

TIGERENASHE MUSHAVA
versus
NORAH JENA
and
SHERIFF-HARARE

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 4 & 15 December 2017

Chamber application-for postponement of sale of dwelling house

S Mahuni, for the applicant
O Machuwaire, for the 1st respondent

ZHOU J: This is an application in terms of Order 40 r 348A (5a) for the postponement or suspension of a sale in execution of the applicant's dwelling house at Stand 446 Strathaven Township 2 of Strathaven A held under Deed of Transfer 319/2005. The application is opposed by the first respondent. An opposing affidavit originally filed on behalf of the first respondent on 29 November 2017 was withdrawn because it had been signed by a person other than the first respondent herself. It is not explained how a Commissioner of Oaths commissioned that affidavit. That affidavit was withdrawn and a fresh notice of opposition was filed together with an opposing affidavit on 4 December 2017.

The applicant, through his legal practitioner, objected to the opposing affidavit deposed to by one Hillary Panganayi Jena. The basis of the objection is that the special power of attorney attached to the opposing affidavit does not entitle the deponent to the opposing affidavit to institute or defend proceedings. That may be so, but the deponent to the opposing affidavit has not instituted the proceedings; neither is he defending the matter, because the first respondent is cited in her own name. Order 32 r 227 (4) (a) requires that an affidavit in application proceedings be deposed to "by the applicant or respondent, as the case may be, or be a person who can swear to the facts or averments set out therein". The applicant does not allege that the deponent to the affidavit lacks the competence to swear to the facts set out in the affidavit.

On the merits, it is not in dispute that the property in question is a dwelling and that it is occupied by the applicant, his wife and four children. Three of those children are minors. The applicant's assertion that the property is his only residence in the country has not been contradicted by evidence. Thus if the applicant and his family are ejected from the property they will no doubt suffer extreme hardship given that the applicant is not in employment.

An offer to pay US\$1000 per month is reasonable in the circumstances of this case. The applicant has offered to increase the monthly instalment to US\$ 5000. This shows *bona fides* on his part. Given such a reasonable proposal to liquidate the debt it is only just that the court grants the relief being sought.

There are aspects of this case which cause anxiety, such that I would have been inclined to suspend the sale based on those other grounds. The first issue is that this property is registered in the joint names of the applicant and his wife. While the applicant admits to owing some money to the first defendant, there is no basis for depriving his wife of her share in the property as she is not a judgment debtor. The writ of execution does not show that the first respondent will be entitled to that share of the proceeds from the sale of the attached property which represented only the judgement debtor's share. The first respondent seems to have proceeded on the mistaken assumption that the property belongs to the applicant alone. The second aspect is that the order being enforced does not sound in money save where it pertains to costs. The order is for "payment in the sum of money equivalent to the current market value" of the property. The same order then states that "the market value to be used shall be the value at the date payment is made". Paragraph (c) of the order states that "if the parties do not agree on the value" an independent and registered valuator was to be appointed to assess the value. Clearly no amount is stated as payable in the order. The first respondent stated that she appointed a valuator to assess the value of that property. It is irregular for the respondent to proceed to issue a writ of execution which is based on a valuation report. A writ of execution must reflect the figures in the order to be enforced. That is not the situation in the instant case.

The matter has been obfuscated by the fact that the applicant has done nothing to address the issue of the irregularities noted above. Be that as it may, for the purposes of the instant application I am satisfied that the applicant and his family would suffer undue hardship if the execution is not suspended. I am also satisfied subject to the concerns raised above regarding the order and the manner in which the writ of execution was issued, that the applicant has made a reasonable offer to settle the debt owed to the first respondent.

In the result, IT IS ORDERED THAT:

1. The sale in execution of Stand 446 Strathaven Township 2 of Strathaven A, held under Deed of Transfer 319/1005 be and is hereby suspended on a condition that the applicant pays a sum of US\$1 000-00 to the first respondent every month on or before the last day of each month, the first such payment being due on or before 31 December 2017. With effect from April 2018 the monthly amount shall be increased to \$5000, and the first payment shall be paid on or before 30 April 2018 and, thereafter, on or before the last day of each succeeding month until the full debt has been settled.
2. The first respondent shall be entitled to proceed with execution of the order if the applicant fails to comply with para 1 hereof.
3. Each party is to bear its own costs.

Mahuni and Mutatu, applicant's legal practitioners
Obedience Machuwairi, 1st respondent's legal practitioners