

XIAO FENG FENG
versus
CBZ
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
TSANGA J
HARARE, 16 October 2017 & 24 October 2017

Urgent Chamber Application

Mr *Ahmed*, for the applicant
Mr *Muchandiona*, for the 1st Respondent

TSANGA J: Rule 348 A of the High Court rules deals with stopping the sale of a dwelling house to facilitate the settlement of a claim. Applicant brought an application under r 348 A (5a) for the postponement or suspension of the sale of the dwelling concerned; or the eviction of its occupants. The application was also made against the backdrop of an application for rescission of judgment filed in in July 2017 of a default judgment. This application therefore seeks an order that a specified dwelling house not be sold until that application is heard. That dwelling house, to be precise, is described as a certain piece of land situate in the district of Salisbury called stand number 419 Colne Valley Township of Brookfield East of Subdivision A of Lot C of Colne Valley of Reitfontein measuring 4 060 square meters held under deed of transfer number 5319/11 dated 8 November 2011. It is also known as number 2 Merewood Drive, Colne Valley, and Chisipite.

The background is this. The first respondent CBZ obtained a default judgment for a sum of money lent to Upbridge Pvt Ltd under a loan facility agreement. The money owing is said to exceed US\$ 2 000 000.00. The company was one in which the applicant and her husband were then directors and in partnership. Applicant stood as surety to the loan in her

personal capacity. The bank sought to execute against the applicant's property as surety which spurred the applicant into making an application for rescission of the default judgment on the basis that she was never served with the summons leading to the default judgment in that case.

The applicant's assertion is therefore that the interim order should be granted on account of her pending application for rescission but also on the ground that when she signed she was not aware that she was being made to sign as surety. Her argument in the cross referenced matter pertaining to the rescission being HC 6749/17 is that her husband had misrepresented the nature of the documents to her at the time that she signed.

The default judgment under HC 6591/12 was granted due to failure of the applicant and her husband as directors as well as the company as represented by their counsel to avail themselves at a pre-trial conference. As regards the assertion that the summons were not received, the cross referenced file shows that the erstwhile legal practitioners who had witnessed the signing of the agreement on behalf of the company and its directors had entered an appearance to defend on behalf of all the defendants. In other words, they had entered an appearance to defend on behalf of the company in question being Upbridge Trading Pvt Ltd and its directors Xiao Feng and He Xuan.

In deciding whether the relief sought in this urgent application should be granted, it is necessary to have regard to the application for rescission and its prospective merits. This is because this court has to be very wary of the abuse of the urgent applicant process applications brought against the backdrop of spurious applications for rescission which lack merit. Far too often courts are inundated by urgent applications from applicants who know very well that monies have been advanced in the strength of their suretyship and yet they seek to spin a yarn through the aegis of some form of urgency when faced with payment.

The default judgment was granted on 26 March 2014. Applicant's position that the lawyers in question at that time *Messrs Madzivanzira, Gama & Associates* had no authority to act on her behalf is not supported by any proof of action against the legal practitioners in question challenging their action without a mandate nor any affidavit from the lawyers to support the claim that they had indeed entered an appearance to defend without authority. In other words, their lack of authority to act as they did is simply a bare denial. The file also indicates that applicant was aware of the judgment as subsequently certain property she had used as suretyship was sold and transferred. It is therefore hard to see how she had sought to

rescind the judgment more than three years later on the basis of error against the backdrop of these realities.

As regards the issue of suretyship it is common practice by banks to require personal sureties from directors for the advancement of a loan. It is not in dispute that she signed as a surety. Her argument is that this interim relief should be granted on the basis that her application for rescission holds prospects of success due to the circumstances of the signing which in essence amounted to misrepresentation by her husband on the nature of the document she was signing. Again, looking at the detail averred in the cross referenced file HC 6749/17 I have no doubt that this argument too holds no prospects of success and that the application for rescission has been merely brought to delay or even to escape the court's jurisdiction as the respondent's aver.

As stated in *Slip Knot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA)

“A person who is induced to sign a suretyship agreement by fraud or misrepresentation of a third party, and who is unaware of the nature of the document he is signing will nevertheless be bound by the agreement if the lender is innocent and unaware of the surety's mistake. The lender would in such a case be entitled to rely on the appearance of liability created by the surety's signature, and the surety would not be entitled to set up his unilateral mistake to escape liability under the agreement.”

Also in *Absa Bank Ltd v Trzebiatowsky & Ors* 2012 (5) SA 134 (ECP) it was held that the principle is still valid that a person who signed a contract is taken to be bound by the ordinary meaning and effect of the words which appeared over his signature. A similar argument as applicant's in the case before me wherein she argues that had she been aware of the nature of the document she would not have signed the suretyship, was held to be trumped by that maxim.

As to the purported argument on urgency with respect to violation of the child's right to shelter if the property is sold, again there is a display of a very simplistic approach to the right where one simply has to cry foul in order for the court to jump sky high. The applicant is a business woman. Her child goes to one of the country's most expensive private schools. It boggles the mind why rented accommodation would be beneath her if her property is sold to meet a legitimate debt to which she stood surety. It is not even her averment that she would be sufficiently impoverished as to be unable to afford rented accommodation. Rule 348 A (5e) provides as follows:

“(5e) If, on the hearing of an application in terms of sub rule (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.”

Notably, no offer at all has been made to settle the debt. The grounds for seeking to postpone the sale as I have already pointed out will not hold and no good ground has been put forward. The applicant will not at all suffer hardship if evicted as the country is presently awash with properties for rental and prices for rentals continue to tumble due to the low uptake of rented properties. People who borrow or stand as surety to a debt on the ground that they are indeed able and willing to pay that debt simply have to learn to live within their means as opposed to seeking to maintain a fictitious life style at the expense of a creditor with a legitimate claim.

There is no reason why the party seeking to execute on the loan should continue to incur unnecessary expenses by humouring such applicants. This is indeed a case where costs on a higher scale are warranted as sought.

Accordingly, the application is dismissed with costs on a higher scale.

Ahmed & Ziyambi, applicant's legal practitioners
Danziger & Partners, 1st respondent's legal practitioners