HH-240-25

HCHC 163/25

SAME SAME

And

LINDA SAME

Versus

Z.B BANK LIMITED

And

THE SHERIFF FOR ZIMBABWE N.O

High Court of Zimbabwe

Commercial Division

CHIRAWU-MUGOMBA J

Harare, 28 March, , 2, 3 April 2025

Ist applicant, in person and on behalf of the 2nd applicant through a power-of-attorney

O. Mutero, for the 1st respondent

No appearance for the 2nd respondent

CHAMBER APPLICATION FOR SUSPENSION OF SALE IN EXECUTION IN TERMS OF R71(14)(a) OF THE HIGH COURT RULES, 2021.

CHIRAWU MUGOMBA J: This application was placed before me as one for the suspension of a sale in execution in terms of R71(14) (a) of the High Court Rules of 2021. It is trite that such an application is treated as an urgent matter. Upon receipt, I caused the matter to be set down for the 28th of March 2024. However, by the date of set down, the applicants' legal practitioners had renounced agency. The first applicant at the hearing made an application for a postponement of the matter on the grounds that they no longer had legal representation and required time to consider the notice of opposition filed by the first respondent. Although Mr. *Mutero* opposed this application, in the interests of justice, I granted the application and postponed the hearing to the 1st of April 2025 at 10:00am.

The background to this matter is that on the 30th day of September 2024 at a case management meeting under HCHC495/24, an order was obtained by consent with all parties fully represented by legal practitioners. The first applicant was also present on his own behalf and that of the second applicant. Subsequently, an order by consent was obtained. After accounting for the money that the applicant paid after the summons were issued, a consent judgment was issued in favour of the first respondent for US$247 735.14, interest at the rate of 18.5% annually, and costs of suit in the agreed upon amount of US$14 000.00. A writ of execution was as a result issued against the applicants' immovable property being certain piece of land situate in the district of Salisbury being the Remainder of subdivision 33 of Helensvale measuring 3886 square metres held under deed of transfer no. 6216/18 dated October 18 issued in favour of the first applicant.

In the application for setting aside of the sale in execution, the applicants made the following averments. The property is their principal dwelling house which they occupy together with their three children. The second applicant is currently in the Republic of South Africa where she is receiving medical attention. Evicting them and their children will render them homeless. The children are all still minors whose right ought to be protected. Section 28 of the Constitution protects the right to shelter especially in instances where a reasonable offer to settle the debt has been made. The applicants are victims of an unforeseen economic down turn. Despite this, an immovable property situate in Marimba that the applicants have an interest in has been sold. The applicants propose that they use part of the sale proceeds to settle the debt with the first respondent.

In the notice of opposition, the first respondent raised a preliminary issue relating to suspension of execution for sales of properties that are subject to a mortgage bond. Further that the new 2021 High Court rules, specifically R71(14) – R71(17) are a replica of the 1971 repealed rules specifically R348(A) (5a) – 348A(5c). On the merits, the first respondent stated that there had been engagements with the first applicant to sell the property by private treaty but these fell through. In addition, the sale of the Marimba property was unknown to them but in any event, the proposed sums do not settle the debt which stands at USD 271 223 and costs. The proposed sale will not cause any hardships at all.

The applicants proceeded to file an answering affidavit that mirror the first applicant's submissions at the hearing of the 1st of April 2025. At that hearing, when I made an inquiry as to whether they were any preliminary issues, the first applicant immediately

launched an application for my recusal. He submitted that he was not comfortable with me hearing the application because of comments I made during the case management of HCHC495/24. He was concerned that he might not obtain justice if I was the presiding judge.

Mr. *Mutero,* opposed this application. He characterised it as one that is frivolous and vexatious. In HCHC 495/24, the applicants were represented by legal counsel and nothing was said about the Judge descending into the arena. He submitted that the parties consented on the order and this had nothing to do with the Judge.

In response, the 1st applicant submitted that he was not happy with his erstwhile counsel and further made a claim that they were 'afraid' of the Judge. He submitted that it was his constitutional right to have the matter determined by another Judge.

In an exchange with the Judge, the first applicant confirmed that he attended the case management meeting under HCHC495/24 on the 30th of September 2024; that he was represented by a legal -practitioners and that he had consented to the order being granted.

In an *ex- tempore* judgment, I dismissed the application for my recusal. This issue has caused many a headache for Judges but regard being had to judicial precedent, the overarching issue is that of bias, actual or perceived. In, *National Social Security Authority vs. Housing Corporation Zimbabwe (pvt) Ltd*, SC-21-24, the court dealt with this issue as follows,

> A party, before a court or tribunal, which alleges impartiality or bias against a judicial officer bears the onus to prove such impartiality or bias on a balance of probabilities which is the standard of proof in all civil matters (see *Zimbabwe Electricity Supply Authority v Dera* 1998 (1) ZLR 500 (SC)). A litigant making an application for recusal must therefore satisfy the requirements for such application. MAKARAU JCC in *Mawere & Ors v Mupasiri & Ors* CCZ 2/22 at p. 5-6 had occasion to discuss the law on recusal. The learned judge held that:
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> > "The law of recusal is settled. It is the law against bias. Quite apart from the constitutional guarantees in favour of the right to a fair trial before an independent and impartial court provided for in s 69 of the Constitution, the common law practised in this jurisdiction has long recognised and applied the law against bias. The constitutional provision may be viewed to have been enacted in abundance of caution so as to locate the law against bias in the supreme law of the land. It is an additional safeguard to that which the common law has long provided. The law against bias seeks to balance two equal positions at law. These are the duty of every judge to sit and determine all matters allocated to him or her unless, in the interests of justice, recusal is necessary…. Recusal is therefore not to be had for the mere asking. It has to be validly taken."

Firstly, the order in HCHC495/24 was obtained by consent and the applicants were fully represented. My role was as a Judge to case manage the matter in terms of the High Court (Commercial Division) Rules of 2020. Despite what the first applicant termed my comments which made him feel uncomfortable, and while being legally represented, he consented to the

order. I have previously explained extensively the role of a Judge in case management – see *Centenary Tobacco (pvt) Ltd vs. Central Mechanical Equipment Department (pvt) Ltd,* HH-591-24.

In that judgment I emphasised that litigants are not forced to agree to a settlement. There is always an option to go to trial. Furthermore, the causes of action are very different. In HCHC495/24, the matter involved the payment of money from the applicants and in *casu* it is one to suspend a sale in execution. The applicants could have opted to go for trial but they did not. I never heard oral evidence upon which I could formulate an opinion or bias because the order was obtained by consent. Furthermore, the order in HCHC495/24 is extant and it is the basis upon which the first respondent seeks execution. The application for my recusal, in my view does not meet the standards enunciated by the courts.

On the merits, Mr. *Mutero* addressed the court in support of the preliminary issue raised in the first respondent's opposing affidavit. He submitted that the 2021 rules, that is R71(14)(a) is a replica of the old 1971 High Court rules as amended specifically R348(5)(a). Therefore the interpretation given by the courts under the old rules applies with equal measure to the new rules. The Supreme Court has already concluded that where there is a mortgage bond, the rules on suspension of a sale in execution do not apply. This is because the applicant would have consented already under a mortgage bond which is a different contract. The court cannot therefore vary this. The applicants cannot hide behind Chapter 4 of the Constitution because in *Tindwa vs. ZB Bank Limited, SC-106-20,* the Supreme Court commented on the applicability of s74. The execution is not arbitrary because a court order has already been obtained. He prayed for an order of costs on a higher scale because the applicants had already been engaged with by their erstwhile legal practitioners. This was after the first respondent's legal practitioners had alerted them on the *Tindwa* judgment. The response and subsequent renunciation of agency suggested that the legal practitioners had conceded the position adopted in that matter. When a party therefore insists on proceeding, it is akin to an abuse of court process. This is more so when regard is had to R71(17) that once such an application is filed, the second respondent halts all execution processes. Reference was made to *African Banking Corporation t/a Banc ABC vs. P.W Motors (pvt) Ltd and ors,* HH-123-13 on costs. Also *Selex E.S p.A vs State Procurement Board and ors,* SC-45-16 on issue of costs. The submission was that an errant litigant must be saddled with an order of costs on a higher scale.

In response, the 1st applicant submitted as follows. He made reference to the form from the court as appears on page 24 of the record. That form gave him directions on how to proceed especially regard being had to the fact that the property is a dwelling house. The applicants were therefore not wrong as they were merely following what they had been directed to do. The Supreme Court judgment that was referred to his erstwhile legal practitioners specifically addresses an instance where a property has been declared specially executable. In *casu*, there was no such declaration and hence the *ratio* in that matter does not apply. The 1971 rules are no longer applicable since in the new rules the issue of a mortgaged property was not specifically provided for. The right to shelter is paramount. The first respondent has not been candid as there have been discussions between the parties especially on the Marimba property. A reasonable proposal had been made to the first respondent to settle the debt. A sum of USD10, 000 had already been paid to show the seriousness of the applicants.

In terms of R71(3)(d) of the High Court Rules of 2021, if an immovable property is attached and is occupied by a person other than the owner, notice of attachment shall be served on the occupier. The form referred to by the first applicant is issued in terms of that order. The form does indeed state a plethora of rights that an aggrieved party can pursue. The immediate question however is this- do those rights apply to the applicants? This addresses the preliminary issue raised by the first respondent that a property subject to a mortgage is not protected.

Now, let me compare the old 1971 rules and the 2021 rules of such sales in execution.

Order 40 r 348A(5a) of the High Court Rules, 1971 provided as follows:

> "Without derogation from subrules (3) and (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."

Subrule (5e) provides the following in relation to what is required for an application in terms of subrule (5a) to succeed:

> "If, on the hearing of an application in terms of subrule (5a), the judge is satisfied –
> (a) that the dwelling concerned is occupied by the execution debtor or his family and it is likely that he or they will suffer great hardship if the dwelling is sold or they are evicted from it, as the case may be; and
> (b) that –
> (i) the execution debtor has made a reasonable offer to settle the judgment debt; or
> (ii) the occupants of the dwelling concerned require a reasonable period in which to find other accommodation; or

(iii) there is some other good ground for postponing or suspending the sale of the dwelling concerned or the eviction of its occupants, as the case may be;
the judge may order the postponement or suspension of the sale of the dwelling concerned or the eviction of its occupants, subject to such terms and conditions as he may specify."

On the other hand, r 71(14) of the 2021, High Court Rules, reads:

"Without derogation from sub rule (11) or (13), 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 or her, of the notice in terms of sub rule (3) make a chamber application in accordance with sub rule 15 for the postponement or suspension of
(a) the sale of the dwelling concerned, or
(b) the eviction of the occupants."

In addition, r 71(18) provides:

"If on the hearing of an application in terms of rule (14), the judge is satisfied that:
(a) The dwelling concerned is occupied by the judgment debtor or his family, and it is likely that he or she or they will suffer great hardship if the dwelling is sold or they are evicted from it as the case may be; or
(b)
i. The execution debtor has made a reasonable offer to settle the judgment debt; or
ii. The occupants of the dwelling concerned require a reasonable period in which to find other accommodation; or
iii. Or there are some other ground for postponing or suspending the sale of a dwelling concerned or the eviction of its occupants, as the case may be."
the judge may order the postponement or suspension of the sale of the dwelling concerned or the eviction of its occupants, subject to such terms and conditions as he may specify."

It becomes apparent that the rules are similarly worded. What becomes important is how the courts have interpreted those rules. In the *Tindwa* matter, the Supreme Court dealt extensively with this issue and in my view, this equally applies to applications brought under R71(14) (a). The court emphatically stated that R348(5a) was brought in to protect genuine debtors who were losing homes.

The court held that,

" If one were to interpret r348(5a) to mean that an execution debtor who has surrendered a dwelling to secure a debt and allowed registration of a mortgage bond on it, can bring an application to suspend or stay the sale of the mortgaged dwelling, that would lead to an absurdity certainly not intended by the makers of the rule. In my view, such a construction would render nugatory the whole essence of mortgage protection. Apart from that, economic activity will be stifled."

The court also found that there is nothing arbitrary about execution against a mortgaged property and cited s74 of the Constitution. Further, that there is due process- see *Meda vs Homelink (pvt) Ltd and anor,* 2011(2)ZLR 516(H).

This interpretation applies with equal force to an application brought in terms of R71(14)(a). It is not in dispute that the attached property is subject to a mortgage bond. Accordingly, the

first respondent's preliminary point is upheld. Having made that finding, it is not necessary for me to go into the merits of the application.

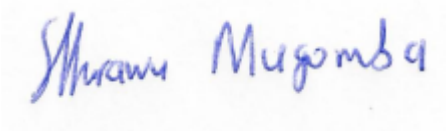
On costs, Mr *Mutero* submitted that the applicants should be made to pay costs on a hinger scale. I would hesitate to award such given the fact that applicants lost legal representation and perhaps might not have appreciated the legal implications relating to mortgaged properties. They may also have genuinely been misled by the notice on form no. 42.

DISPOSITION

The attached property being subject to a mortgage bond, the law being very clear that a sale in execution cannot be suspended in such instance, the application has no merit and ought to be dismissed.

It is ordered that:-

1. The application be and is hereby dismissed.
2. The applicants shall pay costs on the ordinary scale.



Sawyer and Mkushi, first respondent's legal practitioners.