

**BASILIO MUTOSVORI**

**Versus**

**SIMON GAMHA**

**And**

**THE DEPUTY SHERIFF OF HIGH COURT**

IN THE HIGH COURT OF ZIMBABWE  
DUBE-BANDA J  
BULAWAYO 17 JUNE 2021 & 24 JUNE 2021

**Urgent application**

*B. Mandire*, for the applicant.  
*S. Mkhwananzi*, for the 1<sup>st</sup> respondent

**DUBE-BANDA J:** This is an urgent application. This application was lodged in this court on 10 June 2021. It was placed before me on the 17 June 2021, and I ordered that it be served on the respondents together with a notice of set down for 21<sup>st</sup> of June 2021. The relief sought by the applicant has been formulated as follows:

Terms of the final order sought

That you show cause to this Honourable Court why a final order should not be made in the following terms:

1. That the 2<sup>nd</sup> respondent be ordered not to execute the order made in case number HC 589/20 on 9 June 2021 pending the judgment in the application for review.
2. That the first respondent pay costs of suit.
3. Interim relief granted

Pending confirmation or discharge of this Provisional Order, Applicant is and is hereby granted the following relief:

- a. That the 2<sup>nd</sup> respondent be and is hereby ordered to stay execution of an order of this court in case number HC 589/20 made on the 9 June 2021.
- b. If execution has already been made 2<sup>nd</sup> respondent be and is hereby ordered to restore applicant's Toyota Granvia Reg. No. AEE 6367 to the applicant.

Service of this application and provisional order

The applicant's legal practitioners be and are hereby authorised to serve this order on the respondent's or their legal practitioners.

The application is opposed by the 1<sup>st</sup> respondents. 2<sup>nd</sup> respondent neither filed opposing papers nor appeared in court. I take it that 2<sup>nd</sup> respondent has taken a position that it shall abide by the order of this court.

This application will be better understood against the background that follows. On 11 June 2020, 1<sup>st</sup> respondent in case No. HC 589/20 obtained a default judgment against the applicant. Applicant was ordered to pay costs on an attorney client scale. On the 12 December 2020, the Taxing officer taxed and allowed costs in the sum of \$151 687.00. A writ was issued and in pursuance thereof, a certain motor vehicle belonging to the applicant was placed under judicial attachment. Against this background, applicant filed an application for review (HC 766/21) to set-aside the taxed bill of costs. The applicant filed this application to stay execution of the writ pending the finalisation of the review application.

This court may in its discretion to stay execution of a writ pending review of the taxed bill of costs, if such review application for review has prospects of success. In *Farai Bwatikona Zizhou v The Taxing Officer (2) Rita Marque Mbatha SC 7/20* it was held that the court is very slow to interfere with the exercise of the taxing officer's discretion. It will not readily do so unless it is satisfied that the taxing officer acted on some wrong principle or did not exercise his or her discretion at all. It is trite that having obtained an order of costs (which costs were taxed by a Taxing Officer) in his favour, the 1<sup>st</sup> respondent, as a judgment creditor, is entitled to obtain satisfaction of it from the applicant, the debtor. See: *Bredenkamp v Connax Wholesalers (Pty) & Ors 1965 (2) SA 876©*; *Van Dyke v Du Toiten' nander 1993 (2) SA 781(0)* and *Mahlangu v Ndlovu & Ors HB-7-04*. There are, however, exceptions to this general rule where the judgment creditor's right to execute may

be stayed pending the happening of some event. The court has a discretion, in a proper case, to suspend execution. But the discretion must be judicially exercised. See: *E P du Toit Transport (Pty) Ltd v Windhoek Municipality* 1976 (3) SA 818(SWA); *Super Sales & Upholsterers (Pty) Ltd v Lawton* 1974(3) SA 264 (R) and *Mahlangu v Ndlovu, supra*. Has the applicant made out a case for me to exercise this discretion in his favour? This is what I have to determine. See: *Omar and Another v Blue Gum Transport (Pvt) Ltd and Another* HB 44/05.

In support of this application, and his founding affidavit, applicants makes the following averments.

1. I submit that my application for review has merits more particularly in that the bill of costs glaringly over exaggerates the work done by the 1<sup>st</sup> respondent's legal practitioner.
2. In item number 1, it says the legal practitioner spent 31/2 hours taking instructions and perusing documents when I never signed anything with the 1<sup>st</sup> respondent.
3. Further to the above, what sought of documents need 31/2 for just perusing?
4. I am confident that my application for review has merits in that the bill of costs charged both clerical work and messenger work on the legal practitioner, I am advised, will not stand on review.
5. I further submit that there will be no harm if this execution is stayed that may visit the 1<sup>st</sup> respondent. However, the reverse is true. The motor vehicle attached is a family car and the amount that I am required to pay is unjustified.
6. It is clear that I have prospects of success in challenging the 1<sup>st</sup> respondent's bill of costs.<sup>1</sup>

In his oral submissions, Mr *Mandire*, counsel for the applicant criticised a few items contained in the bill of costs. The bulk of the items in the bill of costs are not impeached. Ms *Mkwananzi*, counsel for the 1<sup>st</sup> respondent contended that the application for review has no prospects of success. It is still-borne, in that it is purportedly made in terms of 314 of the High Court Rules, 1971, which provides thus:

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<sup>1</sup> Paragraphs 12 – 17 of the founding affidavit.

### ***314. Review of taxation***

(1) A party aggrieved by the decision of a taxing officer may apply to court within four weeks after the taxation to review such taxation. The application shall be by court application to the taxing officer and to the opposite party, if such opposite party was present at the taxation or if the court decides that such opposite party should be represented. [My emphasis].

It is contended that the bill of costs sought to be reviewed was taxed on the 12 December 2020, and the review application was filed on the 10 June 2021. The application for review was filed approximately twenty weeks outside the timeline provided in rule 314. On this basis alone, it is contended that the application for review is doomed to fail.

Again, the total taxed bill is in the sum of \$151 687.00. The impeached items are less than one third of the total bill. From the papers before me over \$100 000.00 is not being contested by applicant. The applicant has not tendered this uncontested amount. He has not averred any prejudice he could suffer by making the part payment. This court has a wide general discretion to allow the stay execution pending review. It is only where the court is satisfied that the review of the taxation is not brought genuinely with the *bona fide* intention of testing the correctness of the determination of the Taxing officer, but is only brought as a delaying tactic and as a means of staving off the evil day that this court may order execution of the taxed costs to proceed. See: *Omar and Another v Blue Gum Transport (Pvt) Ltd and Another* HB 44/05.

I asked Mr *Mandire* the reason of using the cumbersome review proceedings under Order 33 instead of requesting the taxing officer to refer the issue to a judge in chambers in terms of order 38 Rule 313. This route is faster and cheaper. Rule 313 provides:

#### Taxing Officer may refer point to judge in chambers:

The Taxing Officer may, without filing any formal documents, submit any point arising at a taxation for decision by a judge in chambers, and it shall be competent for the taxing officer and for legal practitioners who appeared at the taxation to appear before the judge respecting such point.

Mr *Mandire's* submissions on this issue were very unsatisfactorily. All he could say was that the execution was imminent. Applicant had to act fast to forestall the execution. The simple answer to counsel's submissions is that an urgent application to stay execution can

still be filed pending the finalisation of a bill of costs referred to a judge of this court in terms of rule 313.

Further in terms of rule 330 of the High Court Rules, 1971 the taxed costs and expenses of issuing and levying execution shall be first charge on the proceeds of the property sold in execution. This is all consistent with case law that review in relation to the taxation of a bill of costs by a taxing officer as is the case here, should, in the absence of exceptional circumstances be concluded with undue delay. See: *Omar and Another v Blue Gum Transport (Pvt) Ltd and Another* HB 44/05; *Armonde v Buirski, Herbstein and Jasobso* 1933 CPD 413; *Policansky Bros v Hermann & Anor* 1911 TPD 319 and *Patel v Ismail Mia & Co* 1912 TPD 650. There more reason a litigant who is desirous of getting a speedy resolution of the matter must seriously consider using rule 313, instead of the cumbersome procedure in rule 314.

In order to comply with the requirements for an interim relief, the applicant has to show a *prima facie* right, reasonable apprehension of irreparable harm, balance of convenience and the absence of any satisfactory remedy. On the facts of this case, the applicant have failed to make out a case for the interim relief sought. Therefore, I am satisfied that the balance of convenience favour the execution of the taxed costs pending review. The applicant did not tender payment of the uncontested taxed costs, which, as already indicated above, are substantial. His application review purportedly filed in terms of rule 314 is hopelessly out of time. It has no prospects of success. He opted to use a longer route instead of utilising Rule 313. The actions of the applicant are therefore designed to stave off the day of reckoning. On the evidence before the court and upon hearing counsel, I find that the applicant has failed to make out a case for the relief sought, and that the application falls to be dismissed.

Costs are always at the discretion of the court. Applicant has failed to obtain the relief he sought from this court. There are no special reasons warranting a departure from the general rule that costs should follow the result. Accordingly, the applicant must bear the 1<sup>st</sup> respondent's costs.

**Disposition**

In the result, I order as follows: this application is dismissed with costs of suit.

*Masawi & Partners Kwekwe*, applicant's legal practitioners  
*Sansole and Senda*, 1<sup>st</sup> respondent's legal practitioners