JOHN ARNOLD BREDENKAMP
versus
THE SHERIFF OF ZIMBABWE N.O
and
YAKUB MAHOMED

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 7 & 13 December 2017

Urgent Chamber Application

T. Magwaliba, with him *T. Chagonda,* for the applicant
E. Samukange, with him *T. C. Hungwe,* for the 2nd respondent

ZHOU J: This is an urgent application for stay of execution of a writ of execution issued pursuant to the judgment granted in Case No. HC 8103/14. The writ was issued to enable the second respondent to recover the taxed costs awarded in HC 8103/14. The applicant has instituted a court application under case No. HC 4856/17 for review of the taxation of the costs. The relief *in casu* is being sought pending the determination of that application for review. The application is opposed by the second respondent.

This is not the first time that the applicant has instituted an urgent chamber application seeking that relief. The same relief was sought in June 2017 under case No HC 4932/17. I dismissed the application and gave reasons in the judgment in that case, HH 389-17.

Subsequent to the judgment in case No. HC 4932/17 the parties engaged each other in negotiations the content of which is evident in the correspondence exchanged by their legal practitioners. The applicant asserts that the negotiations yielded an agreement in terms of which the applicant was to pay, and did pay, a sum of US$34 995-00. In return, the second respondent would not proceed with the execution pending determination of the application for review in HC 4856/17. A letter written by the second respondent's legal practitioners dated 2 August 2017 states, *inter alia*:

> "We undertake to stay execution of the writ in case No. HC 8103/14 pending the judgment in the review matter, case no. HC 4856/17."

The instant application is thus primarily predicated upon the alleged agreement. The

opposing affidavit deposed to by a partner in the firm of attorneys representing the second respondent denies that the second respondent authorised his legal practitioners to suspend the execution of the judgment in his favour pending determination of the application for review.

If this was a simple matter of finding enforcement of a contract created through the agency of the attorneys for the second respondent I would have had no difficulty in imputing the contents of the letter of 2 August 2017 to the second respondent. But that is not the issue. The application *in casu* is one for stay of execution. Execution is a process of the court, and the court in the exercise of its inherent power to control its processes has a discretion as to whether or not to stay execution of its judgment. In the exercise of that discretion the court considers whether real and substantial justice dictates that there be stay of execution, see *Mupini* v *Makoni* 1993 (1) ZLR 80 (S) at 83B-D. I have already considered that matter in case No. HC 4932 /17 and come to the conclusion that there is no negation of real and substantial justice if the process of execution is to proceed. That finding cannot be upset by the subsequent discussions or agreement of the parties. After all, the first respondent which has caused the writ of execution to be issued has shown its intention to proceed with the execution.

The alleged agreement to stay execution does not constitute real and substantial justice justifying stay of execution, as it has not been shown that that agreement is a factor that would render it impossible for the applicant to recover any excess money paid in respect of costs if the application for review succeeds. The alleged agreement does not constitute a special circumstances to warrant the giving of an inconsistent judgment to the one given in case No. HC 4932/17.

In the result the application cannot succeed. It is accordingly ordered that:

1. The application be and is hereby dismissed; and
2. The applicant is to pay the costs.

Atherstone & Cook, applicant's legal practitioners
Venturas & Samukange, 2nd respondent's legal practitioners