JOHN ARNOLD BREDENKAMP
versus
YAKUB MAHOMED
and
THE SHERIFF BINDURA NO

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 6 & 21 June 2017

Urgent Chamber Application

D. Ochieng, with him *T. Nyamasoka* and *T. Chigudumba* for the applicant
T. Mpofu, with him *T. Zhuwarara* and *E. Samukange* for the first respondent

ZHOU J: On 17 February 2016 the first respondent was granted judgment against the applicant for, *inter alia*, payment of a sum of US$3 872 123.00 together with interest thereon at the prescribed rate calculated from 28 February 2013 to the date of payment in full, and costs of suit on the legal practitioner and client scale. The first respondent subsequently had his bill of costs taxed. The taxing officer allowed a sum of US$205 602.00. Pursuant to the taxation of the bill of costs the first respondent caused a writ of execution to be issued on 23 May 2017. On 31 May 2017 the Sheriff attached property belonging to the applicant which, according to the Notice of Seizure and Attachment, is valued at US$610 000.00. On 1 June 2017 the applicant instituted a court application seeking review of the decision of the taxing officer. The application for review was filed under Case No. HC 4856/2017. The attachment also triggered the instant application which was instituted on 2 June 2017. The application is strenuously contested by the first respondent.

The interim relief being sought is "that pending the finalization of the application for review filed by the applicant in case number HC 4856/2017, the second respondent be and is hereby interdicted and precluded from removing the movable goods listed in the inventory dated

31 May 2017 and attached to the application as annexure 'C', and that second respondent shall not proceed with any form of execution in pursuit of a writ of execution issued in case number HC 8103/2014". The final relief sought is for a stay of execution of the Bill of Costs pending determination of the application for review, as well as release from attachment of the goods which were attached by the second respondent.

In the application for review the applicant attacks two items which were allowed by the taxing officer. The first attack is directed at the taxing officer's decision to allow a premium charged by the first respondent's legal practitioners for their work as being grossly unreasonable. The second attack is directed at counsel's fees which the applicant argues should not have been allowed as a disbursement "on the mere presentation of Counsel's invoice".

In opposing the instant application, the first respondent through its counsel raised four objections *in limine*, namely (a) that the application is not urgent; (b) that the application is invalid for non-compliance with the proviso to r 241 of the High Court Rules, 1971; (c) that there was material non-disclosure which justified dismissal of the application without a consideration of the merits thereof; and (d) that the application discloses no cause of action insofar as it is predicated upon the alleged excessive nature of the fee charged by counsel when, as a matter of fact the fee was based on a contingency arrangement sanctioned by the relevant regulations. This complaint cannot be a valid ground to be raised *in limine* in this application, but is relevant to the merits of the application as it pertains more to the basis of the review application than to the instant application.

On the question of urgency, the first respondent's contention is that the bill of costs was taxed on 12 May 2017 yet the present application was only filed on 2 June 2017. Mr *Ochieng* for the applicant disputed that date and submitted that the taxation took place on 18 May and not on the date stated by the first respondent. The parties did not place any evidence of the correct date on which the taxation took place. The applicant in his court application for review and founding affidavit in the present case states that the decision of the taxing officer was made on 18 May 2017, while the first respondent states in his founding affidavit that the bill of costs was taxed on 12 May 2017. Further, although the first respondent refers to 12 May as the date of the taxation in para 3 of the opposing affidavit, there is no specific denial of the explicit mention of 18 May in para 7 of the founding affidavit. In fact, the warrant of execution issued at the instance

of the first respondent states that the taxation date is "18 May 2016" (*sic*). My conclusion on the question of urgency is not affected by whichever of the two dates I accept. The instant application is predicated upon the review application which was filed on 1 June 2017, as the final relief is being sought pending the determination of that application. The review application was filed timeously. The applicant would not have sought stay of execution pending the happening of nothing in the circumstances of this case. In any event, I do not accept that the delay of about one week or two weeks in the circumstances of this case would deprive the matter of its urgency. The warrant of execution was only issued on 23 May and delivered to the Sheriff on 30 May 2017. The attachment only took place on 31 May 2017. Having regard to the collectivity of those facts, it seems to me that there can be no justification for concluding that the matter was deprived of its urgency. The objection that the matter is not urgent must, therefore, fail.

The objection regarding the form used in the chamber application is that it does not comply with the requirements of the proviso to r 241 which states:

> "Provided that, where a chamber application is to be served on an interested party, it shall be in Form No. 29 with appropriate modifications."

In response to the objection, Mr *Ochieng* moved the court to condone the non-compliance with the rules. Mr *Mpofu* for the first respondent submitted that the non-compliance should not be condoned because condonation was only being sought after the objection had been taken to the defect. In view of the fact that this is a chamber application in which there is very little time to file an answering affidavit, and also given that the opposing papers were filed and served on the same date that the matter was being heard, justice demands that the non-compliance be condoned so that the dispute is resolved on the merits. I have also considered the fact that the non-compliance is technical and no prejudice is occasioned to the respondent by it, as the first respondent had the opportunity to file opposing papers. For those reasons, I am prepared to condone the failure to prepare the chamber application in the proper form.

The objection relating to non-disclosure of material information is predicated upon the alleged knowledge of the applicant's legal practitioner that the fee charged by the first respondent's counsel was based upon a contingency arrangement. The applicant's counsel disputed that the legal practitioners for the applicant were aware that the fee charged by counsel for the first respondent was based on a contingency fee arrangement. That dispute was raised in

submissions. As this is an urgent application and no answering affidavit had been filed on behalf of the applicant, there is no basis for the court to make a finding of fact that the legal practitioners were aware of the alleged fact.

Turning to the merits, the basis of the application is that the applicant has instituted an application for review, and that pending its determination the execution should be stayed. The court has inherent power to control its process, including the process of execution, if the requirements for the exercise of that power are met. This trite proposition of law was stated in the case of *Mupini* v *Makoni* 1993 (1) ZLR 80(S) at 83B-D as follows:

> "Execution is a process of the court, and the court has an inherent power to control its own process and procedures, subject to such rules as are in force. In the exercise of a wide discretion the court may, therefore, set aside or suspend a writ of execution or, for that matter, cancel the grant of a provisional stay. It will act where real and substantial justice so demands. The onus rests on the party seeking a stay to satisfy the court that special circumstances exist. The general rule is that a party who has obtained an order against another is entitled to execute upon it. Such special reasons against execution issuing can be more readily found where, as *in casu*, the judgment is for ejectment or the transfer of property, for in such instances the carrying of it into operation could render the restitution of the original position difficult. See *Cohen v Cohen (1)* 1979 ZLR 184(G) at 187C; *Santam Ins Co. Ltd* v *Paget (2)* 1981 ZLR 132(G) at 134G-135B; *Chibanda* v *King* 1983 (1) ZLR 116(H) at 119C-H; *Strime v Strime* 1983 (4) SA 850(C) at 852A."

The position of the law, therefore, is that a party who has a judgment in his or her favour is entitled to enforce that judgment. Stay of execution is a departure from that right, which is the reason why special circumstances are required to justify the conclusion that real and substantial justice demands that the court stays or suspends the execution of a judgment which it has granted. The power which is given to the court must be exercised judicially in a manner that does not cause undue injustice to the judgment debtor or undermine the efficacy of judicial proceedings by rendering judgments ineffectual. In the instant case, there is no challenge to the judgment itself. The applicant's appeal against the judgment was dismissed by the Supreme Court. The challenge is directed at the costs. But the applicant, significantly, has not said, let alone tendered, what he considers to be reasonable costs. He simply wants the court to stop the first respondent from recovering the costs awarded.

Also, the factual basis upon which the applicant seeks to impeach the costs is incorrect. It has been contended that counsel's fees which form the greater portion of the costs allowed

were based upon a contingency arrangement. This application does not suggest that there was consideration of irrelevant factors or discounting of relevant factors in assessing the contingency fee charged. What principles relating to such fees were misapplied? Now that the applicant knows the basis upon which the fee was charged does the basis of its application remain intact? It seems to me that the factual basis upon which the application was founded collapsed. The applicant did nothing to remedy the situation when he was confronted with the facts in the opposing affidavit relating to how the fee was charged. The applicant also says nothing about the position that counsel's fees are a disbursement and therefore not subject to taxation. As for the premium on the fee by the first respondent's legal practitioner, the debate on the difference between the volume of work and the complexity of the work is very academic as it has not been shown that the matter was a simple one. The amount involved and the time it has taken for the matter to be finalized give an indication of the nature of the case. I do not see how the court in the review application would find gross unreasonableness or irregularities in these circumstances.

The question of the value of the goods attached in execution must be understood against the backdrop that the sale in execution is a forced sale which is unlikely to realize the market value of the goods attached. The applicant has not shown what other goods were available to be attached to satisfy the debt other than those attached. After all, any excess realized from the proceeds of the sale will be paid to the applicant. Thus besides the inevitable inconvenience of having one's property sold, the argument that the value of the goods attached exceeds the costs allowed by the taxing officer does not constitute a special circumstance justifying the stay of execution.

Finally, it has not been suggested or shown that if the costs are reduced pursuant to the review application the first respondent would be unable to refund the difference to the applicant. The fact is that even if the costs are reduced the applicant will still be liable to pay some costs as was ordered by the court. There is therefore no irreversible loss which justifies stopping the process of execution in the instant case.

The first respondent has asked for costs to be awarded on the legal practitioner and client scale. That is a punitive scale which is reserved for special cases. There are no factors in the

present case which justify the award of such costs. Costs should therefore be ordered on the ordinary scale.

In the result, It is ordered that:

1. The application be and is hereby dismissed.
2. The applicant shall pay the respondents' costs.

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