TASARA MUGUTI
and
OTTILIA KUDZAI MUGUTI
versus
TIAN ZE TOBACCO COMPANY (PVT) LTD
and
MESSENGER OF COURT

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 8 April 2015

Urgent chamber application

E Gijima, for the applicants
Ms *T Chiguvare*, for the 1st respondent
2nd respondent in default

MATHONSI J: For reasons which are not apparent from the papers placed before me, the first respondent sued the first applicant in the magistrate's court of Harare in case number 19780/13 for payment of the sum of $73 577.93 together with interest of 5% per annum and costs of suit on the scale of legal practitioner and client and obtained judgement on 7 November 2013. I say the reasons are not apparent because a claim of that magnitude would ordinarily be made in this court, the magistrates court's civil jurisdiction being currently limited to only $10 000.00.

Subsequently, a writ of execution against immovable property, being Stand 8 Good Hope Township of Lot 7 of Good Hope, Westgate Harare, was issued on 14 November 2014 after the first respondent had failed to locate sufficient movable assets to satisfy the debt. That property was then attached in execution by the second respondent in terms of Order 26 r 8 of the Magistrates Court (Civil) Rules, 1980. I say that because the second respondent, sought authority from the resident magistrate for the area to sell the property, presumably acting in terms of Order 26 r 8(2) of that court's rules which provides that whenever a dwelling is attached, the messenger shall forthwith send written notification to the magistrate and then take no further steps.

The magistrate sent written notification of the attachment to the secretary in the Ministry of Local Government, Public Works and National Housing who did not bother to respond. On 19 February 2015 the magistrate wrote to the second respondent in the following:

> "Reference is made to my letter to the Secretary dated 2 January 2015. The Secretary has not respondent(*sic*) to the letter. In terms of O 26 r 8, you are hereby directed to proceed with the sale of four attached properties. Be guided accordingly.
>
> B Pabwe
> Resident Magistrate
> Harare Civil Court"

After receiving those instructions from the magistrate, the second respondent, who I must stress is an officer of that court charged with the execution of writs coming out of that court, proceeded to advertise the property for sale by public auction on 10 April 2015. It is that advertisement which has jolted the applicants into action and triggered the filing of this urgent application wherein they seek the following relief:

> "TERMS OF THE FINAL ORDER SOUGHT
> That you show cause to this Honourable Court why a final order should not be made in the following terms:
> (a) The sale of Stand No 8 Goodhope Township of Lot 7 of Goodhope be and is hereby suspended on condition that the applicant pays the judgement in three equal monthly instalments of USD 22 054.00 beginning on the 1st of July 2015 until the debt is settled and if applicant defaults on any one payment execution will proceed.
> (b) Applicants pay the costs.
>
> INTERIM RELIEF
> It is hereby ordered that pending the confirmation of this matter, the applicant is granted the following relief:-
> 1. The sale of stand No 8 Goodhope Township of Lot 7 of Goodhope be and is hereby suspended on condition that the applicant pays an amount of USD 22 054.00 on or before the first day of each month provided that the first such payment shall commence on or before the 1st of July 2015. In the event that the applicants defaults in respect of any one payment the sale in execution shall proceed.
> 2. The 2nd respondent shall suspend any action towards the sale in execution of the property referred to in paragraph 1 hereof.
> 3. A copy of this order or shall be served on the 1st and 2nd respondent's legal practitioners."

Never mind that the interim relief is the same as the substantive relief; (*Kuvarega* v *Registrar General & Anor* 1998 (1) ZLR 188) but clearly this is an application made in terms of r 348A of the High Court of Zimbabwe Rules, 1971 for the stopping of a sale in execution to facilitate settlement of a claim. Ordinarily there would be nothing wrong with it except that it has been made in the wrong court.

Rule 348 A deals with stopping sales in execution conducted by the Sheriff of the

High Court in pursuance of a writ issued in terms of r 346. In terms of r 348 A (1) where a dwelling has been attached the Sheriff is required to forthwith send the Secretary of the Ministry responsible for the administration of the Housing and Building Act [*Chapter 22:07*] notification of the attachment. Subrule (4) allows the Secretary to approach this court by chamber application for an order staying the sale. A judge will issue a provisional order staying the sale if satisfied that there is a reasonable probability that the execution creditor's claim will be satisfied or settled from the National Housing Fund.

In terms of subrule (5a) the execution debtor himself is entitled to make the application where the dwelling is occupied by the execution debtor or members of his family. This court ruled in *Masendeke* v *Central Africa Building Society and Anor* 2003 (1) ZLR 65 (H) 70 E that in terms of r 348 A (6) any such application shall be treated as urgent as no valid argument can be advanced against the urgent treatment of an application in terms of r 348 A.

A writ issued in terms of r 346 is in Form No. 36 of the High Court Rules and is issued following the grant of an order by this court and cannot possibly relate to a writ issued following the grant of an order by a magistrate. The procedure relating to attachment of immovable property in the magistrates court is governed by Order 26 r 8 of the rules of that court. It provides:

> "8. Attachment of dwelling
> (1) In this rule-
> 'dwelling' means a building or part of a building, including a flat, designed as a dwelling for a single family and includes the usual appurtenances and out buildings associated with such a building;
>
> 'Secretary' means the Secretary of the Ministry responsible for the administration of the Housing and Building Act [*Chapter 22:07*].
>
> (2) Whenever a dwelling is attached under rule 7, the messenger shall forthwith send the provincial magistrate or magistrate of the court from which the warrant of execution was issued, as the case may be, written notification that the dwelling has been attached and is to be sold in execution, and the messenger shall take no further steps in regard to the sale of the dwelling for a period of forty days, pending notification by the magistrate concerned in terms of subrule (4).
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> (3) Upon receiving notification of the attachment of a dwelling in terms of subrule (2) the magistrate shall forthwith send the Secretary –
>
> (a) written notification that the dwelling has been attached under this order and is to be sold in execution; and
>
> (b) copies of all documents and particulars relating to its attachment.
>
> (4) If, within 30 days after being sent notification under subrule (3), the secretary notifies

the magistrate in writing that he proposes to satisfy or settle the judgment creditor's claim from the National Housing Fund established by section 14 of the Housing and Building Act [*Chapter 22:07*], the magistrate shall, without undue delay, notify the messenger in writing.

(5) On receiving notification under subrule (4), the messenger shall –

(a) inform the judgment creditor of the Secretary's proposal; and
(b) take no further steps in regard to the sale of the dwelling concerned until a period of sixty days has elapsed from the date on which he received such notification.

(6) For the purpose of calculating any time- limit under this order, any period during which the messenger is required by subule (2) or (5) to take steps in regard to the sale of any dwelling shall be disregarded".

The provisions of Order 26 r (8) are similar to those of r 348 of the High Court Rules. They were meant to provide sanctuary to debtors when attachment of dwelling houses became a serious national problem which was rendering a lot of people homeless. The legislature intervened and a fund to cater for such problem was set up. The High Court rules went further in r 348A (5a) to provide a remedy to a judgment debtor who has made a reasonable offer to pay, other than placing reliance on the Housing Fund administered by the secretary, to approach the court to secure a stay of the sale on condition of the offer.

Unfortunately there is no similar remedy in the Magistrates Court Rules. Even if it were there, it would be available for enforcement in that court. What the present applicants have done is to seek to stay proceedings being pursued by another court, which has complete enforcement mechanisms for its orders and rules that provide for the procedure to be followed, in this court employing rules of this court applying to orders issued by this court. In my view that is incompetent. You cannot mix oil with water.

Mr *Gijima* who appeared for the applicants conceded that the application seeks to stay execution which has been levied in terms of the Magistrates Court Rules. He further conceded that it seeks to apply High Court Rules on a matter governed by the Magistrates Court Rules and that it is therefore out of order. He however submitted that I must indulge the applicants because there is no provision in the Magistrate Court Act [*Chapter 7:10*] and the Magistrates Court Rules allowing for such an application to be made. For that reason, the applicants had no option but to come to this court.

This is a matter in which no amount of benevolence or indulgence can save the applicants. I can simply not entertain an application which has been made in the wrong court

and seeks to apply rules not applicable to the case.

The first respondent opposed the application on grounds other than the issue of an approach made to the wrong court. It stated in the opposing affidavit of Loveness Ngwanga its legal counsel, that the property attached is not a family dwelling as the applicants and their family live at Dunine Farm in Beatrice and that they had in fact consented to the sale of the dwelling by private treaty as far back as January 2014. It produced evidence in the form of the messenger of court's returns showing the attachment of their household furniture at Dunine Farm Beatrice.

In addition to that, the first respondent attached proof that the applicants also own a house in Waterfalls Harare. It further asserted that the applicants have previously made endless undertakings and proposals to settle the debt which have not been honoured and there is nothing to show that the present offer will be different.

I do not consider it necessary to decide the merits of the application having taken the view that the applicants are in the wrong court. I must say however that in light of the evidence produced in opposition, the applicants would have had serious difficulties sustaining a case even on the merits.

In the result, the application is hereby dismissed with costs.

Messrs Mapaya and Partners, applicants' legal practitioners
Muvirimi Law Chambers, 1st respondent's legal practitioners