

RETAN INVESTMENTS (PVT) LTD  
versus  
ISHMAEL NDLOVU  
and  
CAKESTONE MUNHARIRA  
and  
TAFADZWAZANO  
and  
PRECIOUS TENDAI SWETO  
and  
GABRIEL MAFUNGA  
and  
ANESU MUNYURWA

HIGH COURT OF ZIMBABWE  
TAGU J  
HARARE, 12 OCTOBER 2015 AND 4 NOVEMBER 2015

**Urgent Chamber Application**

*B Ndlovu*, for the applicant  
Respondents, in person

TAGU J: This is an urgent chamber application for stay of execution of the applicant's property by the respondents who have already attached the property and are armed with a writ of execution. The cause of action arose from the fact that the 6 respondents are former employees of the applicant. The applicant had employed the 6 respondents in capacities varying from Managers to Shop Assistants. The applicant then terminated the contracts of employment of the 6 respondents on different dates between January and February 2014. The respondents were not paid their terminal benefits pursuant to the termination of their contracts. Having been aggrieved with the applicant's unlawful conduct, the respondents collectively referred their dispute of non – payment of terminal benefits to the Labour Officer for conciliation. The conciliation proceedings culminated in a Certificate of No Settlement. The matter was referred to arbitration.

The respondents claimed before the Arbitrator that they were owed terminal benefits

in the form of Notice pay, Cash in lieu of leave, Underpayment, Severance package and relocation expenses. They gave quantum of respective terminal benefits as follows:-

First respondent	-	US\$ 11 947-60
Second respondent	-	US\$ 12 765-00
Third respondent	-	US\$ 4 128-00
Fourth respondent	-	US\$ 6 784-00
Fifth respondent	-	US\$ 6 236-00
Sixth respondent	-	US\$ 6 123-00

The Arbitrator, Mr Godfrey H. Muzondo, after analysing the submissions by the parties dismissed the respondents' claims on 8 April 2014.

Aggrieved by the decision of the Arbitrator, the respondents appealed against the dismissal of their claim to the Judge of the Labour Court. The Labour Court Judge Justice Kudya overturned the Arbitrator's decision and ruled in favour of the respondents on 17 June 2015. The Honourable Judge's order read as follows-

**“IT IS ORDERED THAT**

In default of the respondent's appearance despite warning on 3 June 2015, appeal be and is hereby allowed with costs.”

On 22 June 2015 the respondents filed a chamber application for the registration of their judgment with the High Court. Notice of the Chamber application for the registration of the judgment was duly served on the applicant on 23 June 2015 by affixing the same to the outer principal black gate at the applicant's place of business at number 48 Craster Road, Southerton, Harare after unsuccessful diligent search. Consequently, the chamber application for the registration of the award was duly granted by Mangota J on 14 August 2015. The registered order read as follows-

**“IT IS HEREBY ORDERED THAT**

1. The order in the matter of Ishmael Ndlovu and 6 others versus Retan Investments [PVT] LTD held before Honourable L Kudya dated 17 June 2015 be and is hereby registered as an order of the High Court of Zimbabwe.
  - (a) The Respondent shall pay Applicants a total gross amount of US\$ 51 619.88 which is subject to taxation.
  - (b) Each party to bear its own costs.”

Soon after registering the judgment the respondents issued a writ of execution to the

Sheriff of the High Court. The Sheriff of the High Court went on to attach and execute the applicant's property. The applicant is now claiming that it only became aware of the registered order when its property was attached. On 9 October 2015 the applicant rushed to this court and filed simultaneously, this Urgent chamber application for stay of execution and a Court application for rescission of the registered judgment. The applicant is now seeking the following relief:-

**“TERMS OF FINAL ORDER SOUGHT**

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

- (1) The execution of the Respondent's unopposed judgment is hereby stayed.
- (2) Each party to bear its own costs.

**INTERIM RELIEF**

**IT IS HEREBY ORDERED THAT:**

Pending confirmation of the final Order sought Applicant is granted the following relief;

- (a) The execution of the Respondents' unopposed judgment is hereby stayed pending the determination of the application of rescission by the applicant.

**SERVICE OFF PROVISIONAL ORDER**

1. Service of this Provisional Order shall be effected by any duly attested member of the Zimbabwe Republic Police, Deputy Sheriff or by the Applicant's legal practitioners upon the Respondents.”

The application is opposed by the respondents who are self-actors.

In its application the applicant said it only became aware of the registration of the ward with this court when its property was attached and the property is due to be removed by the Sheriff. The counsel for the applicant told the court the applicant delayed to apply for rescission of the earlier order granted by Kudya J because of changes of legal practitioners. Hence the order by Kudya J was registered by the respondents while the applicant was trying to put its house in order. As a result the applicant only filed its application for rescission of the Order by Kudya J with the Labour court out of time. The applicant has since filed an application for condonation before the Labour Court and the two applications are still pending. As regards the current Order by Mangota J, counsel for the applicant submitted that the applicant did not see the notice of the application for registration, probably because the notice could have been blown away by the wind. Hence the second application for rescission of the Order by Mangota J is being made on the basis that the applicant did not see the notice. Further, he submitted that the order by Kudya J was not registrable and not executable because it does not sound in money. He said the respondents should have gone back to have their claim quantified. However, be that as it may he conceded that the applicant's premises are not accessible since the gate is always kept locked. This explains why the return of service

of the notice of registration stated that:-

“Chamber application served by affixing to the outer principal black gate after unsuccessful diligent search.”

Mr Ishmael Ndlovu who spoke on behalf of his colleagues who were present during the hearing submitted to the court that the applicant’s premises, from the time they were employed there, is always kept under lock and key. He said there are several cameras which are mounted at the premises such that whoever arrives at the gate is seen by the occupants. In the event that the police officers, ZIMRA officers and or the Sheriff of the court are detected at the gate, the occupants would not open the gate nor attend to them. He said that is the reason why their process or notice of registration was left affixed onto the gate. According to him the applicant saw the notice but was in the habit of ignoring them. This explanation was not disputed by the counsel for the applicant.

As regards the contention by the applicant that the order by Kudya J was not registrable and executable, Mr Ishmael Ndlovu disputed it and stated that there was a figure that was stipulated on the award. Hence the award sounded in money and is registrable and executable. He urged the court to dismiss the application on the basis that the applicant was aware of the court orders but chose to ignore them until its property was attached.

After reading documents filed of record and hearing the parties, it became clear that despite being warned to appear before the Judge of the Labour Court, the applicant refused and or neglected to attend the hearing resulting in the Judge of the Labour Court granting default judgment in favour of the respondents on 3 June 2015. Despite the fact that the applicant was aware of the default judgment granted on 3 June 2015, the applicant failed and or neglected to file an application for rescission of that judgment within the time stipulated by the rules. As that was not enough, the applicant failed to oppose the registration of the award with this court and was jolted into action at the last moment when its property was attached. The actions of the applicant fall far short of the requirements for urgency as stipulated in the case of *Kuvarega v Registrar- General and Another* 1998 (1) ZLR 188 (H) at 193 where Chatikobo J (as he then was) said-

“what constitutes urgency is not only the imminent arrival of the day of reckoning; a matter is urgent, if at the time the need to act arises, the matter cannot wait. Urgency which stems from a deliberate or careless abstention from action until the deadline draws near is not the type of urgency contemplated by the rules”

I am persuaded by the respondents that the applicant is in the habit of ignoring court

processes and or directions. In my view it is not correct that the applicant came to know of the registration of the order when its property was attached. The applicant was careless in the manner it sought to protect its rights.

In my view, the service of the chamber application for registration of the order was valid at law in terms of Order 5 Rule 40 of the High Court Rules 1971 which says-

**“40. Service where person to be served prevents service or cannot be found**

Where any process is to be served, and –

- (a) the person upon whom it is to be served keeps his residence, place of business or employment, address for service or registered office closed and thus prevents the process from being served, or
- (b) the person seeking to effect service of any process is unable, after diligent search at the residence, place of business or employment, address for service or office of the person to be served, to find that person or a responsible person referred to in paragraph (b), (d), (e) or (f) of subrule (2) of rule 39 it shall be sufficient service to leave a copy of the process in a letter-box at or affixed to or near the outer or principal door or, in some other conspicuous position at, the residence, place of business or employment, address for service or office, as the case may be.”

In *casu*, the counsel for the applicant confirmed that the gate is always locked. Therefore the applicant is presumed to have seen the notice of registration of the award but deliberately decided not to oppose its registration. In any case I am not persuaded that the judgment was not sounding in money, was not registrable and or executable. The judgment registered clearly stated the amount to be paid which were a sum total of the individual claims made by the respondents.

In the result I make the following order:-

1. The application is dismissed with costs.

*Rubaya and Chatambudza*, applicant's legal practitioners