ROBERT MORLEY TINDWA
versus
ZB BANK

HIGH COURT OF ZIMBABWE
MUZOFA J
HARARE, 31 October &13 November 2019

Urgent Chamber Application

L Madhuku with D Mundia, for the applicant
O Mutero, for the respondent

MUZOFA J: This is a chamber application made in terms of order 40 r 348 (5a) of the High Court Rules, 1971 (the rules). Due to its nature, the application is treated as an urgent matter in terms of the rule. The applicant seeks the suspension of a sale in execution of a dwelling.

The applicant was a shareholder and non-executive director of a company known as Oxford Agro Chemicals (Pvt) Ltd hereinafter called Oxford. Oxford entered into a revolving short term facility with the respondent. The applicant provided security for the indebtness and stood as guarantor, surety and co-principal to the loan facility. He procured the registration of a first covering mortgage bond over his immovable property otherwise known as stand 262 Mount Pleasant Township 9 of Lot 50 Mount Pleasant.

In due course Oxford did not honour its obligations neither did the applicant. The respondent issued out summons against Oxford and recovered part of the money in the sum of US$214 225, 00, however the amount did not extinguish the indebtness. Following this recovery, the applicant approached this court seeking a declaration to discharge him from liability. The respondent filed a counter claim in the sum of $403 157, 24 being capital, interest and bank charges. The applicant's claim was dismissed and the respondent's counter claim upheld. An appeal to the Supreme Court by the applicant was unsuccessful.

Following the dismissal of the appeal, the applicant's Mount Pleasant home was duly attached for sale after due process was followed. As a result of the attachment, the applicant approaches this court to suspend the sale in execution.

The respondent opposed the application and raised a preliminary point that rule 348 (5a) of the rules does not apply to mortgage property and to foreclosure on such properties.

I directed parties to make submissions on both the preliminary point and on the merits for the obvious convenience to the court and the parties.

I address the preliminary point first.

The issue whether rule 348 (5a) applies to foreclosure proceedings or specially executable property has already been decided in different judgments of this court, see *Meda* v *Homelink (Pvt) Ltd and Another HB 195/11, Nyabindu and Another* v *Barclays Bank of Zimbabwe Ltd and Ors 2016 (1) ZLR 348 (H), Electroforce Wholesalers Pvt Ltd and Anor* v *FBC Bank Limited and Anor HH 240/18.* Both parties referred to these cases *albeit f*or different reasons. In the said cases the courts were in agreement that r 348 (5a) does not apply to especially executable property and to foreclosure on such properties. The basic reasoning being that to find otherwise would amount to a negation or rescission of the court order declaring such property especially executable. I was not referred to any judgment of this court with a different view. Both parties were in agreement that no judgment of the Supreme Court exists on this issue. The respondent were of the view that in *Masendeke* v *Central Africa Building Society and Anor* 2003 (1) ZLR 65 (H) and *Muguti and Another* v *Tianze Tobacco Co. Pvt Ltd and Anor* 2015 (1) ZLR 561 (H) the courts granted relief to applicants whose property was specially executable therefore the rule is applicable . Clearly these matters do not assist in the resolution of this matter. In those cases the point raised for the respondent was not an issue at all. None of the parties raised it. It would be an anomaly to conclude, as I was urged to do, that the court decided on the merits of the case therefore rule 348 (5a) is applicable to specially executable property.

In opposition, it was argued that the judgments relied upon by the respondents may have been wrongly decided because the courts did not give due regard to sections 46 and 74 of the Constitution of Zimbabwe, the intention of the legislature and the words used in the rule in the interpretation of rule 348 .

Section 46 of the Constitution of Zimbabwe sets out what a court should consider in interpreting any provision. I did not hear counsel for the applicant elucidating how the interpretation of rule 348 violates the said section. One of the tenets for consideration is to promote the values and principles that underlie a democratic society based on openness, justice, human dignity equality and freedom. Section 74 of the constitution provides for freedom from arbitrary eviction as follows:

> "No person may be evicted from their home or have their home demolished, without an order of court made after considering all the relevant circumstances."

As correctly pointed out s 74 is one of the socio-economic rights provided in the Constitution. A judgment debtor faced with a sale in execution risks an eviction. However in considering this constitutional provision the contextual matrix should be considered. A sale in execution is a judicial process and no abuse of process has been alleged. The applicant was heard in court, there is no arbitrary decision in this case. In the circumstances of this case, there is nothing that violates s74 of the Constitution.

The parties' agreement was based on contract. Sanctity of contracts is a duly recognized concept in our jurisdiction see *Magodora and Others v Care International Zimbabwe SC 24 / 14.* The courts do not make contracts for parties in fact contractual autonomy is the freedom envisaged in the Constitution. CAMERON JA confirmed the sanctity of contracts in a case where the right to housing was the issue in *Brisley v Drotsky (432/2000) [2002] ZASCA 35 (28 March 2002)* at paragraphs 6 and 8 as follows,

> "What is evident is that neither the Constitution nor the value system it embodies give the courts general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith.... The constitution requires that its values be employed to achieve a careful balance between the unacceptable excesses of contractual "freedom" and securing a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity."

A mortgage bond is an agreement between a borrower and lender binding on the parties once it is registered against the title of the property. The borrower undertakes that in the event of default the lender is entitled to have the property sold in satisfaction of the outstanding debt. The courts will ordinarily sanction such process giving effect to contracts entered where there are no allegations of inappropriateness. Thus where a party alienates their right in the property to unlock value and they indeed benefit from this representation they cannot seek to approach the court to vary the terms of their contract. The agreement is entered on the strength that in the event of default the lender does not suffer a loss. As correctly pointed out in the *Meda* case (supra), financing is a way to give value to those who cannot afford to finance their endeavours and mortgages are one way to unlock value. The creditor therefore also requires the protection of the law. The value of a mortgage bond as an instrument of security is in the confidence that the law will give effect to its terms.

To my mind even taking into account the Constitutional provisions referred to, there is nothing to discredit the position already taken by this court.

The next issue for consideration is whether the intention of the legislature and the wording of the rule should be taken to mean that mortgaged property is subject rule 348 (5a).

The historical context of the rule as expounded by counsel for the respondent is said to be that the amendment to rule 348 resulted from numerous losses of dwellings to banks due to defaults wherein homes were sold. The legislature intervened to save these losses by providing two interventions. The first intervention is through the Secretary who could decide to pay through the National Housing Fund and secondly through an application to this court for suspension of the sale. The first rescue package is not relevant in this case. It is the second part that is relevant.

The background to the rule maybe correct but l was not persuaded to conclude otherwise. The requirement in rule 348 for the Sheriff should not be read beyond its ordinary meaning. The rule requires that when the Sheriff receives the notice and writ of execution by which the attachment was made, he or she shall ascertain all mortgages and real rights registered against the property including caveats lodged in respect of the property. To ascertain is to find out, this should be read to be for administrative purposes only. Indeed it was or it is envisaged that immovable property may have encumbrances. I do not read that rule to provide a judgment debtor such as the one before this court with a reprieve which effectively varies the parties' contractual obligations. The courts have interpreted the rule to exclude specially executable property. The courts have given importance to the circumstances in which the debt arose. Where the immovable property is not intrinsically tied to the debt, then a judgment debtor can approach this court in terms of rule 348 (5a).

I find no reason to depart from the settled position already made in other cases decided in this court so far.

The respondent sought costs *de bonis propiis*. I enquired the reason for such a claim. It was pointed that the applicant's legal practitioners were grossly negligent in bringing a claim on behalf of the applicant in the face of a settled position on the issue and that there was a non disclosure that the property was subject to a mortgage placing reliance on the findings in *Matamisa* v *Mutare City Council*, Mkuphe HH 257/16; *Muhaka* v *Van der Linterm* 1988 (2) ZLR 338. Costs are in the discretion of the court. A reading of the cases relied upon by the respondent shows that costs *de bonis propiis* can be awarded where the legal practitioners act inappropriately, beyond the ordinary misinterpretation of the law. In this case I find nothing inappropriate. This is because there is no Supreme Court judgment on this issue, there is nothing inappropriate in challenging decisions of this court as long as there is a legal basis.

Costs would be allowed on an ordinary scale. Since the preliminary point disposes of the matter, it becomes unnecessary to decide on the merits.

From the foregoing the following order is made.

1. The preliminary point be and is hereby upheld.
2. The application is dismissed with costs.

Mundia & Mudhara, applicant's legal practitioners
Sawyer & Mkushi, respondent's legal practitioners