GRANARY INVESTMENTS (PRIVATE) LIMITED
versus
ELKIN PIANIM

HIGH COURT OF ZIMBABWE
CHIGUMBA J
HARARE, 28 March 2013 & 5 June 2013

L Uriri, for applicant
I.E.G. Musimbe, for the respondent

Opposed application

CHIGUMBA J: This matter came to life as an urgent chamber application in terms of Order 40 Rule 348A sub-rule (5a) of the High Court Rules 1971 (stopping of sale to facilitate settlement of claims) on 25 November 2011. The relief that was being sought by Granary Investments Private Limited (herein after referred to as Granary Investments) was:

1. For the sale in execution of Lot 66A Borrowdale Estate to be suspended pending determination of an application for rescission of judgment and stay of execution in case number HC 9363/03

2. That applicant files an application for rescission of judgment and stay of execution within ten days of the date of the order.

3. That the respondent pays costs of suit.

The urgent chamber application was subsequently referred to the opposed roll in July 2012. This court is now seized with an opposed application for suspension of a sale in execution of a dwelling house. Minora Koshen, nee Omar, deposed to the founding affidavit in which she states that she is a director and shareholder of Applicant Company, Granary Investments, which is the registered owner of the residential property known as Lot 66A Borrowdale Estate, or

number 9 Kingsmead Road, Borrowdale, Harare. She averred that this property was purchased by Granary Investments as a residential family home, and that she has been residing there for the past ten years, with her husband and children.

She submitted that she was surprised and horrified to receive notification from the Deputy Sheriff, on 23 November 2011, that her home had been advertised for sale by auction. The sale was pursuant to a Notice of Attachment issued in case number HC 9363/03 on 18 February 2004. Judgment in that matter had been obtained on 27 November 2003, wherein it was ordered that:

1. Livre Investments (Private) Limited, and Granary Investments, pay to the respondent the sum of US$512 000,00 or alternatively ZW$421 888,00 together with interest thereon at the rate of 30% per annum calculated from 13 July 2002 to the date of final payment.

2. Livre Investments and Granary Investments pay the respondent's costs of suit.

Minora Koshen averred that at no time during the ten years that she has been in occupation of the property in question was she served with any court process. She submitted that the court orders were obtained in a clandestine manner, deliberately without notice to Granary Investments or to her. She contended that she has no idea why the respondent deliberately waited seven years to sell the property in execution. Finally, she submitted that the notice of attachment served on her by the Deputy Sheriff is defective; it is not the prescribed form number 43 in terms of Rule 347 sub-rule 4 of the rules of this court. The notice served on her was repealed by SI 80/2000.

The respondent raised various points *in limine* in his opposing affidavit. He averred that the property in question does not qualify to be a dwelling for purposes of R348A sub-rule (5a) because it is registered in the name of a company which is incapable of "dwelling". Respondent's view is that the provisions of Rule 348A, sub-rule (5a) must be fulfilled conjunctively. In other words, the court must satisfy itself that:

(a) R348A (5e) (a): the dwelling concerned is occupied by the execution debtor and his family and that, it is likely that if it is sold, they would suffer great hardship, or

(b) R348A (5e)(b)(i): the execution debtor has made a reasonable offer to settle the judgment debt, or

(c) R348A (5e) (b)(ii): the occupant of the dwelling concerned requires a reasonable period within which to secure alternative accommodation, or

(d) R348A (5e) (b)(iii): there is some other good ground for postponing or suspending the sale of the dwelling concerned or the eviction of its occupants.

Respondent contended that applicant ought to fulfill all sub-rules (5e) (a) and (5e) (b) (i) to (5e) (b) (iii), in order to establish entitlement to the relief that it seeks. Respondent contended further that an application for rescission of judgment does not fall within the provisions of sub-rule (5e) (b) (iii) (some other good ground), to entitle the applicant to relief in terms of Rule 348A, sub-rule (5a).

Applicant submitted that an application for suspension of a sale in execution of a dwelling house pending determination of an application for rescission of judgment and stay of execution can correctly be made in terms of Order 40 Rule 348A(5e)(b)(iii), which should be read disjunctively with (5e)(b)(i) and (5e)(b)(ii), because of the use of the word "or" between (5e)(b)(i), (5e)(b)(ii), and (5e)(b)(iii).

In its answering papers, applicant vigorously challenged the averment that a dwelling house must be owned by an individual as opposed to a company, for purposes of Order 40, Rule 348A sub-rule (5a). The Sheriff, in his report dated 17 April 2012 raised various issues of concern to him such as whether in terms of Order 40 Rule 348A sub-rule (5a) the fact that immovable property is owned by a company which is separate and distinct from its shareholder should affect the outcome of the matter. In other words, whether Order 40 Rule 348A sub-rule (5a) requires that the judgment debtor be a natural person who is capable of living in the property in question, and further, whether the provisions of the rule apply to a judgment debtor who does not make a payment proposal or arrangements for alternative accommodation.

I am persuaded by the applicant's argument, however, that the provisions of Order 40 Rule 348A sub-rule (5e)(b)(i) to (b)(iii) ought to be read disjunctively because of the use of the word "or", between (b)(i) to (b)(iii). I find that the application for rescission of judgment and stay of execution constitutes "some other good ground", for postponing or suspending the sale of the dwelling concerned. I disagree with the submission made by the respondent, that Rule 348A sub-rule (5a) envisages an execution debtor who is in fact an actual person with a family, as

opposed to a company. Part of the reason for this finding is based on the definition of a dwelling house which is set out by Rule 348A as:

> "a building or part of a building including a flat designed as a dwelling for a single family and includes the usual appurtenances and outbuildings associated with such a building".

My interpretation of this definition is that a dwelling for purposes of Rule 348A is a building capable of being occupied by a single family. There is nothing in this definition that stipulates that the building ought to be registered in the name of a natural person as opposed to a juristic person, a company. The question in my view is simply whether the building is a dwelling which is capable of housing a single family.

I find more support for this view in the wording of Rule 348A (5a) wherein it is stated that:

> "…where the dwelling that has been attached is occupied by the execution debtor or members of his family…"

In my view it is not stipulated that the execution debtor must be a natural person. Section 9 of the Companies Act [*Cap 24: 03*] states that:

> "A company shall have capacity and powers of a natural person of full capacity in so far as a body corporate is capable of exercising such powers".

It is accepted that Minora Koshen (the deponent to the founding affidavit) is a director of Granary Investments, which is a separate and distinct legal persona from its directors. It is trite that a company can only act through its directors and officers. I see no reason why the fact that the property in question is owned by a company should preclude or disqualify the company from consideration for relief in terms of Rule 348A sub-rule (5a) of the rules of this court. In my view, the rule was designed to prevent undue hardship to a judgment debtor who is in occupation of the property in question, resulting from a sale in execution. The loss of a property of considerable value, in the circumstances of this case, would constitute undue hardship to Granary Investments, and to its director and shareholder, who is in occupation. Minora Koshen is wearing two hats, that of an occupier, and that of a director of applicant. She is an occupier as an individual, and again in her capacity as a director and officer of applicant, and she is imbued with capacity to act on applicant's behalf. The point *in limine* that only a natural person is entitled to relief under Rule 348A sub-rule (5a) is hereby dismissed.

Having already found that the provisions of Rule 348A sub-rule (5e) (b) (i) to (b) (iii) ought to be read disjunctively because of the use of the word "or" which means "alternatively", in that context, I hereby dismiss the respondent's point *in limine* that the applicant is not entitled to the relief that it seeks unless or until it makes a proposal to settle the debt and proposes a date by which to secure alternative accommodation.

Another point *in limine* raised is that the chamber application ought to have been filed within ten days of 18 February 2004, the date when the property in question was placed under judicial attachment, and that, in the absence of an application for condonation of late filing of the chamber application on 25 November 2011, the current application is not properly before the court, and ought to be dismissed.

Respondent submitted that the application for condonation of late filing ought to be dismissed because applicant's explanation for the delay in filing was not reasonable, and that the application for condonation ought to have been made separately from the chamber application. Respondent referred the court to the case of *Divine Homes (Private) Limited* v *Sheriff of Zimbabwe* SC 54/03 as authority for the proposition that condonation of the non-observance of the rules is by no means a mere formality and that it is for the appellant to satisfy the court that there is sufficient cause to excuse him from compliance. Respondent also relied on the case of *Chimbadzo and Anor* v *Nkosana and Anor* HH-H-153-92 at p5 and 6 where it was held that:

> "…If the application is out of time it is in reality two separate applications, one for condonation, and the second on the merits".

I am inclined to agree with the respondent that applicant erred by filing the chamber application out of time and that its explanation for the delay is not believable or reasonable. There is need to make a separate and formal application to this court, to justify applicant's non compliance with the rules, and seeking the court's permission to proceed. The respondent's point *in limine* in regards to the question of whether the chamber application was filed out of time is hereby upheld.

Turning to the merits of the matter, the respondent averred that, one Joosbi Sams Omar, a sole shareholder of the applicant at the time that the parties entered into the agreement of sale of shares, mortgaged the property in question to respondent as security for the payment of the purchase price of shares belonging to respondent. Respondent stated that he placed a caveat,

number 66/2004 on the title deeds of the property, after judgment was obtained, and that, correspondence was exchanged in 2010 with applicant's Legal Practitioners, who sought his requirements for uplifting the caveat. This according to the respondent shows that applicant, and or its duly authorized agents, have always been aware of the existence of the judgment. Respondent averred that Minora Koshen is not being candid with the court, when she states that she only became aware of the judgment sometime in 2011.

Applicant submitted that no prejudice would be suffered by the respondent where this application to be granted, especially in light of the evidence that the execution creditor chose to wait seven years to execute the judgment debt, a sign that he is not in a hurry to recover his money. At the hearing of the matter, the court's attention was brought to an application for condonation of late filing of application for rescission of judgment and application for rescission of judgment which had been filed under case number HC 9363/03, between the same parties. Applicant admitted to also having filed the chamber application in terms of Order 40 out of time, and made an oral application for condonation of late filing of the chamber application.

Counsel for the applicant submitted that Rule 348A sub-rule (5a) clearly provides that an application must be filed within ten days of the service of the notice of attachment. He submitted that the ten day notice period only begins to run when a valid notice has been issued in terms of the rules and validly served on the occupier of the premises. SI 80/2000 brought into effect a new form number 43 which requires service on:

(a) The execution debtor; and

(b) The occupier of the premises.

It is not in dispute that Annexure 'C' to the founding affidavit is not the new form number 43 Annexure 'C' was repealed and replaced with different requirements by SI 80/2000. It is common cause that the Sheriff served the old and invalid, Form number 43 on the occupier of the property in question. I find the applicant's argument persuasive, that in the absence of service of a valid form number 43 to the applicant and to the occupier of the property in question the ten day stipulated period within which to respond, does not begin to run. It is my view that, the purported service was invalid; it failed to comply with the provisions of Rule 348A of the rules of this court.

The Sheriff must comply with the rules of this court and serve proper notice of the sale in execution on the applicant (judgment debtor) and on the occupier of the property in question Minora Koshen. After proper service of the notice, the ten day period will begin to run. As things stand, neither applicant Granary Investments, nor the occupier of the property in question has been put on the clock. It is thus not necessary that applicant apply for condonation of late filing of the chamber application. Applicant is not late.

No prejudice will be suffered by the respondent if the Sheriff is ordered to serve a fresh notice of sale in execution which complies with the rules of this court. Respondent has placed a caveat over the property and is in possession of the title deeds. On the other hand, Granary Investments stands to lose significant sums of money. Its director and shareholder who is in occupation will suffer great hardship if she is unceremoniously uprooted from her home of ten years. The equities of the matter and the balance of hardship persuade me to exercise my discretion in favor of the applicant.

The application is allowed. It is hereby ordered that;

1. The sale in execution reference number SS 194/11 of Lot 66A Borrowdale Estate, measuring 4070 square meters be and is hereby suspended, pending determination of an application for rescission of judgment and stay of execution in case number HC 9363/03.

2. That the applicant shall file an application for set-down of the application for rescission of judgment and stay of execution within ten days of the date of this order.

3. Respondent shall pay costs of suit.

Messrs Hussein Ranchhod & Company, applicant's legal practitioners
Messrs IEG Musimbe & Partners, respondent's legal practitioners