STANLEY BRUCE ALFRED LONGHURST

Versus

QUENTINE LEE

And

VISION SITHOLE

And

NKOSANA NCUBE

And

THE REGISTRAR OF DEEDS

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 13 APRIL, 26 SEPTEMBER & 17 NOVEMBER 2006
AND 15 MAY 2008

Advocate S Nkiwane for the applicant
A Sibanda for 1st respondent
B Ndove, for 2nd respondent
S S Mazibisa, for 3rd respondent

NDOU J: The applicant is the executor dative of the Estate of the Late Dorothy Anne Lee, who died at Bulawayo in 1998. In 2004, the applicant produced a first and final liquidation and distribution account, which was approved by the Assistant Master of this court on 5 May 2004. The account shows that Quentine Hogan Lee, the 1st respondent herein, was to receive amongst other things, the immovable property that forms the subject of this enquiry. The applicant has not been able to transfer the immovable property to the 1st respondent as per the account. An attempt has been made. However, there has been a lot of activity around this immovable property. In no less than five(5) applications/suits, the respondents herein have sued and counter sued each other, with none of the papers being served on the applicant. Two orders of this court now co-exist for the transfer of the property to

two different parties. According to the records of the Registrar of Deeds, the 2nd respondent currently holds title, by virtue of Deed of Transfer 760/04. This document shows *ex facie* that the Deputy Sheriff signed on behalf of the Estate of which the applicant remains the executor. As alluded to above, it is beyond dispute that the applicant has never been served with any application or court order. In the provisional order, the applicant seeks, in the interim, that the 4th respondent be directed to register a caveat against title of the disputed property. As a final order, the applicant seeks that the above-mentioned two orders be set aside in terms of Rule 449 of the High Court Rules, 1971.

In his opposing papers, the 3rd respondent raised some points *in limine*. The first one is on the question of urgency. It is 3rd respondent's contention that this application is not necessary at all and therefore not urgent. The 3rd respondent has indicated, in black and white, in letters written to the conveyancers, Webb, Low and Barry Legal Practitioners and all the parties that he has no intention of transferring the disputed property pending the resolution of the ownership wrangle involving some of the parties.

In my view, parties do not seek provisional orders because it is fashionable to do so. They do so when it is imperative that it be so. *In casu*, the basis of the application is that the 3rd respondent is about to take transfer. The 3rd respondent has indicated no such desire because he withdrew his transfer papers as soon as this dispute arose. In the circumstances, there is no merit in the averment that the applicant will suffer irreparable damage. In any event, even if the transfer goes through, the applicant cannot suffer irreparable harm because in terms of section 8 of the Deeds Registries Act [chapter 20:05] an improperly registered deed of transfer

may be cancelled – *Williams* v *Kroutz Investments (Pvt) Ltd & Ors* HB-25-06. As alluded to, *in casu*, the applicant has been made aware, in writing, by the 3rd respondent that he will not seek to have transfer into his names before the dust is settled. The applicant can best proceed by way of a court application or summons to set aside the two orders or seek whatever relief he thinks is imperative. There was no need to bring this matter under a certificate of urgency. The matter is not urgent at all. The applicant did not act timeously when he became aware of the two orders. The applicant has been living on the property for two years. He has been paying all rates and rents due to the local authority. There is no urgency here. On this point alone the application must fail.

Before the judgment was handed down [but after it was reserved], *Adv Nkiwane* caused a hearing to be held to introduce an affidavit by the applicant's legal practitioner to point out an alleged forged affidavit by 2nd respondent. Mr *Mazibisa*, for the 3rd respondent challenged the procedure adopted on the basis that such a fresh affidavit can only be introduced with the leave of the court of Judge in chambers – Rule 235 of High Court Rules, 1971. As the applicant did not make any substantive application for such leave, the affidavit cannot be made after the court has reserved judgment – *Mupini* v *Makoni* SC 15-93; *Phillips* v *PTC & Ors* HB-109-93 and *Paterson* v *Wintertorn Holmes & Hill* HH-113-93. If the applicant is serious about the introduction of the affidavit, he should make a proper application for leave in compliance with Rule 235, *supra*. In the circumstances, the affidavit of Mr Masuku and its annexures cannot be filed without leave of the court or Judge.

Accordingly, the application is dismissed with costs on the basis that it is not urgent.

Ben Baron & Partners, applicant's legal practitioners
Joel Pincus, Konson & Wolhuter, 1st respondent'r legal practitioners
Marondedze & Partners, 2nd respondent's legal practitioners
Cheda & Partners, 3rd respondent's legal practitioners