PEDDINGTON GURA
versus
INTERNATIONAL EXPORT TRADING COMPANY ZIMBABWE (PVT) LTD
and
SHERIFF FOR ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
MUSAKWA J
HARARE, 13 October 2017 & 17 October 2017

Chamber Application

R. Venge, for applicant
G. Nyengedza, for first respondent

MUSAKWA J: This is an application for suspension of the sale in execution of stand number 1898 Marlborough Township 23 of Marlborough following a judgment that was granted in favour of the first respondent. The property is owned by the applicant.

It is common cause that a judgment was granted in favour of the first respondent on 4 November 2015 in the sum of $111 365.96 plus costs and a penalty fee. As of the date of hearing the present application the total due was said to be in the region of $170 000.00. The applicant claims to have been served with the warrant of execution and notice of attachment on 26 September 2017.

Since this is an application made in terms of rule 348 A of the Rules of the High Court the applicant must make a reasonable offer to satisfy the judgment debt and demonstrate that he will suffer great hardship if the attached property is sold in execution.

Concerning a reasonable offer the applicant avers that he has entered into a joint venture agreement with a company called Row-Croppers (Private) Limited. Through Row-Croppers (Private) Limited the applicant proposes to extinguish the debt through tranches of $30 00.00 commencing on 30 November 2017 running to 2020. As of May 2020 the outstanding balance on the judgment debt will be $49 289.00.

On great hardship the applicant claims that the dwelling constitutes matrimonial property and his family's only property. He claims to survive on his wife's meagre earnings

and assistance from well-wishers and friends. He cannot afford to rent accommodation as he has no regular income.

In opposing the application, the respondent contends that the offer to settle should have been preceded with a substantial deposit. Concerning the proffered instalments, it is contended that the amounts can sustain the applicant wherever he decides to relocate. It is further contended that the offer of an unencumbered property as security could have been a worthy consideration.

On great hardship, it is contended on behalf of the first respondent that what the applicant asserts amounts to ordinary hardship which any person in similar circumstances is bound to experience. It is also contended that the applicant and his family can relocate to the farm where he is engaged in the joint venture.

The requirements for such an application as the present are well established. In *Masendeke* v *Central Africa Building Society* 2003 (1) ZLR 65, it was held by CHINHENGO J that the requirement for great hardship must be viewed against the requirement for a reasonable offer. Concerning great hardship the learned judge further opined that it must be hardship that will result in rendering the execution debtor homeless or destitute.

The applicant was very cursory in detailing issues about his family. There is just a fleeting reference to a wife and children. Nothing more is said about the children, their number, ages and whether they attend school and if so, where. It will be assumed that the hardship that the applicant makes reference to only concerns him and the wife who deposed to a supporting affidavit.

The applicant conducts farming at Riversdale Farm in Mazowe district. Mr *Nyengedza* submitted that the applicant actually resides at the farm and not at the house in Marlborough. This was contested by Ms *Venge* for the applicant. In such situations it is helpful to a court if such averments as to where an execution debtor resides are made on oath. It would not be so difficult as this can also be supported with the returns of the Sheriff. Attached to the notice of opposition is the Sheriff's return indicating there was no property to attach at the farm. There is no comment regarding who was seen at the farm.

Nonetheless, there is merit in the first respondent's argument. The applicant does not explain why it would be difficult for his family to relocate to the farm. It is a ready alternative to losing the Marlborough dwelling. Therefore, the applicant is not going to be rendered

homeless. I would therefore hold that the applicant has not demonstrated that he will suffer great hardship.

Concerning the offer Ms *Venge* submitted that the applicant is *bona fide* and is not just trying to buy time. In *Taonezvi* v *Central Africa Building Society* HH-668-15 MATANDA-MOYO J held that an offer must be based on what an execution debtor is earning and not on future unattainable earnings. Ms *Venge* submitted that the projected income is attainable. On the other hand Mr *Nyengedza* submitted that it is easier to tender a plan than to adhere to it. He highlighted that the applicant is in dire financial constraints and that the interests of the execution creditor ought to be considered. On the need to consider the interests of an execution creditor, Mr *Nyengedza* referred to the case of *Smith and Another* v *Acting Sheriff and Another* 1995 (1) ZLR 158 in which at 161 McNALLY JA had this to say-

> "The second consideration is a general one. The evolution of the Roman-Dutch law in the spirit of our customary law is an on-going process - a process of indigenisation. **Current public concern over the fate of people who lose their houses because of economic misfortune is a good example of the clash between the stricter Western legal mentality and the gentler, more compromising, customary-law outlook. We must be careful not to drift into maudlin sentimentality and excessive sympathy for the hard-luck stories.** If we do, we undermine the very efficient and effective mechanisms by which housing is funded. But there is no reason why the courts should not take account of the fact that forced sales generally realise a lower price than ordinary sales, and that the judgment debtors' interests rank low in the scale of priorities in these sales. Perhaps too low." (**my emphasis**)

It can be noted that the offer by the applicant is premised on projected earnings from his joint venture with Row-Croppers (Private) Limited. However, there is no indication of the total earnings due to the applicant or what the terms of the joint venture agreement entail. In fact the applicant did not even attach the actual agreement reached with Row-Croppers (Private) Limited. What was attached is a letter from the director of Row-Croppers (Private) Limited to which is attached a document that sums up intended agricultural activities and the projected earnings. Therefore the proposal made by the applicant fails to qualify as a reasonable offer.

The applicant also claims that the dwelling is mortgaged to Zimbabwe Asset Management Company (ZAMCO) which assumed his debt of $120 000.00 with the Agricultural Bank of Zimbabwe (Agribank). As such it was contended that even if the property is sold the proceeds will not revert to the first respondent.

Mr *Nyengedza* countered by submitting that what happens to the proceeds of the sale is of no concern. He also pointed out that since the granting of the judgment in favour of the first respondent the applicant had not made any payment plan to reduce the judgment debt. This is the first plan following the attachment of the property.

I am mindful that a court can suspend a judicial sale for some other good ground in terms of rule 348 A (5e) (b) (iii). It was not clear whether this was one such other good ground that the applicant was advancing. If it is it does not advance the applicant's case in any significant way.

Therefore, the application is dismissed with costs.

Mambosasa, applicant's legal practitioners
Scanlen & Holderness, first respondent's legal practitioners