HH 7-03
HC 773/02
HC 10798/02

THADEOUS JEREMIAH MASENDEKE
versus
CENTRAL AFRICA BUILDING SOCIETY
and
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE
CHINHENGO J,
HARARE, 13 December, 2002 and 15 January, 2003

E R Mutama **for applicant**
A Maingauta **for first respondent**

URGENT APPLICATION IN TERMS OF RULE 348 A

CHINHENGO J: The applicant was sued by the first respondent (CABS) for the payment of $229 674,39 being money lent and advanced to him together with interest charges. This claim was in accordance with the terms and conditions of a first mortgage bond passed by the applicant in favour of CABS over Stand 1218 Fort Victoria Township of Fort Victoria Township Lands. The money had therefore been advanced to enable the applicant to purchase a dwelling. In terms of the mortgage bond the applicant was required to pay the amount lent and advanced in monthly instalments of $7 550. As at l December, 2001 the applicant was in arrears of $23 350. CABS's claim included a further claim for interest charges at the rate of 38% per annum on the sum of $229 674,39, costs on a legal practitioner and client scale and an order that the property be declared specially executable.

The summons was served on the applicant on 16 January 2002. The applicant did not enter an appearance to defend the claim because he did not dispute the indebtedness. A judgment in default was entered against him on 2 July 2002. A writ of execution against immovable property was issued on 20 September,

2002 and served on the applicant's domestic worker at the *domicilium citandi et executandi*(the dwelling) on 22 November, 2001.

The applicant then instituted the present application on an urgent basis in terms of Order 40 Rule 348A of the High Court Rules, 1971. In terms of subrule (5a) of Rule 348A a person whose dwelling has been attached and he or his family members occupy the dwelling as at the date of attachment may, within ten days after the service upon him of the notice of attachment of immovable property under Rule 347, make a chamber application for the postponement or suspension of the sale of the dwelling or for the postponement or suspension of the eviction of its occupants. The applicant was out of time in making this application. He accordingly applied for condonation of the late institution of these proceedings. I readily granted condonation because the explanation which he gave for the delay was reasonable. He said that he resides at his workplace at Masvingo Teachers' Training College and visits his home (the dwelling) every other weekend. He said that when the domestic worker was served with the notice in terms of R 347, she did not appreciate its importance and that she only gave it to him when he visited the dwelling on 16 December, 2002. The domestic worker filed an affidavit in support of the applicant's averment on this point. I was satisfied that the applicant did not willfully neglect to make the application within the time prescribed by the rules of this Court and I granted the application for condonation.

In the founding affidavit, the applicant averred that the dwelling is the only dwelling for him and his family and that they all would be destitute without a dwelling of their own.

He averred that before the judgment in default was entered against him his legal practitioners were negotiating a settlement with the judgment creditor's legal practitioners and that there had been some positive developments in that regard.

In their letter of 7 March 2002 CABS's legal practitioners had made an indication that they were prepared to accept the proposed settlement. Part of the letter reads -

> **"In your letter of the 5th February, 2002, you have suggested that your client intends to settle the arrears on his loan account but you have not indicated the manner in which he proposes to do this. Perhaps you will be kind enough to let us have these details for onward transmission to our clients for their consideration".**

It appears nothing further took place until the execution creditors issued the writ of attachment and execution.

The applicant averred that he was surprised when the judgment creditor issued and served the writ of execution because he had thought that a settlement was in the offing. In further support of the present application, the applicant proposed to settle the debt together with the interest claimed by monthly installments of $50 000 beginning on 20 December 2002. He averred that he had in fact paid $50 000 on 26 November, 2002 before he became aware that his property had been attached. He sought a provisional order the terms of which would suspend the sale of his dwelling whilst he made payments in terms of his own proposal.

At the hearing of this application I made an order in favour of the applicant and undertook to give my reasons for that decision. This judgment is in fulfilment of that undertaking.

The attachment by creditors of dwellings became such a pernicious problem that the Legislature stepped in to provide some relief to debtors and their families who are in distress because their only dwelling is to be attached and sold in execution. Rule 348 A was inserted into the High Court Rules by the High Court (Amendment) Rules 2000 (No 35) (S I 80/2000). In terms thereof if a dwelling has been attached the Sheriff is required, upon receiving documents relating to the

attachment, to send forthwith to the Secretary of the Ministry responsible for the administration of the Housing and Building Act (Chapter 22:07) a written notice that the dwelling has been attached. The Sheriff is also enjoined not to take any further steps in regard to the sale of the dwelling or the eviction of the occupants for a period of ten days. Within this ten day period the Secretary may notify the Sheriff that he intends to satisfy the execution creditor's claim from the National Housing Fund established by s 14 of the Housing and Building Act. Again for a period of 30 days the Sheriff shall take no further steps to sell the dwelling concerned. The Secretary may within that 30 day period lodge a chamber application with a judge for an order staying the sale of the dwelling concerned, and if the judge is satisfied as to the propriety of such an order he or she may issue a provisional order directing that the sale shall not take place for a period of three months at the most pending the confirmation of the order. That provisional order shall not be confirmed unless the execution creditor's claim has been satisfied or the Secretary has, within the three months, undertaken to settle the claim from the National Housing Fund.

The alternative approach to the above is that provided in subrule (5a) of R 348A. In terms thereof if a dwelling has been attached and it 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 of attachment, make a chamber application for the postponement or suspension of the sale of the dwelling concerned or the eviction of its occupants. In terms of subrule (5c) of R 348A the Registrar is required, without delay, to notify the Sheriff or his deputy that the application has been filed and to serve a copy of the

application on the execution creditor and set the application down for hearing after notifying the execution creditor and the applicant of the set down date.

At the hearing of the application the judge must satisfy himself/herself, first, that the dwelling is occupied by the execution debtor or his family and that it is likely that he or his family will suffer great hardship if the dwelling is sold or they are evicted from it; and second that the execution debtor had made a reasonable offer to settle the judgment debt or that the occupants require a reasonable period in which to find other accommodation or that 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. If the judge is so satisfied he/she may order the postponement or suspension of the sale of the dwelling concerned or the eviction of its occupants on such terms and conditions as he may specify. I must, in passing observe that subrule (5e)(b)(ii) should really stand alone as (5e)(c), because this is a separate ground on which a judge may base his decision to postpone or suspend the sale of a dwelling.

It is necessary to underline the requirements of Rule 348A (5e) in regard to the aspects on which the judge must be satisfied. It is not enough that the execution debtor or his family will suffer hardship if the dwelling is sold. The judge must be satisfied that the hardship is great. In my view the hardship must be more than the ordinary hardship which persons deprived of their place of residence ordinarily suffer such as the attendant inconveniences in finding and paying for alternative accommodation or the need to relocate to another residential place such as a rural home or a rented accommodation. The hardship must be great in that it results in

the execution creditor being rendered homeless or destitute. The second requirement relevant to this application is whether the execution debtor has made a reasonable offer to settle the judgment debt. Subrule 5e)(b)(iii) of Rule 348 A also empowers the judge to postpone or suspend the sale of the dwelling for "some other good ground".

The applicant is a school teacher and it seemed to me that his family resides in the dwelling where he employs a domestic worker. He himself ordinarily resides at the school because he said that he goes to the dwelling every other week. There was no evidence of the kind of accommodation which he has at the school. It did not seem to me that he was one likely to suffer great hardship if the dwelling was sold. It would seem that the requirement of great hardship must be viewed against the other requirement - that a reasonable offer to settle the judgment debt had been made by the execution debtor. Although the word "and" is used at the end of para (a) of subrule (5e) of R 348A I do not think that it should be read conjunctively so as to say that the two requirements - of great hardship and the making of a reasonable offer must both be met before an order postponing or suspending a sale of a dwelling can be made. I think that the word "and" must be read disjunctively so that if one requirement is eminently met then the fact that the other requirement has not been fully met does not necessarily debar the applicant from obtaining the order of postponement or suspension of the sale. That this is the correct construction to be placed on the word "and" is supported by the fact that a judge is empowered to make the order of postponement or suspension if there is some other good ground for doing so. As such therefore where the hardship is not so great, but

the execution debtor has made a very reasonable offer of settlement, an order should be granted in his favour. Conversely where the offer of settlement is not entirely reasonable but the hardship which the execution debtor will suffer is extreme, an order should again be made in his favour. The applicant had, by the time that he received the notice in terms of s. 347, already paid $50 000 which not only covered the arrears but probably covered the interest charges as well. In his founding affidavit, the applicant offered to pay $50000 a month the first such payment being made on or before 20 December, 2002. The payment of $50 000 and the offer to make similar payments until the judgment debt was settled appeared to me to be eminently reasonable, despite the fact that the hardship he was to suffer if the house was sold was unlikely to be great.

It was for this reason that I granted the provisional order whose final and interim relief was the following -

"**Terms of the Final Order Sought**

1. The sale of Stand 1218 Fort Victoria Township Land be and is hereby suspended on condition that the applicant pays an amount of $50 000 at the end of each month beginning on 20 December 2002 until the debt is settled and if the applicant defaults on any one payment execution will proceed.

2. The applicant pays the costs.

Terms of the Interim Order

That pending the final determination of this matter -

1. The sale of Stand 1218 Fort Victoria Township Lands be and is hereby suspended on condition that the applicant pays an amount of $50 000 on

or before the last day of each month provided that the payment for the month of December 2002 shall be made on or before 20 December 2002. In the event that the applicant defaults in respect of any one payment the sale in execution of Stand 1218 Fort Victoria Township Land shall proceed.

2. The Deputy Sheriff shall suspend any action towards the sale in execution of the property referred to in paragraph 1 hereof.

3. A copy of this order shall be served on the first and second respondents' legal practitioners."

In conclusion I would like to put to rest any misconception that an application in terms of Rule 348A may be treated other than on an urgent basis. Counsel for the first respondent had argued to that effect. In terms of Rule 348 A(6) any such application shall be treated as urgent. As such no valid argument can be advanced against the urgent treatment of an application in terms of R 348 A.

***Mwonzora & Associates c/o Gula-Ndebele & Partners* , applicant's legal practitioners**
***Winterton Holmes & Hill c/o Honey and Blankenberg* , respondents' legal practitioners**