

NEHEMIAH NHANDO  
versus  
BRIGHT PHARMACIES (PVT) LTD  
and  
THE SHERIFF OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
CHITAKUNYE J  
HARARE 6 and 12 OCTOBER 2017

**CHAMBER APPLICATION - Rule 348A (5b)**

*N T Mazungunye* for the applicant  
*O. Kadare* for the 1<sup>st</sup> respondent

CHITAKUNYE J. The applicant, as a self actor, filed this application seeking an order for the postponement or suspension of sale in execution of his dwelling house in terms of order 40 rule 348A(5b). The draft order was couched as follows:

It is ordered that:

1. The sale in execution of the said dwelling being Lot 521 of Greendale Township in the District of Salisbury measuring 4032m<sup>2</sup> held under deed of transfer number 12870/02 is hereby suspended until the 31<sup>st</sup> October 2018.
2. The sale in execution of the said dwelling is suspended on condition the Applicant carries out fully the terms of the offer of settlement made above.
3. There be no order as to costs.

On the date of hearing the applicant was now represented by Mr. Mazungunye.

The circumstances of the application are that on the 27<sup>th</sup> April 2017, the first respondent obtained a judgement from this court against the applicant in HC 9522/14. That judgement was apparently obtained by consent of the parties. In terms of that court order, the applicant was ordered to pay to the first respondent a total sum of US\$11 326.00 in full and final settlement of the first respondent's claim. The order provided that the applicant was to make a down

payment of US\$1029.00 and the balance was to be paid in monthly instalments of US\$500.00 until the debt was liquidated.

As fate would have it, the applicant failed to make payments in terms of the order. As the court order provided that in the event of default the first respondent shall be entitled to execute on the consent order, the first respondent put in motion measures for execution of the order. A writ of execution against movable property was issued on 2 August 2017 but nothing came of it in terms of recovering the debt. As a result on the 7<sup>th</sup> September 2017, first respondent obtained a writ of execution against movable and immovable property against the applicant. Armed with this writ the sheriff attached an immovable property owned by the applicant being, Lot 1 of Lot 521 of Greendale Township in the district of Salisbury held under deed of transfer No. 12870/02. The sheriff duly proceeded to serve the notice of attachment and it was in reaction to this notice of attachment of immovable property that the applicant approached this court in terms of r 348A of the High Court Rules.

Order 40 r 348A (5a) provides that:

“Without derogation from subrules (3) and (5), where the dwelling that has been attached 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 in terms of rule 347, make a chamber application in accordance with subrule(5b) for the postponement or suspension of—

- (a) the sale of the dwelling concerned; or
- (b) the eviction of its occupants.”

Sub-rule (5b) referred to states that an application in terms of sub-rule (5a) shall be made in Form No. 45b and filed with the Registrar.

The above sub-rules thus provide the instances when such an application maybe made and the Form to use in making the application.

For an applicant to succeed he must satisfy the presiding judge that the sale of the dwelling would cause them to suffer great hardship.

In this regard subrule (5e) provides that:-

“If, on the hearing of the 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 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 judgement 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 occupant, 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.”

The *onus* is thus on the applicant to satisfy the judge that his situation meets the criteria. It is pertinent that in order to so satisfy the judge the applicant must be candid in his founding papers. This is especially so as an application stands or falls on its founding affidavit.

*In casu*, in his founding affidavit the applicant alleged that the property in question is his sole residential property which he occupies with his family, that is, his wife and 4 children. In the circumstances if the property were to be sold in execution they would suffer severe hardships such that he will not be able to recover such a loss given that they have no other alternative accommodation and that property is the only one they have always known as their home.

The applicant stated that he incurred the debt in question whilst operating a surgery which he later closed due to losses incurred. However he has since reopened the surgery and he hoped that he will pay the debt from income from that surgery. Besides raising money from his work in the surgery he also indicated that he would lease out part of the premises and will use the revenue there from to service the debt.

In the circumstances, the applicant offered to settle the debt at a rate of US\$500.00 per month with effect from November 2017. The applicant’s offer would entail paying up the debt in a period close to two years. That is the offer he deemed reasonable in his founding affidavit.

Applicant’s counsel in his submissions indicated that applicant had raised about US\$ 500.00 and will be able to pay another US\$500.00 at the end of this month and thereafter pay US\$500.00 per month till the debt is liquidated. He further stated that the applicant reopened his surgery about 6 weeks ago and so he should be able to settle the debt in terms of the offer made.

The first respondent opposed the application. As the matter was heard on an urgent basis first respondent could not file opposing papers. The grounds for opposing the application were basically to the effect that the property in question is not the applicant’s only dwelling as there was an affidavit by applicant’s young brother, John MT Nhando, showing that the property was in fact occupied by that young brother and his family whilst the applicant resides in Dema. Though the applicant’s counsel asked court not to give much credence to that affidavit as it was not by the applicant, sight cannot be lost of the fact that the affidavit pertains to the

property in question and to an attachment of movable property that the Sheriff had done in respect of this applicant's debt. The affidavit was prepared in the young brother's claim over the movable property found at the property in question in interpleader proceedings. In para 8 of that affidavit, and in a bid to rescue the property attached, John MT Nhando stated that:

"I am the one who stays at number 45 Kennedy Drive Greendale Harare and I started staying there sometime in November 2016. The judgement Debtor my brother is now based in Dema Growth Point Seke where he has a surgery and when he relocated to Dema I took occupation of his property on a verbal Lease Agreement. I moved on with all my belongings. See attached Annexure 'D' and 'E' being proof of ownership of some of the movable attached by the Sheriff."

The above affidavit was deposed to on the 24<sup>th</sup> August 2017. Faced with the above sworn deposition by his brother, all applicant's counsel could say was that court should not consider that affidavit as it was not deposed to by applicant. The question that should have exercised his mind is the purpose of that affidavit more so as it was a reaction to a notice of attachment of movable property at the property in question. I did not hear the applicant or his legal practitioner to deny that the movable property attached belonged to John Nhando yet it was at a dwelling applicant said he was currently living in with his family. There was no suggestion at all that the applicant's movable property was also attached in the process. A question anyone would want answered is: if the applicant truly resided at that property with his family why is it that his own movable property was not attached by the Sheriff and, instead, the Sheriff attached John's property?

In his founding affidavit applicant had not indicated that he lived with his young brother(s). He simply stated that he occupied the dwelling with his wife and 4 children. When I asked applicant's counsel about such anomalies, counsel was simply lost for words.

It is my view that the applicant was not being truthful in his founding affidavit. Though applicant's counsel maintained that applicant will suffer hardship if the property is sold I did not hear him to describe that hardship beyond what anyone would suffer if their property is sold. The sale of the property would not leave applicant with no accommodation as he currently is said to be staying in Dema. If he is not, he can still utilise the balance of the sale proceeds to secure another property for his family to either buy or lease.

In *Masendeke v CABS* 2003(1) ZLR 65 at 68H- 69B CHINHENGO J aptly put the position as follows:

"It is not enough that the executor 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 debtor being rendered homeless or destitute.”

In *Makupe v ZB Bank Ltd* 2016(1) ZLR 553 (H) ZHOU J reiterated the point when he held that:

“... rules of court refer to “great hardship, not just hardship. An allegation that the applicant and his family will suffer mere hardship is insufficient to found relief. Not every hardship warrants the invocation of the procedure provided for in order 40 rule 348A of the High Court Rules, 1971 (RGN 1047 of 1971). The hardship must be great, by which is meant that it must be extra ordinary. That is so because ordinary hardship in an inevitable inconvenience of any process of execution by which a person’s property is attached and sold.”

*In casu*, in both the founding affidavit and submissions made, there were no great hardships demonstrated. If anything it is the hardship of having a property worth about US\$200 000.00 sold over a debt of US\$11300.00. That, in my view, is not the type of great hardship envisaged in the rule. Clearly applicant will not be made destitute or be rendered homeless by the sale. He can utilise the balance of the proceeds to secure another accommodation for himself and his family.

The other requirement if the applicant is to succeed is that he must make a reasonable offer to settle the debt. Whether an offer is reasonable or not is dependent on the circumstances of each case. An applicant must thus satisfy the judge that in the circumstances of his case the offer he has made is reasonable. In my view those circumstances must include a disclosure of one’s income and necessary expenditure and a show of bona fide intention to settle the debt. It is impossible to assess the reasonableness of any offer where one’s income has not been disclosed.

It is pertinent to note that the intention behind the rules is not to create an avenue for execution debtors to avoid their liabilities but to offer an opportunity to a debtor who finds himself sandwiched between a rock and a hard surface an opportunity to settle his debt without being rendered homeless or destitute whilst at the same time ensuring that the execution creditor is paid his dues. It is a compromise situation that the debtor must appreciate requires utmost good faith in ensuring that the offer made is observed.

*In casu*, the offer made by the applicant was met with resistance by the first respondent on the basis that applicant has not been able to meet other offers he made in the past. The parties have gotten to this stage of attachment of immovable property because the applicant has not made good his previous offers. In this regard the respondent’s counsel alluded to the fact that in his plea to the claim filed on 26 February 2015 the applicant had offered to make payments

in instalments of US\$200.00 per month commencing 7<sup>th</sup> March 2015 but he never did so. Upon negotiating the parties agreed on a settlement hence an order by consent was granted by this court on the 27<sup>th</sup> April 2017 in which the applicant was required to make a down payment of US\$1029.00 and the balance to be paid in monthly instalments of US\$500.00 but the applicant has not done so to date. Despite the above offers the applicant has to date paid only US\$500.00 in two instalments of US\$200.00 and US\$300.00 since the commencement of the court action in 2015. It was in these circumstances that the first respondent's counsel contended that the applicant lacks a sense of commitment thus even if the offer he has now made were to be accepted; he would not comply with its terms. In any case the offer is not different from what the court order required him to do except for the initial down payment but he has failed to comply. An offer for settlement must surely be accompanied by a sincere desire to comply with the settlement terms. Where such desire is lacking the settlement plan would not be said to be reasonable as it would only be a dilatory tactic to frustrate the execution creditor and delay the inevitable.

Upon a consideration of the submissions made I am inclined to agree with first respondent's counsel.

As already alluded to earlier, the applicant was not candid with court on the circumstances of his dwelling. He was also not candid on the offers he has made so far but which he has lamentably failed to fulfil. It would appear to me that applicant's greatest handicap is a failure to appreciate the need to adhere to commitments made as a means to gain trust from his creditors. One may be desirous of maintaining a certain lifestyle but when debts mount one has to accept a downward adjustment so as to be able to pay the debts. One has to adjust their priorities to ensure that whatever is available is availed to creditors. It may also be noted that despite stating that he resumed his surgery operations 6 weeks ago and is now earning an income, the applicant did not disclose that income or even suggest a projected income from which to assess whether what is being offered is reasonable or not. If the applicant was sincere he surely would have disclosed his income and expenditure. It would also have been prudent to demonstrate his ability to pay in terms of the plan. As things stand his offer is what he has been failing to pay in terms of the court order and clearly his offer may just be another ruse to frustrate the execution creditor.

In the circumstances of this case, I am of the view that the offer made is not reasonable. Accordingly, it is hereby ordered that:

The application be and is hereby dismissed with costs.

*Chigwanda Legal practitioners*, applicant's legal practitioners.  
*Kadare Legal Practice*, 1<sup>st</sup> respondent's legal practitioners.