ELTON MUTISI
versus
OLD MUTUAL LIFE ASSURANCE COMPANY (PRIVATE) LIMITED
and
PUZEY AND PAYNE (PRIVATE) LIMITED
and
THE SHERIFF OF ZIMBABWE
and
THE REGISTRAR OF DEEDS
and
CHARLES NHAMO NYAMBUYA

HIGH COURT OF ZIMBABWE
NDEWERE J
HARARE, 10 April 2017 & 7 February 2018

Chamber application (rule 348A)

E Mubaiwa, for the applicant
N R Mutasa, for the respondents

NDEWERE J: The background of the matter is that Old Mutual sued the applicant, Elton Mtisi, alongside Puzey and Payne (Pvt) Ltd, who was the first defendant and Charles Nhamo Nyambuya who was the third defendant for payment of US$334 125,81 as rent arrears following the cancellation of the lease agreement between Old Mutual and the defendants. On 10 February, 2016, Old Mutual obtained a default order against the defendants in HC 12586/15.

Pursuant to the default judgment, the Sheriff attached the applicant's property, Stand number 20208 Seki Township measuring 313 square metres on 5 October, 2016. The Notice of Attachment of Immovable Property gave the applicant ten days to approach the court to ask for the sale to be postponed or suspended.

On the tenth day, 19 October, 2016, the applicant filed a chamber application for the suspension of the s ale in terms of r 348 A (5a) of the High Court Rules.

The applicant in his Heads of Argument; clarified that since he had filed a rescission application he was applying for the postponement or suspension of the sale on the basis of r 348 A (5e) (b) (iii), which says if "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."

So in essence, although the application was brought in terms of r 348 A, it is an application for stay of execution pending the determination of a rescission application against the order in HC 12586/15.

The first respondent filed an opposing affidavit, saying the application is an abuse of court process because the applicant never contested the judgment debt and that it defaulted on several payment plans. The first respondent argued that it must be left to execute against the attached property. It also argued that the spirit behind r 348A is to afford judgment debtors the opportunity to come up with payment plans for the debt and not to avoid payment altogether as the applicant wanted to do. It said the filing of the rescission application was ill conceived because the first respondent was disputing all the alleged defects in the summons claim and maintained that the default order in HC 12586/15 was properly granted.

The actual merits or lack thereof of the rescission application are for the court that will handle the rescission application. However, the applicant is required to convince the current court that his rescission application has prospects of success before an earlier order of this court can be stayed.

After the first respondents' opposing affidavit, the applicant filed an answering affidavit but omitted to specifically address the prospects of success of the application for rescission in view of the strong opposition from the first respondent.

In an application for rescission, a defendant is expected to show that firstly, they were not in wilful default and secondly, that they have prospects of success in the main matter on the merits. Then when an applicant is applying for stay of execution pending a rescission application, the applicant is supposed to show that there are prospects of success in the rescission application. As aforesaid, the applicant did not address the issue of prospects of success. He made allegations of a defective summons which were strenuously refuted by the first respondent.

What compounds the applicant's challenge on prospects of success is the fact that the merits of HC 12586/15 are about a debt which the applicant and his co-defendants never disputed. The record is full of documents which were never disputed wherein the applicant and his co-defendants admitted the debt and just pleaded for time to pay. On p 34 to 36 of the first respondent's opposing affidavit, there is a payment plan on a letter dated 25 January 2016 where the applicant and fifth respondent proposed to clear the debt with amounts of US$10 000 in June, 2016, US$12 000 in July, 2016, US$15 000 in August, 2016, US$15 000 in September, 2016; US$15 000.00 in October 2016, US$18 000 in November 2016 and US$18 000 in December, 2016. From January, 2017 to December, 2017 the defendants undertook to pay US$20 000.00 per month.

From p 37 to p 39 of the opposing papers there is a letter dated 30 March, 2016 by Puzey and Payne, signed by the applicant and the fifth defendant as a co-director. In para 2 of that letter the accumulation of rent arrears of $334 000 was admitted and the letter said the arrears were a result of the Management Buy Out Scheme of the company. Page 37 gave another payment plan as follows:

$30 000 on 30 March, 2016

$7 000 on 7 April, 2016

$15 000 on 30 April 2016

$15 000 on 31 May 2016

$18 000 on 30 June 2016 and $20 000 from July, 2016 onwards till "we are up to date".

That paragraph concludes by saying lump sum payments shall be made as they realised income from projects.

> "We anticipate that payments of at least $400 000 be made to towards Old Mutual debt within a year from now."

From p 41 to 42 there is yet another letter dated 14 October, 2016 from Puzey and Payne, signed by the applicant as Managing Director. He was asking for a revision of the initial lump sum payment of $50 000.00 to US$25 000 "towards our rent account."

> "The balance of US$308 140.57 will be cleared within 24 months using funds from anticipated projects."

On p 43 there is an acknowledgement of debt signed by the applicant accepting the then unpaid portion of the rentals of $186 316.74. Another payment plan was given of $7 000 on 31 January, 2017, $7 000 on 28 February, 2017, and US$57 000.00 on 31 March, 2017. It said they would finish paying on 31 December, 2017. The above information clearly shows that the applicant has no prospects of success on the merits in the rescission application because the rescission application cannot succeed if the applicant has no prospects of successfully defending the main matter.

If the applicant were to succeed in the rescission application that means he will be given time to defend the matter and file a plea. What plea would he file in his defence when he has always admitted the debt in his own words and even signed an acknowledgement of debt? Obviously none. That is the reason why the success of a rescission application goes beyond just the wilful default inquiry and proceeds to the prospects of success in the main matter.

Rule 348 A (5e) says

"If, on the hearing of an application in terms of subrule 5 (a), 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 of the sale of the dwelling concerned or the eviction of its occupants, subject to such terms and conditions as he may specify."

In paragraph 13 the applicant's Heads of Argument stated the following:

"This application does not make offers or premise itself on same. Its sole premise is the pendency of the rescission cause and the principles by which this court has constituted such an application "some other good ground" for the relief sought."

This means the applicant has abandoned relief on the basis of r 348 A (5e) (a) and 5e (b) (i). Rule 348 A (5e) (a) and 5e (b) (i) have to be read together because of the word "and" inserted before (5e) b. This means that whoever pleads great hardship if the dwelling is sold must then propose a reasonable offer to settle. It is not enough to just allege great hardship. But the applicant has not claimed relief on the basis of (5e) (a) and (b) (i).

He has not claimed relief on the basis of (5e) (b) (ii) either because, nowhere in the papers did he ask for time to find other accommodation.

So his claim is based on (5e) (b) (iii) only as stated in para 13 of his Heads of Argument.

I have already indicated that the applicant did not indicate the prospects of success of the rescission application and indeed, as indicated in my analysis above, I do not see any prospects of success in the rescission application when there are clearly no prospects of success on the merits of the main matter as evidenced by the applicant's several formal admissions of the debt.

I therefore find no reason to order the postponement or suspension of the sale of Stand number 20208 Seki Township.

The application is therefore dismissed.

The first respondent asked for costs on the higher scale. I do not see any justification for costs on the higher scale in a situation where the applicant was invited through the notice of attachment to apply for relief within ten days of the service of the Notice of Attachment. The applicant simply exercised the right extended to him by the law. Why penalise him with punitive costs? Therefore the applicant shall pay costs on the ordinary scale.

Makiya & Partners, applicant's legal practitioners
Costa & Madzonga, 1st respondent's legal practitioners