

ELECTROFORCE WHOLESALERS (PRIVATE) LIMITED
and
CHAMUNORWA MAWUNGANIDZE
versus
FBC BANK LIMITED

HIGH COURT OF ZIMBABWE
MAKONI J
HARARE, 24 July 2014

Opposed Matter

C. Chinyama, for the Applicants
N.R. Mutasa, for the respondent

MAKONI J: The applicants brought the present proceedings in terms of r 348A (5a) of the High Court Civil Rules 1979 (The Rules). They seek an order suspending the sale in execution of Stand Number 834 Adylin Township of Lot 2A Bluffhill measuring 1211 square meters held by the second applicant under Title Deed Number 549/07 (the property). They seek a suspension for a period of 12 months from the date of the order with a condition that within that period, the first applicant clears its indebtedness to the first respondent in full. They also seek an order of costs against the respondent.

The brief background to the matter is that the respondent and in case number HC 4944/12 obtained a judgment against the applicants on 10 October 2012. On 11 March 2013 the applicants were served with a Notice of Attachment of movable and immovable property. On 19 March 2013, the applicant filed the present proceedings.

The applicants seek the order on the basis that the second applicant and his family resides at the property which is the subject of execution. He does not have any other house. If the property is sold, undue hardship and irreparable harm will be suffered by the second applicant and his family. He will not be in a position to buy some other house. He further avers that the first applicant had made significant inroads towards extinguishing the debt and it has the capacity to pay off the amount outstanding. The first applicant is owed substantial

amounts by several debtors chief among them the ZRP who owes it USD 1 200 000.00. They were therefore praying to be given a period of 12 months within which to clear the debt.

The application is opposed and the respondent raised two points *in limine*, viz *locus standi* of the first applicant and that the property was bonded in favour of the respondent and had been specially declared executable by an order of court.

Locus standi

It was submitted on behalf of the respondent that the first applicant lacks *the locus standi* to bring an application in terms of r 348 A (5a) and (5b) as it is a body corporate, does not own the property in issue and was not in occupation of attached property.

The point was conceded by Mr *Chinyama*. The concession, in my view, is proper. Rule 5(a) provides:-

“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 5(b) for the postponement or suspension of –

- (a) the sale of the dwelling concerned; or
- (b) the eviction of its occupants (my own underlining)

In r 348A(1) dwelling is defined as “ a building or part of a building including a flat, designed as a dwelling for a single family” If r 348A (5a) is read together with the meaning of dwelling in r 348A, it will be clear that r 348 A (5a) is not available to body corporates. The rule is designed for individuals who would be in occupation of the attached property or whose family members are in occupation of the attached property. The first applicant therefore, has no substantial interest in the property and is non-suited in bringing the present proceeding.

Mortgaged property and are declared specially executable by an order of court.

It was submitted on behalf of the respondent that r 348A does not apply to sale of immovable property specially declared executable by an order of a competent court. Mr *Mutasa* referred to the case of *Priscilla Moda v Homelink (Pvt) Ltd and Anor* HB 195/11 at 13.

Mr *Chinyama* submitted that the rules in question does not specifically exclude such properties.

It is common cause that the second applicant's immovable property was hypothecated to the respondent as security for due payment of the amounts loaned to the first applicant. It is also common cause that the applicants failed to repay the loan resulting in the respondent instituting foreclosure proceedings. The respondent sought an order that the property be specially executable and the applicants did not contest the grant of such relief. The court duly granted the order sought.

In the Meda case (*supra*), NDOU J (as he then was) dealt with the case which is almost on all fours with the present matter. At p 3 of the cyclostyled judgment he stated the following:-

“In my humble view, execution of mortgaged property is different from the property being referred to in order 40 Rule 348A. The difference is that we dealing here with foreclosure proceedings. In foreclosure proceeding, the security which the mortgager pledged is the one that is sold after institution of judicial proceedings for the amount of the debt, where after a writ of execution against the property is issued. In one word, if the mortgagor does not pay the capital when due, or if he commits any breach of the conditions of the contract entitling the mortgage to fore close then the latter is entitled to have the secured property sold and obtain the amount of his debt from the proceeding the sale – Benson v Hirschlorin 1936 NPD 277. A mortgagor cannot claim a stay of execution in terms of R 348A (*supra*).”

Further down in the judgment NDOU J has this to say regarding property declared specially executable by an order of the court.

“Having made an order directing the sale of the house, applicant, cannot now bring an application in terms of Rule 348A (5a) stopping the sale on the basis she has made a reasonable offer. She is thus precluded from doing so as allowing the application would have the effect of rescinding, through the back door, the order that has been made by a competent court. By declaring the house “specially executable” the court has given the 1st respondent the right to sell the house in execution to recover what is owed to it. **The mortgagor's first and foremost duty is to pay the debt secured and the mortgage's corresponding right is to “call up” or “foreclose” the bond. The significance of mortgage bonds and all other forms of hypothecation lies in the fact that they provide the creditor with a “real security” for the payment of his claim for if the debtor is unable to raise the necessary funds to pay the debt which is secured, the creditor is entitled to demand that the property, that being the thing which is subject matter of his security, be sold and that the proceeds of such sale are used for the satisfaction of his claim** – The Law of Property (3rd Ed) Silberberg and Schoeman at 419 and 429.” (own emphasis)

He concluded by stating the following:-

“On the basis of the aforesaid, it is respectfully submitted that Rule 348A is not applicable to foreclosure proceedings and to the sale of immovable property which was been declared to be specially executable as in this case. Accordingly, the present application must be dismissed with costs on a Legal Practitioner and client scale. As averred in the foreclosure proceedings filed it was a term of the loan agreement and Deed of Hypothecation that Applicants would pay Respondents legal costs on a legal practitioner and client scale. See **Scotfin Ltd v Ngomahuru (Pvt) Ltd 1997 (2) ZLR 567.**”

I associate fully with the views expressed by NDOU J in *Meda (supra)*. *In casu*, the second applicant mortgaged to the respondent the property in question to secure a debt advanced to the first applicant. When the first applicant defaulted, the respondent instituted foreclosure proceedings wherein it sought an order to have the property specially executable. The applicants did not contest the granting of such a relief. They only sprung to action when the property was attached in execution and filed the present proceedings. As was stated by NDOU J in *Meda (supra)*, this is seeking rescission of a judgment made by a competent court declaring the property executable, through the back door.

In view of the above, I will therefore uphold the points *in limine* as raised by the respondent and make the following order.

- i) The application is dismissed with costs.

Chinyama & Partners, Applicants' Legal Practitioner
Costa and Madzonga, Respondent's Legal Practitioner