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**ARTWELL CHIGUVI**  
**Versus**  
**TRUST BANK CORPORATION**

IN THE HIGH COURT OF ZIMBABWE  
TAKUVA J  
BULAWAYO 16 MARCH & 4 JUNE 2015

**Opposed Application**

*Miss L. Mguni* for the applicant  
*B. Masamvu* for the respondents

**TAKUVA J:** This is an application for postponement or suspension of sale of a dwelling in terms of r 348A (5a) of the High Court Rules 1971.

The relief sought is couched in the following terms:

“The sale in execution of the said dwelling shall proceed subject to the condition that the above-mentioned occupants are permitted to remain in occupation until (*sic*)

Or alternatively

The sale in execution of the said dwelling house is suspended on condition that the applicant carried out fully the terms of the offer of settlement namely; (a) payment of US\$2 000,00 on or by 16<sup>th</sup> February.

(b) US\$2 000,00 on or by 31 March 2015 and thereafter US\$2 000,00 per month payable by the last day of each succeeding month until the whole debt has been paid in full”.

The facts are that on 16 August 2011 applicant and a company called Committed Investments (Pvt) Ltd were granted a loan facility of US\$11 300,00 by the respondent. Applicant signed a surety Mortgage Bond on the same date. In that bond applicant bonded as security specifically stand 7387 Bulawayo Township of Bulawayo Township Lands measuring 1 487 square metres held under Deed of Transfer number 192/2006. The Mortgage Bond was registered under number 1330/2011.

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The applicant renounced all the benefits of excursion, division, cession of debts, *de doubis reci plaribus reis debenti* and revision of accounts. In breach of the loan agreement applicant failed to pay the loan as agreed and respondent filed a chamber application for default judgment after applicant had failed to oppose it within the *dies induciae*. The application was granted by my brother MAKONESE J in the following terms:

- “1. Judgment be and is hereby entered for the plaintiff in the sum of US\$64 098,88 against defendants jointly and severally one paying the others to be absolved.
2. Interest thereon at 35% per annum
3. Stand number 7387 Bulawayo Township lands be declared executable.
4. Costs of suit on an attorney-client scale”.

The applicant then filed this application after he received notification on 16 February 2015 of the sale of his immovable property in execution of a judgment debt. He filed this application on 11 March 2015 well after the 10 day period stipulated in r 348A which states:

“348A (5a)

Without derogation from sub-rules (3) to (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 the service upon him of the notice in terms of r 347, make a chamber application in accordance with sub-rule (5b) for the suspension of –

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

Since applicant was out of time in making this application, he accordingly applied for condonation of the late institution of these proceedings which I granted. I was satisfied that the applicant did not willfully neglect to make the application within the time prescribed by the rules of this court.

In the founding affidavit the applicant averred that the dwelling is the only dwelling for him and his family comprising his wife, a maid and three children. He also stated that were the sale to go ahead his family would suffer extreme hardship in that they would have nowhere to live. Further, he said discussions between himself and the respondent were underway and he had

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paid US\$2 000,00 on 16 February 2015 and a further US\$500,00 on 4 March 2015. He promised to abide by his offer to pay US\$2 000 per month until the debt is liquidated.

The application was opposed on the grounds that r 348A does not apply to mortgaged property. Secondly, it was argued that since the immovable property has been declared especially executable in a court order, to suspend the sale of such dwelling would amount to rescission of that order through the back door. Thirdly, it was contended that the applicant would not suffer any hardship in that he is gainfully employed realizing a salary of US\$4 800,00 per month. He is therefore able to secure a descent rented accommodation for his family. Finally, it was argued that applicant's offer is too little as it would take him more than two years to pay off the debt in circumstances where the respondent urgently requires its money in order to resuscitate its business operations.

The following are the issues for determination:

- 1) does r 348A apply to mortgaged property used as a dwelling?
- 2) is the dwelling occupied by the applicant and or his family?
- 3) is the applicant or his family likely to suffer great hardship if the dwelling is sold or they are evicted from it?
- 4) has the applicant made a reasonable offer to settle the debt?

The second issue is common cause. As regards the 1<sup>st</sup> issue NDOU J in dealing with the same question held that, "execution of mortgaged property is different from the property being referred to in O 40 r 348A. The difference is that we are dealing here with foreclosure proceedings. In foreclosure proceedings, the security which the mortgagor pledged is the one that is sold after institution of judicial proceedings for the amount of the debt, whereafter a writ of execution against the property is issued". See *Priscilla Meda v Homelink (Pvt) Ltd & Anor* HB-195-11 at p 3 of the cyclostyled judgment. See also MAKONI J's comments in *Electroforce Wholesalers (Pvt) Ltd and Chamunorwa Maunganidze vs FBC Bank Ltd* HH-14-15 at page 4 of the cyclostyled judgment.

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I totally agree with the learned judge's reasoning for the simple reason that this is the only interpretation that makes sense. To employ the literal rule of statutory interpretation would lead to an absurdity in that it would shatter the whole regime of hypothecation of immovable property where the mortgagor's first and foremost duty is to pay the debt secured and the mortgagee's corresponding right is to "call up" or foreclose" the bond.

Mortgage as a generic term covers every form of hypothecation of property and in this sense it includes every real right which one person has in and over another person's property for the purpose of securing the payment of a debt or generally the performance of an obligation – Silberberg and Schoeman, *The Law of Property* second edition at 427.

Mortgage has a legal and economic function. Its legal function is to secure the payment of a debt, whereas its dual economic function is to enable one person without liquid financial resources to obtain funds or credit facilities which would not be available without the security of a mortgage bond. To an investor, it provides a more attractive rate of interest than a savings account. Consequently, a mortgage plays a critical commercial role in a modern capitalist society. To allow a mortgagor to renege on his promise to pay the debt by shielding him with the provisions of r 348 A is to uproot this well established system with dire consequences for home seekers, borrowers and investors.

In my view, and for these reasons, the legislature did not intend to have mortgaged property fall under the ambit of r 348A. Therefore, this rule does not apply to the dwelling *in casu* and the application must fail.

Assuming, however, that I am wrong, there is another reason why the application should be dismissed. The loan was advanced in August 2011 and as at 20 June 2013 applicant was US\$64 098,88 in arrears. Between July 2013 and February 2015 he failed to pay even a cent. In his own words he "started servicing the loan on 16 February 2015" by paying US\$2 000,00. Applicant is not a pauper. He runs a viable company that pays him a salary of US\$4 800,00 per month. He owns gold mining claims worth between US\$10 000,00 and US\$15 000,00. In view

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of all this, I consider the applicant's offer to pay US\$2 000,00 per month as unreasonable in that it would take him more than 2 ½ years to pay off the debt.

The next issue is whether applicant and his family will suffer great hardship if the dwelling is sold or they are evicted from it. In *Masendeke v Central Africa Building Society and Anor* 2003 (1) ZLR 65 (H), CHINENGO J held that:

“It is not enough that the debtor or his family will suffer hardship if the dwelling is sold: the judge must be satisfied that they will suffer more than the ordinary hardship which persons deprived of their place of residence ordinarily suffer. The hardship must be great in that it results in the execution debtor being rendered homeless or destitute.”

*In casu*, applicant can afford rented accommodation for him and his family in the event that their dwelling is sold or they are evicted from it. The sale of the dwelling will not have the effect of rendering him homeless or destitute.

Accordingly, the application is dismissed with costs.

*Job Sibanda & Associates* for applicant  
*Dube-Tachiona & Tsvangirai* for the respondent