PUWAI CHIUTSI
versus
ELIOT RODGERS
and
THE SHERIFF OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 27 July 2017, 1 August 2017 & 24 August 2017

Opposed Application

Mr. *P Chiutsi*, for the applicant
Mr. *T. Biti*, for the 1st respondent

CHIGUMBA J: This is a chamber application brought in terms of r 348 A (5b) of the High Court Rules 1971. The applicant seeks the postponement or suspension of the sale in execution of a certain piece of land situate in the district of Salisbury called the remainder of Subdivision C of lot 6 of lots 190, 191, 193, 194 and 195 Highlands Estate of Welmoed measuring 4377 square meters. The property was placed under attachment pursuant to a writ of execution issued by this court on 29 January 2016 in case number HC 649/17. It is not in dispute that this property is currently occupied by the applicant's ex-wife and children. What is in dispute if firstly, whether this property is the applicant's only and principal dwelling, whether this application has been brought before us within the prescribed time periods, whether the applicant's offer to settle the judgment debt is acceptable to the first respondent, and whether the applicant's application for rescission of judgment, HC 649/17 has any prospects of success.

The applicant in his founding affidavit averred that the first respondent obtained judgment against him in case number HC 3331/14. He attached the notice of attachment, and averred that he had challenged the attachment under case number HC 649/17, which challenge was currently pending before this court. It is common cause that the attachment proceedings had been held in abeyance when the application for rescission of judgment had been filed. Applicant averred that on 19 July 2017 he was served with a notice to sell the property on 4 August 2017. Applicant averred that this had been done without any notice to him, and without advertising the property for sale in terms of the rules. The judgment that is sought to be enforced is in the sum of USD$70 000-00. Applicant avers that the amount now outstanding is USD$35 000-00, and that the attached property is valued at USD$280 000-00. He averred further, that the 1st respondent had failed, refused or neglected to account to him for the proceeds of sale of movable property belonging to him which had previously been attached and sold in execution.

Opposing papers were filed on behalf of the first respondent, on 26 July 2017. In a nutshell the deponent to the opposing affidavit, a legal clerk, denied each and every averment made by the applicant and took exception to the averments made by the applicant which sought to cast aspersions on the conduct of the first respondent's legal practitioners of record, and the second respondent. It was averred on behalf of the first respondent, that he was defrauded by the applicant, rendered destitute, and frustrated at every turn whenever he sought to execute judgment and recover the money owed to him. In the opposing affidavits, and the heads of argument filed on behalf of the first respondent a point in limine was raised, which in my view is dispositive of the matter. The preliminary point is simple. It is that this application is not property before us, because it was brought outside the time limits prescribed by rule 348A (5a), and no condonation for late filing and extension of time within which to file had been sought, or obtained.

Rule 348 A (5a) of the rules of this court provides that;-

"(5a) Without derogation from sub rules (3) to (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. (my emphasis)

It was submitted on behalf of the 1st respondent that the notice referred to in the abovementioned rule is the notice in terms of rule 347,which provides as follows;-

"***347. Mode of attachment of immovable property***
(1) The method of attachment of immovable property, including a mining claim, shall be by notice by the Sheriff or his deputy served, together with a copy of the writ of execution, upon—
(*a*) the **owner** of the property; and
(*b*) the **Registrar of Deeds** or officer charged with the registration of such property.
(2) In the notice referred to in subrule (1), the Sheriff or his deputy may require the execution debtor to deliver to him all documents that relate to the execution debtor's title to the property under attachment.
(3) If the immovable property concerned is occupied by a person other than the owner, notice of the attachment shall also be served on the **occupier.**

I find merit in the submission made on behalf of the first respondent, that the applicant was served with notice of attachment on 26 July 2016, because he makes a similar averment in his founding affidavit. It seems to me that indeed, once notice of attachment is served, the 10 day period which is prescribed in the rules begins to run, and by my calculation, that period ran from 26 July 2016 to 9 August 2016.

I accept as correct, the interpretation of r 348 A (5b), as read with r 347, which was put forth on behalf of the first respondent. It is also quite clear to me, that this application, filed on 21 July 2017, is clearly out of time. It is my view that indeed the note which is referred to is the notice of attachment, not the notice of sale, because the rules provide a different time period between service of a notice of sale and the actual sale, and service of a notice of attachment and the time period within which it is permissible to challenge attachment. It then follows that the court must determine what the next course of action is, in terms of the rules, in circumstances where prescribed time periods have not been adhere to. It is indeed trite, that for condonation to be granted, there must be a substantive application for it. See *Granary Investments Private Limited v Elkin Pianim* [1], *Nobuhle Nanasi Ncube* [2].

These cases relied on the dicta in the case of *Forestry Commission v Moyo*[3], where the court stated that;-

[1] HH 180-13

[2] HC160-11

[3] 1997 (1) ZLR 254 (S) @ 260 C-H and 261 A

> "I entertain no doubt that, absent an application, it was erroneous for the learned Judge to condone what was on the face of it, a grave noncompliance with rule 259. For it is the making of the application which triggers the discretion to extend the time. In *Matsambire v Gweru City Council S- 183-95* (not reported) this court held that where proceedings by way of review were not instituted within the specified eight weeks period and **condonation of the breach of rule 259 was not sought, the matter was not properly before the court.** I can conceive of no reason to depart from this ruling. One only has to have regard to the broad factors which a court should take into account in deciding whether to condone such non-compliance, to appreciate the necessity for a substantive application to be made. They are;
> (a) That the delay involved was not inordinate, having regard to the circumstances of the case;
> (b) That there is a reasonable explanation for the delay;
> (c) That the prospects of success should the application be granted are good;and
> (d) The possible prejudice to the other party should the application be granted.
> Moreover, in every such application the respondent is entitled is entitled to be heard in opposition. He must be permitted an opportunity to persuade the court, that the indulgence sought is not warranted. Without hearing him how can a court for instance, be satisfied that he will suffer no possible prejudice by the condonation."

It is also trite that an application for condonation must precede the main application. See *Sibanda* v *Ntini*[4]*; Mlondiwa* v *Regional Director of Education Midlands Province N.O & Anor* HB 19-94*; Viking Woodwork Private Limited* v *Blue Bells Enterprises Private Limited* 1998 (2) ZLR 249 *(S)* 251 C-D*; Sai Enterprises Private Limited* v *Girdle Enterprises Private Limited t/a Quality Engineerin Services Private Limited* HB 62-09 (unreported*).* The court finds, therefore in line with all the abovementioned precedents, that this application cannot be heard in the absence of a substantive application for condonation. The applicant sought to argue that the condonation of late filing of this application was sought in his founding affidavit together with the relief sought in the main matter. We found no evidence of this in his founding affidavit. We found no evidence of this in his prayer, or in the draft order attached to the main application. Despite being given ample opportunity to amend his draft order, sadly the applicant did not include a prayer for condonation, or for extension of time within which to file this application.

We also find that the delay was inordinate, from August 2016 to July 2017, having regard to the circumstances of this case. The explanation for the delay was not reasonable, in fact, the applicant sought to rely on misinterpretation of r 348 A (5b). Having regard to the fact that the applicant is a registered legal practitioner, an officer of this court of many years, an experienced lawyer who briefed a number of lawyer to represent hinm in this matter only to appear in person on the date of hearing, it is not reasonable to accept that he was operating under

[4] 2002 (1) ZLR 264 (S)

a misapprehension of the law, together with two or three other learned friends. The truth of the matter is that the applicant cannot withstand the preliminary point raised by the first respondent. His explanation for the delay was not believed by the court. He is a drowning man clutching at straws to stave off the evil day of execution.

We are quite certain that the first respondent would be prejudiced if execution were to be delayed any further, because the applicant's prospects of success are not good, we cannot grant condonation where none was sought by way of a substantive application. We accept that, even if the applicant seeks to challenge the attachment of his property, albeit without first seeking condonation for late filing of this chamber application which is by nature heard on an urgent basis, there in nothing at the moment to stop the sale in execution.

Having found that the chamber application for postponement or suspension of sale of a dwelling house is not properly before us, for noncompliance with the rules relating to stipulated time limits, we remove the application from the roll and refer it to the ordinary roll of court applications. We decline to hear the merits of the matter. Applicant has failed to jump the first hurdle in an application of this nature, that of complying with the rules of this court which stipulate time limits in applications of this nature. In the result, it be and is hereby ordered that;-

1. The application for an order postponing or suspending the execution of a dwelling is removed from the urgent chamber roll and referred to the ordinary court roll.
2. The application will be re-enrolled as an urgent chamber application once condonation for its late filing and extension of time within which to file it has been sought, and obtained.

Messrs Chiutsi, applicant's legal practitioners
Messrs Tendai Biti Law, 1st respondent's legal practitioners