TERENCE MAKUPE
versus
ZB BANK LIMITED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 20 & 27 April 2016.

Chamber Application – Rule 348A (5b)

I.E. G. Musimber for the applicant
O. Mutero for the respondent

> "*Unoka was, of course, a debtor, and he owed every neighbour some money, from a few cowries to quite substantial amounts . . . and they swore never to lend him any more money because he never paid back. But Unoka was such a man that he always succeeded in borrowing more, and piling up his debts."* **Chinua Achebe, *Things Fall Apart*.**

ZHOU J: The applicant's case, as set out in his affidavits, characteristically resembles that of the eccentric character called Unoka in the celebrated *Things Fall Apart*. The attitude of the applicant in no less measure typifies that of Unoka. One day a creditor by the name Okoye came to ask for repayment of a debt owed to him. The conversation went as follows:

> "Look at that wall," he (Unoka) said, pointing at the far wall of his hut, which was rubbed with red earth so that it shone. "Look at those lines of chalk," and Okoye saw groups of short perpendicular lines drawn in chalk. There were five groups, and the smallest group had ten lines. Unoka had a sense of the dramatic and so he allowed a pause, in which he took a pinch of snuff and sneezed noisily, and then he continued: "Each group there represents a debt to someone, and each stroke is one hundred cowries. You see, I owe that man a thousand cowries. But he has not come to wake me up in the morning for it. I shall pay you, but not today. Our elders say that the sun will shine on those who stand before it shines on those who kneel under them. I shall pay my big debts first." And he took another pinch of snuff, as if that was paying the big debts first. *Things Fall Apart*, pp. 7-8.

On 11 April 2012 the respondent, a commercial bank, obtained judgment against the applicant, a legislator, in the total sum of US$56 500.31 in Case No. HC 1359/12. A portion of that amount, US$47 871.53, was ordered to attract interest at the respondent's maximum overdraft lending rate from 1 February 2012 to the date of payment. Having regard to the

duplum rule the debt has by all accounts almost doubled by now, and interest has stopped running. On 5 July 2012 the respondent caused a writ of execution to be issued for the attachment of the applicant's property described in the papers as a Certain Piece of Land Situate in the District of Salisbury Being Stand 293 Glen Lorne Township 6 of Glen Lorne Measuring 8529 Square Metres, Held under Deed of Transfer No. 667/11. The applicant reacted to the attachment of his property by instituting the instant chamber application in terms of Order 40 r 348A (5b) of the High Court Rules, 1971. That application was filed on 28 August 2012 under a cover which refers to it as a "Court Application", which probably explains why it was not referred to a judge in chambers then as is the practice where a chamber application has been filed. The respondent filed a notice of opposition and an opposing affidavit on 28 September 2012. Nothing happened to the matter after that. The record was only referred to me in April 2016. I set it down for argument on 8 April 2016. On that day the applicant, through his counsel, requested for a postponement to enable him to file a supplementary affidavit. I granted the postponement to 20 April 2016. On 13 April 2016 the applicant filed a supplementary affidavit. The respondent responded to it by affidavit filed on 15 April 2016. On 20 April 2016, the date on which the matter had been postponed to for argument, the applicant filed an answering affidavit.

In the original founding affidavit the applicant's case was that the property attached is a dwelling which is occupied by him, his wife, daughter and two brothers. He stated in para 6 that: "if execution proceeds, myself (*sic*) and my family will suffer hardship and will be left destitute with no place to live." The applicant stated that the property attached was purchased through a mortgage loan from the Commercial Bank of Zimbabwe (CBZ Bank) for US$300 000. He stated that CBZ Bank advanced him a further amount of US$300 000. In his words: "CBZ are aware of my temporary challenge in respect of my current financial position and have understood it. They have given me till end of September 2012 to start making my repayment on their loan." According to the applicant, even if the sale in execution was to proceed then the respondent would "not receive a single cent" because the proceeds of the sale would be applied to the debt owed to the CBZ Bank. He argued, therefore, that the respondent was "better off suspending the sale in execution for me to make payments (as) per my proposal." The proposed payment was a monthly sum of US$5 000 with effect from 31 October 2012. It is common cause that the applicant never made the monthly payments proposed, and had not paid anything at the time of the hearing of the application.

In the supplementary affidavit the applicant made a fresh offer to pay a monthly sum of US$1 000 with effect from 31 April 2016. Quite apart from the fact that there is no 31st April (the last day of April in any year being 30th), the offer was now significantly less than that made some four years ago. The applicant further offered "bullet payments" in the sum of US$10 000 after every six months with the first of such payments to be made on or before 30 October 2016. He also submitted, in the alternative, that the sale of his property be suspended to enable him to arrange with the CBZ Bank to have the property sold by private treaty in order to reduce the extent of his liability (not to the respondent, but) to CBZ. He stated that in his estimation the property would not realise more than US$350 000 even if it was to be sold by private treaty. According to him CBZ Bank was owed "in excess of US$80 000". The applicant attached to his supplementary affidavit a default judgment in Case No. HC 9401/14 granted in his favour against another financial institution, FBC Bank Limited, in which this Court suspended a sale in execution of the same property at the instance of that bank on condition that the applicant made a monthly payment of US$1 000, among other terms. Thus the applicant also owes the FBC Bank a substantial amount of money. A letter addressed to the Registrar which is in the record shows that the applicant also has another pending matter, Case No. HC 14560/12(2), in which he is seeking the same relief against the African Banking Corporation of Zimbabwe Limited which he also owes some money. Thus the applicant owes four commercial banks some money and is seeking to have his property excused from sale. In his answering affidavit the applicant contradicted himself as to the amount owed to the CBZ Bank by alleging that a sum of US$1 297 874.36 is owed which is different from the $80 000 referred to in his supplementary affidavit. Two valuation reports are attached to the answering affidavit. The first report which was prepared by Livingking Realtors gives an open market value of US$350 000 and a forced sale value of US$175 000 for the property. A second report prepared by Realty World gives an open market value of US$300 000 and a forced sale value of US$170 000.

In its supplementary affidavit the first respondent stated that its investigations had revealed that the applicant's debt to the CBZ Bank was about US$80 000.

Order 40 r 348A (5a) of the High Court Rules, 1971, provides as follows:

> "Without derogation from subrules (3) to (5), where the dwelling house 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 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.

Subrule (5e) provides the following:

> "If, on the hearing of an application in terms of subrule (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."

Mr *Musimbe* for the applicant submitted that the applicant was not relying on the ground of the hardship which the applicant or members of his family were likely to suffer if the dwelling is sold or they are evicted from it. Instead, the applicant relies on the reasonableness of his offer as well as "some other ground for suspending the sale". The concession was properly made, in my view, for the following reasons. The provision cited above refers to "great hardship", not just hardship. In the founding affidavit the applicant merely alleges that he and his family "will suffer hardship" if the property is sold, albeit he then suggests that they will be made destitute, an assertion that appears to have been abandoned. This court has held that not every hardship warrants the invocation of the procedure provided for in r 348A. The hardship must be great, by which is meant that it must be extraordinary. See *Masendeke* v *Central Africa Building Society & Anor* 2003 (1) ZLR 65(H) at 68H-69B. That is so because ordinary hardship is an inevitable inconvenience of any process of execution by which a person's property is attached and sold. Indeed, no evidence of the degree of hardship has been led by the applicant. The applicant has not suggested that the property attached is his only immovable property or that he cannot reasonably secure alternative accommodation.

In adopting the stance taken by the applicant Mr *Musimbe* relied on the following remarks by Chinhengo J in *Masendeke* v *Central Africa Building Society* (*supra*) at p. 69D-E:

> "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."

I respectfully disagree with the above construction of subr (5e). The "golden rule" for construing all written engagements is that the words used must be given their ordinary grammatical meaning unless there are reasons for departing from that meaning. A ground for not adhering to the grammatical and ordinary sense of the words used in an enactment could be found where such meaning would lead to some absurdity or some repugnancy or inconsistency with the rest of the instrument or would otherwise defeat the intention of the legislature. See *ZRA & Anor* v *Murowa Diamonds (Pvt) Ltd* 2009 (2) ZLR 213(S) at 217D-218A; *Hofrho (Pvt) Ltd & Anor* v *UDC Ltd* 2001 (2) ZLR 58(S); *Tengwe Estate (Pvt) Ltd* v *Minister of Lands & Anor* 2002 (2) ZLR 137(H) at 141F-G; E. A. Kellaway, *Principles of Legal Interpretation: Statutes, Contracts & Wills, Butterworths* (1995). Thus the word "and" may be read as "or" and the word "or" as "and" if the context renders it absolutely necessary. In the context of subr (5e) no absurdity or repugnancy or inconsistence results from giving the word "and" its ordinary conjunctive meaning. I believe that there would be an injustice if a judgment debtor would be allowed to escape the consequences of execution by merely proving the likelihood of great hardship without making a reasonable offer to settle the debt or satisfying any of the other requirements disjunctively provided for in subpara(s) (ii) and (iii) of para (b) of subr (5e). See *Granary Investments (Pvt) Ltd* v *Elkin Planim* HH 180-13 at p.3. Such an approach would drown the efficacy of judicial execution of judgments in a sea of biased equity.

It seems to me, therefore, that once the applicant failed, as he spectacularly did *in casu*, to establish the likelihood of great hardship then his application must fail. That is not to suggest that the offer made by the applicant to settle the judgment debt is reasonable, or that the applicant satisfied any of the other requirements of subr (5e) (b) (i) to (b) (iii). Rather, the offer is not only unreasonable but lacks *bona fides*. In 2012 when the application was filed

the applicant made an offer to make a monthly payment of US$5 000. He did not pay a cent for almost four years after filing his application. He would have discharged the debt by now if he had made those payments. Four years later, the applicant offers US$1 000 per month to settle a debt that has now probably doubled. His offer of "bullet payments" is difficult to believe in view of the manner in which he has made previous false undertakings. For instance, in his first affidavit in 2012 he stated that he was going to receive "in excess of US$30 000" in terms of the agreement with his employer as well as "in excess of US$1.5 million" in respect of commissions earned. The only reference to those appears in a legal opinion by one Advocate *Supiya* which is dated 16 March 2016. Nothing was said about those amounts which the applicant claims to be owed for almost four years after the application was filed. The applicant has presented inconsistent figures of his debt to the CBZ Bank. He has also shown an attitude that he does not quite care about his debts owed to the respondent and the other financial institutions as long as he can forestall execution by promising to settle on some future date. In the answering affidavit he repeats his thesis that even if the property attached is sold in execution the respondent will not benefit from the sale because the proceeds will be appropriated towards the debt owed to CBZ Bank. From the above facts, this is a case where the scepticism of the court to all the assurances and undertakings made by the applicant must be candid to the point of brutality.

The respondent has prayed for costs on an attorney-client scale. It seems to me that the special order of costs is justified by the conduct of the applicant as detailed above. The respondent has clearly been put to unnecessary expenses in seeking to recover what is lawfully due to it. The application is vexatious and amounts to an unacceptable abuse of the court procedures. When the application was filed the applicant alleged that the sale of the attached property would render him and his family destitute. That submission was abandoned without any explanation at all. At the hearing of the matter the applicant then sought to rely on the reasonableness of his offer even though that offer was significantly reduced from the amount which was offered at the time that the application was filed. See *TM Supermarkets (Pvt) Ltd* v *Chadcombe Properties (Pvt) Ltd* 2010 (1) ZLR 196(H) at 200E; *Sibanda* v *Nyathi & Ors* 2009 (2) ZLR 171(H) at 178C – D; *Nexbank Investments (Pvt) Ltd & Anor* v *Global Electrical Manufacturers (Pvt) Ltd & Anor* 2009 (2) ZLR 270(S) at 276E-F.

In all the circumstances of this case, the application is without merit.

In the result, IT IS ORDERED THAT:

1. The application be and is hereby dismissed.
2. The applicant shall pay the respondent's costs on the attorney-client scale.

IEG Musimbe and Partners, applicant's legal practitioners
Sawyer & Mkushi, respondent's legal practitioners