Judgment No. HB 26/06
Case No. HC 491/06
X-Ref 498/06; 494/05;
3369/04; 2834/03; 237/04;
2440/05 & 2280/05

QUENTIN LEE

Versus

NKOSANA NCUBE

And

VISION SITHOLE

And

REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 13 AND 16 MARCH 2006

A J Sibanda for the applicant
S S Mazibisa for 1st respondent
B Ndove for 2nd respondent

Urgent Chamber Application

NDOU J: The applicant seeks a provisional order in the following terms:

"Terms of the order made:

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

a) Pending an application to reinstate Caveat 252/04 granted by this honourable court in favour of applicant under case number HC 3369/04 and finalisation of a further application by the executor in the deceased estate of the late Dorothy Lee to set aside the disputed transfer of stand number 11 Fernspruit Township of Essexvale estate situate in the district Umzingwane from the deceased estate of the late Dorothy Lee into the name of 2nd respondent the Registrar of Deeds be

and is hereby interdicted and restrained from registering any transfer and from authorising any dealing of any kind in

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respect of the subject property, and further that any transfer or any dealings already processed by the office of the Registrar in favour of 1st respondent or any other person be declared null and void and set aside.

b) The executor in the deceased estate of the late Dorothy Lee who died at Bulawayo on 14 October 1998, ref DRB 578/99 shall file his application or action with this honourable court to set aside the transfer from the deceased estate into the name of 2nd respondent within 14 days of the date of this order and 1st applicant shall also file his application to reinstate Caveat No 252/04 within the same period.

c) The costs of this application shall be borne by 2nd respondent on the attorney and client scale.

Interim Relief granted

1. Pending the return date, applicant is hereby granted the following interim relief:

   (a) The registration of the Deed of Transfer lodged for and on behalf of 1st and 2nd respondents purporting to transfer stand 11 Fernspruit Township shall upon service of this provisional order by applicant's legal practitioners upon the Registrar of Deeds be suspended, and any action since taken by the Registrar of Deeds in respect thereof is hereby provisionally set aside.

   b) The legal practitioner of record of the applicant is hereby authorised to personally serve a copy of this provisional order upon the Registrar of Deeds.

   c) A copy of this order together with a copy of the chamber application shall be served upon the Assistant master of this honourable court [not cited in these proceedings] to the extent of his interest in the deceased estate DRB 578/99"

I believe the appropriate procedure is to simply seek a stay of execution of orders in HC 2440/05 and 2834/03 pending application of rescission. The salient facts of this matter are the following . The

applicant is sole beneficiary of the estate of the late Dorothy Anne Lee, who died on 14 October 1998. On 6 October 1999, legal practitioner, Mr S B A

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Longhurst was appointed *executor dative* of the said estate by virtue of letters of administration granted in his favour. In 2004, Mr Longhurst produced a First and Final Liquidation and Distribution Account which was approved on 5 May 2004. The Account shows the applicant was to receive, amongst other things the immovable property that forms the subject of this enquiry. There has been a lot of activity around this immovable property. In no less than five(5) suits the applicant and the respondents have sued and counter-sued each other with none of the papers being served of the executor. From the records in the Deeds Registry, the 2nd respondent currently holds title, by virtue of Deed of Transfer number 760/04. This document shows *ex facie* that the deputy Sheriff signed on behalf of the estate, of which Mr Longhurst remains the executor. It is common cause that the executor has never been served with any application or court order. This immovable property is the only asset of value. It goes without saying, therefore, that in any litigation involving the estate assets, since such assets vest in the executor until such a time as they are transferred to the beneficiaries, the executor has *locus standi.* The executor's duties are disclosed fully when he has not only drawn the account, but

when he has acted in terms of the account, that is, transferred the property to the beneficiaries in terms of account. In addition to the executor, the Assistant Master of this court has never been cited in any of these applications. Mr *Mazibisa,* for the 1st respondent, raised points *in limine* which I proposed to deal with in turn.

a. *Locus standi*: Briefly in HC 498/06 Mr Longhurst N.O. is trying to assert his rights as an executor of the estate. Mr Longhurst has not ceded these rights to applicant. It was submitted on behalf of the 1st respondent that the applicant cannot compete with the executor in such a case. Since the immovable property still vests in the executor until such a time it is transferred to the applicant, the executor has the *locus standi* to litigate on behalf of the estate. The applicant ceased to enjoy such *locus standi*. On this point alone the application should fail.

b. Urgency - In HC 3369/04 under certificate of urgency the applicant obtained a provisional order which granted him a caveat on 13 September 2004. The 1st respondent filed opposing papers on 17 December 2004

[without seeking condonation. The file does not show when the provisional order was brought to the 1st respondent's notice]. Thereafter, the applicant did nothing about the confirmation of this order, not even to file an application for rescission in terms of the said order [within 14 days]. There is no explanation for such dilatoriness from 2004 to 2006. In the papers filed in HC 3369/04 it is apparent that the applicant was aware that the

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property may have been sold but he did not seek to assert the same right. After obtaining the caveat under a provisional order he did nothing thereafter. On account of such inactivity the provisional order was eventually discharged for want of prosecution in HC 2440/05. This order still stands and has not been assailed. The applicant in any event is about three(3) years out of time. There is also judgment in HC 2834/03 which is also in favour of the 2nd respondent. All these orders have not been challenged via application for rescission. It is trite that all orders of court,

whether correctly or incorrectly granted are binding and have to be obeyed until they are properly set aside – *Culverwell* v *Beira* 1992(4) SA 490(W) and *Macheka* v *Moyo* HB-78-03. The applicant only acted when the 1st respondent wanted to transfer the property from the names of the 2nd respondent into his own name.

He acted on the eleventh hour after the 1st respondent had the caveat lifted. The applicant was not vigilant. The courts will generally assist the vigilant and not the sluggish. His explanation for his dilatory behaviour is that he was unable to serve the provisional order as the 1st respondent was not found at the given address. But is this not why the rules make provision for substitute service? This is a case of self-created

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urgency – *Dilwin Investments (Pvt) Ltd t/a Farmscaff* v *Jopa Eng Co. (Pvt) Ltd* HH-116-98; *Kuvarega* v *Registrar General & Anor* 1998(1) ZLR 188 (H); *Mushonga & Ors* v *Min of Local Govt & Ors* HH-129-04 and *Moyo* v *Constituency Elections Officer, Tsholotsho & Ors* HB-72-05. Once more, on this issue of urgency alone the application should fail.

On the merits, even if I assume that the applicant has the *locus standi* and that the matter is urgent he still has to satisfy the

requirements of an interdict – *Mabhodho Irrigation Group* v *Kadye & Ors* HB-8-03. The requirements are the following.

i) He must establish a clear or prima facie right. Because of the involvement of the executor, *supra*, at this stage, the applicant has no clear or *prima facie* right to seek an interdict.

ii) He must establish a welt granted apprehension of irreparable harm. This option of reversing the transfer is available to the applicant.

iii) He has to establish that the balance of convenience support the granting of the interdict. Here, 1st respondent is already in occupation of the property for two years. He has ploughed resources to improve the property. The applicant has not visited the property for years. The balance of equity favours the *status quo.*

iv) The applicant has a satisfactory alternative remedy of suing for damages – see also *Knox D"Archy Ltd & Ors* v *Jameson &*

Ors 1996(4) SA 348 AD and *Setlogelo* v *Setlogelo* 1914 AD 221 and *Watson* v *Gilson* 1997(1) ZLR 324.

Mr *Ndove,* for the second respondent further averred that the applicant failed to disclose all material facts by giving an impression

that the matter was still to be reported to the police against the 2nd respondent yet he is aware that he did so in 2004 already and the matter was investigated by the police at his behest. The police did not find any substance in the allegations against the 2nd respondent. I agree that such non-disclosure of material facts may, on its own result in the application be dismissed – Graspeak Investments P/L v Delta Corp P/L & Anor 2001(2) ZLR 551(H). Looking at the facts I uphold the points *in limine* that the applicant has no *locus standi* to bring this application whilst the estate is still vests in the executor dative. On this alone I would dismiss the application. If I am wrong in this finding, still I would dismiss the application on the question of urgency. He authored this urgency by failing to prosecute his provisional order to its conclusion.

Accordingly, I dismiss the application with costs.

Joel Pincus, Konson & Wolhuter, applicant's legal practitioners
Cheda & Partners, 1st respondent's legal practitioners
T Hara & Partners, 2nd respondent's legal practitioners