KENNETH SCHOFIELD
versus
FBC BANK LIMITED
and
THE SHERIFF OF THE HIGH COURT OF ZIMBABWE N.O

HIGH COURT OF ZIMBABWE
CHIKOWERO J
HARARE 2, 3 & 4 May 2018

Urgent Chamber Application

H. Mutasa, for the applicant
Advocate T Zhuwarara, for the 1st respondent
2nd respondent *in default*

CHIKOWERO J: On April 27th 2018 applicant filed an urgent chamber application for suspension of a sale in execution of a dwelling in terms of Rule 348A (5b) of the High Court Rules, 1971.

In line with rule 348A (6) l treated this matter as urgent. I caused it to be set down for May 2nd at 2.30pm for hearing as soon as it was allocated to me.

Opposing papers were duly filed on April 30th 2018, and served. The parties and their legal practitioners appeared before and, by consent, the matter was postponed to May 3rd 2018 at 9.00am to enable the applicant's legal practitioner to reconsider whether to proceed with the application. This was occasioned by the points in limine raised in 1st respondent's opposing affidavit.

I also took the opportunity to point out to both parties to consider whether the matter was properly before me in view of this court's decision in *Masimbe* v *Rainbow Tourism Group 2016* (1) ZLR 367. I pause to remark that when l was preparing this judgment l noted that the application was meant to be brought under rule 348A (5a) and not (5b).

Rule 348A (5b) provides for the form in terms of which the application in terms of 348A (5a) must be brought. The form is provided in the rules as Form no. 45b. The citation of the incorrect subrule prejudiced no one. I ignored it.

Preliminary point 1 – should a Rule 348A (5a) application be filed as an urgent chamber application?

May 3rd 2018 saw the preliminary points being argued before me. The first point was that the matter was not properly before me because an application in terms of rule 348A (5a) cannot be brought as an urgent chamber application. This matter came before me as an urgent chamber application, in terms of rule 348 A (5a), for suspension of sale of a dwelling declared specially executable by judgment of this court dated March 30th 2016.

The order declaring the dwelling specially executable appears on the last page of the judgment. Copy of the judgment is annexed to the application.

Rule 348A (5b) is clear that an application for suspension or postponement of a sale in execution of a dwelling, made in terms of the preceding subrule, shall be in form 45b. It deals with the procedure. Rule 348A (5b) is couched in peremptory terms.

In this regard, I agree that, as a matter of procedure, an application for suspension of a sale in execution of a dwelling brought in terms of Rule 348A (5a) must not be brought as an urgent chamber application.

It must be brought as a chamber application as clearly spelt out in rule 348A (5b) utilising the format therein provided. The relevant form is attached to the rules. It is form no. 45b. I agree also that an application in terms of rule 348A (5a), because it is not an urgent chamber application, it is not supported by any affidavit, is not accompanied by any certificate of urgency and should not have attached to it a draft provisional order. Form 45b is a standard form document in the nature of a statement setting out what should be contained in an application for suspension or postponement of a sale in execution of a dwelling.

Put differently, when duly completed and filed with the Registrar of this court, form 45b is the application itself. It has no provision for a certificate of urgency. It also does not make provision for seeking interim relief. The remedy envisaged therein is clearly final in both form and substance. It is evident that l have on this point reached the same conclusion as in *Masimbe* v *Rainbow Tourism Group* 2016 (1) ZLR 367 (H). As the rules of this court currently stand, an application under rule 348A (5a) cannot be brought as an urgent chamber application. It must be instituted as a chamber application in form 45b, although it is treated urgently.

However, on the basis of the papers before me l dismiss the first point *in limine*. The reasons are:-

1. The cover and title of the application clearly show that it was brought as an urgent chamber application.
2. It was accompanied by a certificate of urgency.
3. The application was supported by a founding affidavit.
4. As originally filed, it had a draft provisional order setting out the terms of the final relief sought as well as the interim relief desired.
5. All the above shortcomings notwithstanding, pages 1 to 3 of the application although christened:

"Urgent chamber application for suspension of sale in execution of dwelling in terms of rule 348A (5b) of the High Court Rules, (1971)" is in fact Form 45 b. It is not only so headed but is in fact so.

During argument an oral application was made to amend the draft order by entire deletion of the interim relief sought and substitution of certain words in the remaining draft order to conform with the offer made in Form 45 b. Although the net result of the amendments sought was clumsy *vis-a-vis* the order sought, I was prepared to, and did, grant the application for amendment of the draft order.

I took the view that no one was prejudiced. A draft order, amended or unamended, remains precisely that – a draft order. I agree that the state of applicant's papers even after the amendment is in form a mixture of an urgent chamber application and a chamber application in Form No. 45 b. That is clearly undesirable considering that applicant is legally represented. One option would have been for applicant to withdraw the application and file, in proper form, the desired application. That was not done. I am prepared to, and do, condone applicant's procedural failings in this regard. I condone the procedural departure using the discretion reposed in me by r 4 C of the High Court Rules, 1971.

There has been substantial compliance with r 348 A (5a) and (5b) in that Form 45 b is in fact part of the papers before me. Confusion may also have ensued in the wake of this court relating to applications for postponement or suspension of sale in execution of a dwelling in terms of r 348 A (5a) being made as urgent chamber applications. I refer in this regard to the following matters; *Masendeke* v *Central Africa Building Society & Anor* 2003 (1) ZLR 65 (H); *Muguti & Anor* v *Tian Ze Tobacco Co (Pvt) Ltd & Anor,* 2015 (1) ZLR 561 (H).

If the confusion does in fact exist, the same is in my view, clearly unnecessary. The rules cannot be clearer on the correct procedure to be followed.

In the circumstances, I dismiss the first point *in limine.*

Preliminary point 2 – is rule 348 A (5a) applicable to a dwelling which has been declared by a court order to be specially executable? This issue has been considered by this court in the past. The following matters are pertinent in this regard; *Meda* v *Homelink (Pvt) Ltd & Anor* 2011 (2) ZLR 516 (H); *Nyabindu & Anor v Barclays Bank of Zimbabwe Ltd & Others* 2016 (1) ZLR 348 (H); *Electroforce Wholesalers (Pvt) Ltd & Anor* v *FBC Bank* Ltd HH 14/2015.

In all three matters this court has held that r 348 A (5a) does not apply to a dwelling which has been declared by a Court Order to be specially executable.

I am not persuaded that the above matters were wrongly decided. In *Meda (supra)* DUBE J stated at 352 G – 353 A;

> "Rule 348 A is applicable where the Sheriff attaches a "dwelling" in circumstances where the debt sought to be recovered is not linked to the dwelling concerned. It applies where the dwelling is not under mortgage. Rule 348 A is not applicable to foreclosure proceedings. Where a person approaches a bank for a loan and mortgages his house as security for a debt, he cannot when he defaults, plead that his house is his sole dwelling. Any person who puts his home up as security for loan and does so being well aware of the fact that should he fail to service the loan, his house will be up for sale, cannot complain when he fails to service the loan and the bank attaches his home. Such a person takes a risk which he should live with. The applicants cannot cry foul now and seek to avoid their financial and lawful obligations by invoking r 348 A to avoid their obligations. The applicants should live with the consequences of mortgaging their house. To allow litigants in foreclosure proceedings to hide behind the fact that the mortgaged house is a family dwelling would amount to home seekers getting mortgages without security."

I am in entire agreement with these remarks. Although no distinction is made on a plain and literal reading of r 348 A (5a) between attached dwellings subject to a mortgage bond and those not so subject, by mortgaging the dwelling the applicant effectively waived the protection otherwise available under r 348 A.

In my view, this court cannot blow hot and cold. It cannot declare the dwelling specially executable and then, when that very order is executed upon effectively set it aside by declaring the same property not executable, never mind the conditions attached to such latter court order.

I am aware that *Masendeke* v *Central Africa Building Society & Anor* 2003 (1) ZLR 65 (H) was an urgent chamber application brought under r 348 A wherein this court suspended the sale in execution of a dwelling.

A reading of that judgment does not disclose that this point was raised in that matter. Rather the matter was decided on the basis of r 348 (5e) (b) (i) (ii) and (iii). I observe also, in passing, that *Masendeke (supra)* was brought as an urgent chamber application when the rules

provide for a chamber application. Because of that, the provisional order granted therein was not only final in nature but a
replica of the final order sought.

I remain unpersuaded that *Masendeke* (*supra*) was correctly decided in so far as it ordered suspension of sale in execution of a dwelling declared specially executable by an order of court. I therefore uphold this preliminary point.

Accordingly, the application is dismissed with costs.

Gill Godlonton & Gerrans, applicant's legal practitioners
Mawere & Sibanda, 1st respondent's legal practitioners