BRINWORTH SERVICES (PVT) LTD
versus
INFRASTRUCTURE DEVELOPMENT BANK OF ZIMBABWE
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
DUBE J
HARARE, 25 September & 17 October 2018

Urgent Chamber application

E Mubaiwa, for the applicant
O Mtero, for the 1st respondent
No appearance, for the 2nd respondent

DUBE J: The applicant seeks an order postponing or suspending the sale of a dwelling in terms of s 348 (A) 5 (a) of the High Court Rules, 1971, the Rules.

The brief background to this matter is as follows. The applicant is Brinworth (Pvt) Ltd, hereinafter referred to as the company. The respondent obtained a judgment against the applicant together with some of its co -defendants. On 5 September, the respondent caused the attachment of Stand 3404 Salisbury Township of Salisbury Township Lands belonging to the applicant. The applicant seeks an order postponing and or suspending a sale of the property on the basis that the dwelling is used as offices by the applicant and as a dwelling for Colleen Ruth Zimbeva a director of the applicant. Colleen Ruth Zimbeva as deposed to the founding affidavit which forms the basis of this application on behalf of the applicant company. She avers that she resides in the dwelling with two named relatives. The dwelling is her only home and the intended sale will render her and her family homeless and destitute. The applicant makes an offer to settle the debt in four instalments. She asserts that the proposals made to clear the debt are reasonable.

The second respondent did not oppose the application .The first respondent is opposed to the relief sought. It took a point *in limine.* It submitted as follows;

The application is improperly before the court. An application for suspension and or postponement of sale of a dwelling brought in terms of r 348 (A) 5 (a) can only is brought by

the execution debtor and or members of his family. Rule 348 (A) 5 (a) was designed to apply to execution debtors who are natural persons and their families who are in occupation of a dwelling. In this case the dwelling is owned by an artificial person which cannot take physical occupation of a dwelling neither does it have a family. On the merits, it submitted that the parties entered into a deed of settlement on 11 August 2017 and that the debt should have been settled by December 2017. A year later the applicant has paid nothing .It contended that no basis has been shown for suspension of the sale. The respondent submitted that the provisions of r 348 A 5 (b) does not apply to mortgaged property and hence the application is improperly before the court.

Rule 348 (A) 5 (a) reads as follows,

> "Without derogation from subrules (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 service upon him of the notice in terms of r 347, make a chamber application in accordance with subrule (5b) for the postponement or suspension of-
> (a) the sale of the dwelling concerned
> (b) the eviction of its occupants"

In the year 2000, the legislature introduced r 348 A into the High Court Rules by (Amendment) Rules 2000 (No 35) (S I 80/2000). The legislative intend in introducing r 348A 5 (a) was to provide relief to debtors where the dwelling sought to be attached is occupied by the execution debtor or members of his family by allowing the making of a chamber application for the postponement or suspension of the sale or their eviction. The effect of the rule is to facilitate payment of the debt and in the case of a debtor who cannot pay, an opportunity to find alternative accommodation by postponing and suspending the sale of the dwelling. As a result of this development, families get protection and are not rendered homeless. The following requirements for an application under r 348A (5a) emerge from this discussion,

1. The dwelling must have been attached
2. The dwelling must have been occupied by the execution debtor or members of his family.
3. The execution debtor or members of his family must make a chamber application for postponement or suspension,

a) of the sale of the dwelling concerned

b) or the eviction of its occupants.

The court had occasion to consider the applicability of this section in *Electroforce Wholesalers (Pvt) Ltd and Anor* v *FBC Bank* HH 14/15. This case involved a director of a company who resided in a company house with his family. When the house was about to be sold, his plea was that he resided in the company house and did not have anywhere else to go. The court defined the meaning of the word ''dwelling '' within the context of the

rule. The court held that r 348A 5 (a) is not available to body corporates. Further that it is designed for individuals in occupation of attached dwellings and their family members. The court held that the applicant had no substantial interest in the dwelling and dismissed the application. I agree with the views expressed by the court.

In *Granary Investments (Pvt) Ltd v Elkim Pianim HH 180/13* the court held a contrary view. The court allowed an application under r 348A 5 (a) where a director and shareholder of the applicant company occupied a dwelling bought and owned by the company. The company had bought the house as a residential home and its director had resided there for many years with her family. The execution debtor being the company had brought the application. The court examined the meaning of the word ‘’dwelling’’ as used in the rule and remarked as follows;

> “My interpretation of this definition is that a dwelling for purposes of r 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’’

The court concluded that r 348A 5 (a) applies to corporates for the reason that the rule does not stipulate that the execution debtor must be a natural person. The court disagreed that r 348 A 5 (a) envisages an execution debtor who is in fact a natural person with a family as opposed to a company. The court seems to have been swayed by the fact that the occupant of the dwelling was the *alter ego* of the company.

It is pertinent to examine closely the provisions at play. A dwelling is defined in the rule as follows,

‘’ (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 outbuildings associated with such a building.’’

A dwelling is defined as a building designed as a dwelling for a single family. Rule 348A 5 (a) applies where the execution debtor is a natural person, owns and occupies the dwelling concerned with his family. It appears that it is only these two categories of persons that can bring this application. The point of departure with the *Granary Investments case* is the viewpoint that there is nothing in this definition that stipulates that the dwelling ought to be registered in the name of a natural person as opposed to a juristic person, a company. This controversy is disposed of by looking at the mischief of the rule. In *Masendeke v Central Africa Building Society and Anor* 2003 (1) ZLR 65 (H) CHINHENGO J discussed the intention of the legislature in introducing r 348A and expressed the following sentiments,

’’ The attachment by creditors of dwellings became such a pernicious problem that the Legislature stepped in to provide some relief to debtors and their families who are in distress because their only dwelling is to be attached and sold in execution. Rule 348 A was inserted into the High Court Rules by the High Court (Amendment) Rules 2000 (No 35) (S I 80/2000). In terms thereof if a dwelling has

been attached the Sheriff is required, upon receiving documents relating to the attachment, to send forthwith to the Secretary of the Ministry responsible for the administration of the Housing and Building Act (Chapter 22:07) a written notice that the dwelling has been attached. The Sheriff is also enjoined not to take any further steps in regard to the sale of the dwelling or the eviction of the occupants for a period of ten days. Within this ten day period the Secretary may notify the Sheriff that he intends to satisfy the execution creditor's claim from the National Housing Fund established by s 14 of the Housing and Building Act. ‘’

The court formulated the view that the rule was introduced to bail out families in financial distress when an only dwelling is being sold in execution. The rule is applicable where the dwelling is been occupied by the execution debtor or members of his family. The Secretary for Housing was roped in as a protective measure to bail out families by paying their debts on their behalf. Because the rule speaks to families only, the conclusion is inescapable. . The specific mention of the family in the rule excludes a company. The rule specifically applies to families who occupy the dwelling who are in debt and are on the verge of the dwelling being sold. It is envisaged that the dwelling belongs to the execution debtor, who must be shown to have failed to pay a debt and he must be in occupation of the dwelling together with his family. If the applicant is unable to show that he is the execution debtor, then he cannot bring an application under this rule.

It was never intended that the rule be employed to protect companies as a companies have no family as in the case of natural persons and cannot take physical occupation of a dwelling. The rule does not make any reference to a company and or its employees. The rule may not be invoked where company directors and their families use company houses and where they are not in themselves the execution debtors. The rule does not apply where the dwelling is used as offices by any occupant. If the legislature had intended that companies be protected under this rule, it would have made specific reference to companies in the rule. It is only the execution debtor and his family that can make use of this rule where they are in occupation of the dwelling. It was envisaged that the chamber application is made by the execution debtor. A Rule 348 A (5 a) application cannot be brought by a person who is not in occupation of the dwelling on behalf of another person. The rule does not apply where the building is used for any other purpose other than as a dwelling for a family.

In this case, the dwelling is owned by the applicant company which is the execution debtor. It has brought the application and yet it is not a natural person. The applicant uses the building as its offices and hence as far as the applicant is concerned, it cannot qualify as a dwelling in terms of the rule. The applicant is also not in occupation of the dwelling. The occupant of the building is the deponent to the founding affidavit. She is a director of the applicant and is not

the execution debtor. She has not brought any application and is not before the court. The mere fact of deposing to a founding affidavit to an application does not make one a part of the application and give rise to an entitlement to an order. If the deponent to the founding affidavit had wanted to be part of the application, she ought to have been cited as part of the application. She and her family are not before the court and are not entitled to any order. As Colleen Ruth Zimbeva is not the owner of the dwelling nor is she the execution debtor. She has no direct and substantial interest in the dwelling and for that reason cannot invoke the provisions of r 348A 5 (a) through the applicant company. The deponent to the founding affidavit cannot benefit from this rule. Rule 348A 5 (a) is not applicable to the circumstances of this case. The point *in limine* succeeds.

The respondent asked for costs against Mr Takawira who prepared this application, *de bonis propriis.* Mr *Mtero* contended that the application ought not to have been brought and is frivolous and vexatious and amounts to an abuse of process for the reason that the law is clear that only a natural person can bring this application. The respondent contended that Mr Takawira ought to know the law which law is clear and that he ought have known better and not brought this application .The applicant has offered costs on a higher scale. Costs are always in the discretion of the court. The court has considered that there are two conflicting judgments over the applicability of this rule. The law is not yet settled with no decision yet from the upper court on the contentious issue. I am unable to find that the applicant's legal practitioner abused court process.

Consequently,

(a) The application is dismissed

(b) The applicants shall pay the costs of this application on a higher scale

Matuso, Taruvinga & Mhiribidi, applicant's legal practitioners
Sawyer & Mkushi, 1st Respondent's Legal Practitioners