In the event that I am wrong in finding the need by the applicant to apply for condonation I proceeded to deal with the merits of the case.

In applications as these it is not sufficient for the applicant to prove that he or his family would suffer hardship but he must go further and show that he would suffer greatly. In *Thadeous Jeremiah Masendeke* v *CABS and Anor* HH 7/2003 Chinhengo J explained the hardship envisaged as follows;

> "In my view the hardship must be more than the ordinary hardship which persons deprived of their place of residence ordinarily suffer such as the attendant inconveniences in finding and paying for alternative accommodation. The hardship must be great in that it results in the execution debtor being rendered homeless and destitute."

The applicant in his founding affidavit dismally failed to show that he would be rendered homeless and destitute. Having a wife and two school going children moving accommodation is not the hardship protected under the rules.

Secondly the applicant had an *onus* to show that he made a reasonable offer to settle the debt. In his founding affidavit the applicant averred that he owns a mining concession from which he is going to receive $120 000-00 in return as part of his equity. He said he would be appointed Executive Director earning a salary of $12 000-00. He pledged to pay instalments of $10 000-00 per month from such salary. He proposed to pay $10 000-00 from September 2015 to November 2015 and then paying off the debt end of December 2015. The law requires that the execution debtor makes a reasonable offer to settle the judgement debt. The offer must be based on what the debtor is receiving not futuristic, uncertain monies. The offer made by the judgment

debtor herein relates to the future. Nothing is conclusive. There is no guarantee that the applicant would receive such amounts, thus making the offer unreasonable. To date the applicant has made no effort to extinguish the debt.

The order by this court ordering the applicant to settle the debt is dated 16 October 2014. Nine months later the applicant has not made an effort to settle the debt.

What makes this case distinguishable from others where sale has been suspended is that the applicant knowingly and willingly borrowed funds from the respondent. He used the property in question as security. The applicant was aware that should he fail to settle the debt, the property would be sold in execution. To protect such persons would be a mockery of the law of security of debts. Should I order suspension of sale of property this would mean the applicant accessed respondent's funds without security. This would mean debtors could frustrate a creditor's claim to a mortgaged property by using r 348A (5a). See *Nedbank Ltd* v *Franger and Anor* case number 2011/00418 (Republic of South Africa – South Gauteng High Court). The debt herein is tied to the house.

For the above reasons the application is dismissed with costs.

Takawira Law Chambers, applicant's legal practitioners
Henning Lock c/o Coghlan, Welsh and Guest, 1st respondent's legal practitioners