ELVIS CALEB CHIKIWA
versus
PEOPLES' OWN SAVINGS BANK
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHITAKUNYE J
HARARE , 21 July 2017

URGENT CHAMBER APPLICATION

Applicant, in person
G M Nyangwa, for the 1st respondent

CHITAKUNYE J. On 13 July 2017, I dismissed the application by the applicant for the stay of execution pending the finalisation of case number HC 5724/17 between the same parties. The reasons for my decision are as follows:

On 29 November 2011, the first respondent obtained a default judgement against the applicant and two others for the payment of a sum of USD47 130.55 and interest on a sum of USD44 522.93 at the rate of 30% per annum calculated from 31 March 2011 to the date of payment in full.

The order also provided that the mortgaged immovable property being share number 1 in Stand 1576 Ardbennie Township of Subdivision A of Lots 5, 6 and 7 Block MM Ardbennie Township registered in the first defendant's name is declared especially executable.

The judgment remained unsatisfied leading to the sale of the Ardbennie property in execution. Proceeds there from were not adequate to liquidate the debt. On 28 September 2016 the sheriff served a Notice of Attachment of immovable property, namely Stand 6757 Salisbury Township of Salisbury Township lands which is owned by the applicant, on the applicant.

On 21 June 2017, the applicant filed a court application for condonation for the late filing of an objection to attachment of immovable property under HC 5614/17. Apparently he was seeking condonation so that he files an application in terms of Order 40 Rule 348 A [5a] of the High Court Rules, 1971. On 5 July 2017, the first respondent filed its opposing papers.

On 23 June 2017, the applicant filed what he termed a 'court application for stay of execution pending finalisation of case number HC 5614/17.'

On 27 June 2017, the Sheriff dispatched a notice to applicant and co- judgment debtor AFNtech Engineering (Pvt) Ltd that he had received instructions to sell Stand 6757 Salisbury Township of Salisbury Lands. As a consequence of this notice the applicant filed this application on his own certificate of urgency as a self-actor on 4 July 2017.

He termed this application 'Urgent Chamber application for stay of execution pending finalisation of case HC 5724/17.

In the application the applicant alleged that the first respondent has instructed the second respondent to sell applicant's immovable property in a pre-emptive move to render case HC 5724/17 useless which is an ordinary court application for stay of execution. He also asserted that through HC 5724/17 he had tendered a payment plan to liquidate the debt.

An applicant in an urgent chamber application is required to show that the matter is urgent and deserves to be treated so. The applicant must show that:

1 The matter cannot wait the observance of the normal procedural and time frames set by the rules of the court in ordinary applications as to do so would render negatively the relief sought
2 There is no other suitable remedy
3 The applicant treated the matter as urgent by acting timeously and if there is a delay to give good or sufficient reason for such delay; and
4 The relief sought should be of an interim nature and proper at law.

The first respondent opposed the application. In its opposition first respondent raised some points *in limine*.

1. That the matter was not urgent as the need to act arose on 28 September 2016 when the applicant was served with a Notice of attachment.
2. That there are no prospects of success in the applications for condonation and for stay of execution under Rule 348 A.

From the sequence of events outlined above it is clear that when the notice of attachment was served, the applicant did not sit on his laurels but took a route that failed to

yield the desired results. He firstly sought to show that he had donated the property to a family trust and so it was now owned by the family trust Florel Trust. Interpleader proceedings were apparently instituted. When the interpleader proceedings failed he later filed court application HC5614/17 on 21 June 2017 purportedly seeking condonation for late filing of an objection to attachment of immovable property. Two days later, on 23 June, he filed another application HC5724/17, this time for stay of execution pending the finalisation of the application for condonation in HC 5614/17.

Both these court applications were filed before receipt of the notice of 27 June 2017 notifying him that the sheriff had received instructions to sell the immovable property. It is thus my view that what prompted applicant to now approach court on urgency basis is that notification of 27 June 2017. But for that notification applicant would have simply pursued his court applications that had already been filed with court.

Though the applicant filed the two court applications before receipt of the notice to sell, it is apparent that he had been lethargic in his conduct. The applicant was notified of the attachment of his immovable property on the 28 September 2016 and instead of proceeding in terms of rule 348 A, as he now seeks to do, chose to institute interpleader proceedings knowing full well that the property was in his name and thus still belonged to him. He clearly chose a wrong procedure and persisted with it at his own peril. The applicant did not disclose when the interpleader proceedings failed. What is clear is that it is only on the 21 June 2017 when he filed a court application for condonation for the late filing of an application in terms of rule 348 A. Two days later another application for stay of execution was filed.

It is trite that a matter is urgent if, when the need to act arises it cannot wait. It cannot wait because any waiting would result in irreparable harm being occasioned. The applicant must also have treated the matter as urgent by acting when the need to act arose or, where there is some delay, must give good cause for the delay. See *Document Support Centre (Pvt) Ltd v Mapuvire* 2006 (2) ZLR 240 (H)

In *casu*, as already alluded to when the immovable property was attached on 28 September 2016, that is when the need to act arose. The applicant chose a wrong procedure and pursued it till he was informed by a judge of the fatal error with that process. On the eve of being notified that the property would now be sold, he embarked on the court application for condonation and later a court application for stay of execution. (HC 5614/14 and HC5724/17). The net effect of the courses of action applicant took was that the debt has been

ballooning to his detriment. Counsel for first respondent alluded to the fact that the debt has now reached a figure of about USD80 000.00.

I am inclined to say the need to act arose when he was served with the notice of attachment and in response thereto the applicant chose a wrong process. When that process came to a nought on a date he did not disclose he again could have approached court on an urgent basis, but alas he chose the slower process again buying time whilst the debt ballooned.

The present application is intended to provide for the ordinary applications to take their own course with little regard to the ballooning debt.

In the circumstances it is my view that the applicant has not treated the matter as of urgency. I am of the view that even in the event that the need to act is deemed to be the date when the interpleader proceedings failed, such date has not been furnished and no explanation was tendered for whatever delay may have occurred before launching court applications on 21 and 23 June 2017.

Besides the issue of delay the application itself has its own challenges as disclosed in the next point *in limine*.

The next point pertains to the prospects of success of the court applications. According to counsel for first respondent there are no prospects of being granted condonation for the late filing of the application for stay of execution. Counsel further alluded to the fact that due to the lack of a reasonable offer for the settlement of a debt, even the application for a stay will not succeed.

It is in these circumstances that counsel argued that execution should not be stayed pending meritless applications.

The applicant on his part maintained that he should be given the opportunity to prosecute his applications before the property is sold.

On the draft order counsel for the first respondent argued that the draft order was fatally defective and cannot be granted.

It is trite that while the draft order is only a draft which court can vary and thus does not bind the court, it must nevertheless be based on the case pleaded. It is not a mere formality for applicants to file draft orders in application proceedings. The draft order must properly assist the court as to the relief being sought by an applicant. See *Tinashe Mutarisi v United Family International Church and another* HH 445/2012.

In *casu*, the interim relief sought was drafted as follows:

That pending the return date first respondent is ordered to stay execution of Stand No. 6757 Salisbury Township of Salisbury Lands in the district of Salisbury.

The final order sought was crafted as follows:

a) That case HC 5724/17 shall determine whether second Respondent shall or shall not proceed with the sale in execution.
b) Costs of suit on the higher scale shall be borne by the first respondent if it opposes the confirmation of this order.

It was in respect of the final order that counsel for the first argued that the draft order is incompetent as it seeks, inter alia, to direct another court /judge to solely confine itself to HC 5724/17 as the sole determining factor of whether the sheriff's sale should proceed or not.

As already alluded to above, case No. HC 5724/17 is a court application for stay of execution pending finalisation of HC5614/17. The draft order in HC 5724/17, does not however relate to the application sought. Instead the draft order seeks the granting of the condonation of the late filing of a chamber application in terms of rule 348 A [5a] of the High Court Rules, 1971.

It may also be noted that in HC5614/17, the draft order does not speak to the court application for condonation. The draft order appears to be for the grant of an order staying the sale for 18 months and for the applicant to be liquidating the debt at a rate of USD2 500.00 per month. This is materially different from a relief that should be sought in an application for condonation for late filing of an objection to attachment of immovable property.

One would say that in respect of both HC 5714/17 and HC 5724/17, no competent relief is being sought hence the 1st respondent's argument that the applications are doomed to fail.

It is unfortunate that the applicant as self actor did not deem it fit to seek legal assistance despite advice on the first day of hearing. He gave the impression that he is prepared to push his applications as they are.

Whilst it may be said the draft orders can be amended, one amends something which is there and not something not there.

As the applicant is a self actor court may choose to be more accommodating in as far as the amendment of draft order is concerned but overally I am of the view that the application is without merit. It is purely intended to delay the inevitable. The debt will

certainly continue to grow and applicant will not be able to liquidate it at all to the prejudice of the first respondent.

Whilst it is true that the sale in execution of a debtor's family home inevitably leads to some hardships, it is not every hardship that is intended to be covered in terms of rule 348 A. Counsel for first respondent ably contended that the applicant has not been serious in liquidating the debt and even his offer does not seem to be serious taking into account the time that the debt has remained unserviced. The draft orders are at variance with the applications.

In any case it is not every hardship that would merit a suspension of sale of one's dwelling

In *Masendeke v CABS* 2003(1) ZLR 65 CHINHENGO J alluded to the fact that it is not every hardship that will result in the stay or suspension of a sale of a debtor's dwelling, but the debtor must satisfy court that they will suffer more than the ordinary hardship which persons deprived of their place of residence suffer. The hardship must be great in that it results in the debtor being rendered homeless or destitute.

In *casu,* the applicant indicated that he earns about USD2700.00 per month and he hopes to receive income in the region of USd54 000.00 at the end of September 2017 hence his proposal to start paying the debt from September 2017. If he indeed is in receipt of such income he will be able to afford suitable accommodation for his family and will not be destitute. He certainly can rent a dwelling within his family's needs and avoid the ballooning debt.

I am of the view that it is in fact in the applicant's interests for the debt to be liquidated rather than to let it balloon to a level whereby by the time the immovable property is sold the proceeds there from will not be adequate to liquidate the debt.

After a careful analysis of the application before me I am of the view that the application cannot succeed. Not only did the applicant not treat the matter as urgent when the need to act arose, but he also has not shown any seriousness on his part in reaching finality on the issue of the debt. His attitude is simply to frustrate the execution of a judgment obtained in 2011. Had he been serious he would have taken steps to address the ballooning debt. Even as he appeared before me his proposal was for him to start paying from the end of September 2017 at a rate that would not liquidate the debt in the proposed period of 18 months when interest is taken into account. The application is thus without merit. It is clearly frivolous and vexatious intended to harass and harangue the first respondent. The first respondent will be

clearly prejudiced by the dilatory manner in which applicant is addressing the issue of the debt.

In the circumstances I am of the view that the application be dismissed with costs on the ordinary scale.

I decided on the ordinary scale as I am of the view that whilst the applicant must be censured to avoid unnecessary litigation, his situation is such that costs on a higher scale would only exacerbate his situation. He should take this as a warning that he risks being ordered to pay costs on a higher scale should he persist with ill advised litigation. Should he wish to take any litigation he is better advised to seek legal advice and representation.

Accordingly, the application be and is hereby dismissed with costs on the ordinary scale.

Mawere Sibanda, first respondent's legal practitioners