GORDON LINDSAY
versus
BERNADETTE MUKARAKATE N.O
and
MASTER OF THE HIGH COURT OF ZIMBABWE N.O
and
THE PETER LINDSAY TRUST
and
SHAYNE LINDSAY N.O
In his capacity as the trustee of the Peter Lindsay Trust
and
PAUL LINDSAY N.O
IN his capacity as a trustee of the Peter Lindsay Trust
and
ANDREW LINDSAY N.O
In his capacity as the trustee of the Peter Lindsay Trust

HIGH COURT OF ZIMBABWE
DEME J
HARARE, 11 October 2022 & 6 July 2023

Opposed Application

Mr T Pisirayi, for the applicant
Mr M Mavhiringidze, for the 1st, 3rd and 4th respondents
No appearance for the 2nd, 5th and 6th respondents

DEME J: The applicant approached this court seeking the review of the second respondent's decision. More particularly, the relief sought by the applicant is couched in the following manner:

> "1. That the application for review be and is hereby granted.
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> 2. The decision of the 2nd respondent dated 17 February 2022 confirming the Final Liquidation and Distribution Account of the Late Peter Lindsay prepared by the 1st respondent be and is hereby set aside.
> 3. The Final Liquidation and Distribution Account of the Late Peter Lindsay prepared by the 1st respondent and confirmed by the 2nd respondent on 17 February 2022 be and is hereby set aside.
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> 4. The 1st respondent in her personal capacity be and is hereby ordered to pay the costs of this application on a legal practitioner-client scale.

5. The 2nd respondent be and is hereby ordered to pay the costs of this application on the legal practitioner- client scale jointly and severally with the 1st respondent only in the event of it opposing this application."

The applicant seeks the review of the second respondent's decision on the following grounds:

"1. That an asset of the late Peter Lindsay being Shop A23 Mbuya Nehanda Street was omitted from inclusion in the final liquidation and distribution on the erroneous basis that it is not an asset due for distribution to the estate on (sic) as it was donated to the 1st respondent.

2. The 1st and 2nd Respondents failed to fully apply their minds to the fact that the apparent donation of the shop to the 1st respondent was not valid as the shop is still an estate asset of the late Peter Lindsay in terms of section 4(3)(d)1 of the Estate Duty Act [*Chapter 23:01] as the donation as made less than five years before the death of the late Peter Lindsay and therefore the shop is deemed an asset of the state and liable for distribution to the estate.*

3. The 2nd respondents (sic) conduct in confirming the final liquidation and distribution account excluding Shop A23 Mbuya Nehanda Street from the estate of the late Peter Lindsay is a gross and material error of law.

4. The 2nd respondent did not fully apply his mind to the objections and concerns raised by the Applicant concerning Shop A23 Mbuya Nehanda Street in connection with the winding up of the estate of the late Peter Lindsay.

5. The 2nd Respondent did not apply his mind to the fact that the intentions of the late Peter Lindsay as contained in his last will and testament were for all his assets including Shop A23 Mbuya Nehanda Street to be distributed to the Peter Lindsay Trust.

6. That the 2nd Respondents (sic) conduct in confirming the final liquidation and distribution account excluding Shop A23 Mbuya Nehanda Street from the estate of the late Peter Lindsay is so grossly unreasonable that no reasonable person acting on the same facts, could come to the decision that he did."

The applicant is a beneficiary of THE PETER LINDSAY TRUST and a party aggrieved by the decision of the second respondent in confirming the Final Liquidation and Distribution Account of the Late Peter Lindsay estate prepared by the first respondent which excluded Shop A23 Sirus Mall of Mbuya Nehanda Street (hereinafter referred to as Shop A23).

The first respondent is cited in her three capacities. She is sued in her personal capacity as the beneficiary of the estate of the late Peter Lindsay. She is also sued in her two official capacities as an executrix of the estate of the late Peter Lindsay and as the Trustee of the third respondent. The first respondent is the one who prepared the Final Liquidation and Distribution Account in dispute which was later confirmed by the second respondent cited in his official capacity as the functionary who gave the decision under review. The third

respondent is a Trust duly registered in terms of the laws of Zimbabwe. The fourth, fifth and sixth respondents are the Trustees of the third respondent.

By way of background, the applicant averred that the late Peter Lindsay passed away on 26 March 2018 and his estate was registered with the second respondent for winding up under reference number DR 693/19. Moreover, the applicant stated that, before the passing away of the late Peter Lindsay, the deceased on 27 February 2009, drew up a will in which he bequeathed his entire estate, property, and effects to the third respondent. The applicant claimed that the late Peter Lindsay's intention was to include all his assets including Shop A23 to be the assets of the third respondent, a Trust which was founded by the late Peter Lindsay on 19 January 2009. The applicant additionally affirmed that the beneficiaries duly constituted in terms of the third respondent include the first, fourth and the sixth respondent as well as Mark Five Lindsay, Peter John Lindsay, Wayne Lindsay and the applicant.

The applicant asserted that the Final Liquidation and Distribution Account was advertised on 11 June 2021 where he noted that Shop A23 was excluded from the inventory list. On 29 June 2021, the applicant averred that the sixth respondent lodged his objection with the first respondent to the effect that Shop A23 was part of the estate of the late Peter Lindsay liable to be distributed to the beneficiaries of the third respondent.

The applicant stated that the objection noted by the sixth respondent was based on a point of law, where the sixth respondent alleged that the donation in question was invalid as Shop A23 was deemed as an estate asset of the late Peter Lindsay in terms of S 4(3) (d) 1 of the Estate Duty Act [*Chapter 23:01*] (hereinafter called "the Estate Duty Act"). According to the sixth respondent's objections that he raised, the donation was made on 10 November 2015 less than 5years before the death of the late Peter Lindsay. The applicant also asserted that it was a material term of the sixth respondent's objections that the donation made under such circumstances was invalid in terms of the law.

The applicant averred that on 2 July 2021, the second respondent replied to the sixth respondent's objection where he indicated that Shop A23 was indeed an estate asset but went on further to explain that the first respondent as the executrix of the estate of the late Peter Lindsay was entrusted with the power to deal with the issues of claims and the first respondent had already dealt with the claim in respect of Shop A23. The applicant further averred that the second respondent in his letter dated 2nd of July 2021, he advised the

aggrieved party to take recourse in terms of S 47 of the Administration of Estates Act [*Chapter 6:01*] (hereinafter called "the Administration of Estates Act").

The applicant alleged that through a letter dated the 13th of July 2021 acting on behalf of the sixth respondent, the legal practitioners for the sixth respondent disputed the position taken by the first respondent. The applicant averred that they went on to allege that the manner in which the claim in dispute was dealt with was inconsistent with the principles of natural justice and the only way to cure this defect was to wait for the second respondent to confirm the Final Liquidation and Distribution Account and therefore go on to make an application for review of that decision. Moreover, the applicant stated that the sixth respondent's legal practitioners went on to dispute the suggested legal recourse proposed by the second respondent stating that the sixth respondent was a beneficiary of the estate of late Peter Lindsay and not the creditor who could be afforded legal protection in terms of Section 47 of the Administration of Estates Act.

The applicant further alleged that on 26 August 2021 the first respondent through her legal practitioners opposed the basis of the objection noted by the sixth respondent. In her opposing papers, the first respondent alleged that Shop A23 was only included in the inventory list as an estate asset for the purposes of payment of estate duty only. Moreover, the applicant averred that on 16 November 2021 the second respondent confirmed the above position by the first respondent's legal practitioners and advised the aggrieved party to follow their statutory rights in terms of s 47 of the Administration of Estates Act.

The applicant, aggrieved by the exclusion of Shop A23 from the Final Liquidation and Distribution Account prepared by the first respondent and later on confirmed by the second respondent, approached this court for relief. The applicant alleged that Shop A23 is still an estate asset of the late Peter Lindsay in terms of S 4(3)(d)1 of the Estate Duty Act. In his averments, the applicant maintained that the sixth respondent's position that the donation was made less than 5years before the death of the late Peter Lindsay and is therefore invalid in terms of the law and must be included as an estate asset of the late Peter Lindsay in the Final Liquidation and Distribution Account.

Furthermore, the applicant averred that Shop A23 was still registered in the name of the late Peter Lindsay when he passed away, therefore the property still belonged to the late Peter Lindsay, despite the donation.

The applicant thus alleged gross irregularities in the conduct of proceedings and gross unreasonableness or irrationality of the decision of the second respondent of confirming the Final Liquidation and Distribution Account which excluded Shop A23.

The present application was opposed by the first and fourth respondents. The first respondent averred that the property in dispute was donated to her by the late Peter Lindsay as a birthday gift made on 10 November 2015. The first respondent averred that it was a material term of the donation as captured in the letter of donation dated 10 November 2015 that she would enjoy the fruits of the donation when Peter John Lindsay had completed his studies at the University of Zimbabwe in September 2018. The first respondent claimed that Shop A23 belongs to her as this can be confirmed by a copy of the letter dated 25 September 2017 from the property managers of the building. The first respondent disputed the applicant's claim that Shop A23 was still owned by the late Peter Lindsay at the time of his death.

The first respondent asserted that Shop A23 was put under claims against the estate in the inventory list because it was deemed to be an estate asset for the payment of estate duty and its inclusion in the inventory list under claims against the estate was a clear indication by the first respondent that she did not intend to evade estate duty.

The first respondent averred that the Final Liquidation and Distribution Account was confirmed on 17 February 2022 and the applicant is not disclosing the date when he became aware of the Final Liquidation and Distribution Account. Additionally, the first respondent claimed that the applicant failed to raise his objections when the Final Liquidation and Distribution Account was advertised. Alternatively, the first respondent averred that the applicant had the option, at his disposal, of seeking a declaratur against the inclusion of Shop A23 under claims against the estate. The first respondent maintained that the present application is baseless and should be dismissed.

The fourth respondent adopted the position taken by the first respondent and filed the supporting affidavit. The fifth and sixth respondents did not oppose the present application.

The second respondent filed the report. According to the second respondent, the decision to confirm the final distribution account is not unreasonable. According to the second respondent, Shop A23 was treated as the asset of the estate contrary to the applicant’s averments. The second respondent also asserted that Shop A23 was dealt with as donation and claim to the estate and was accordingly awarded to the first respondent. The second

respondent additionally maintained that the sixth respondent lodged an objection which the second respondent regarded as the claim to the estate. According to the second respondent, claims are exclusively dealt with by the first respondent in her capacity as the executrix to the estate. The second respondent further affirmed that the objection of the sixth respondent was dealt with according to the statutory procedures and the aggrieved parties were advised to follow the statutory remedies. It is the second respondent's case that the applicant never pursued the remedies at his disposal and hence the second respondent proceeded to confirm the final distribution account of the estate.

The first and fourth respondents raised some points *in limine* against the present application. Firstly, the first and fourth respondents alleged that the application for review was filed out of time. Resultantly, the first and fourth respondents claimed that the applicant ought to have sought condonation for filing the application outside the eight week period.

According to the applicant, he became aware of the confirmation of the estate's distribution account by way of the letter addressed to the applicant's legal practitioners from the second respondent dated 16 March 2022. He argued that the present application was thereafter filed within time.

Secondly, the first and fourth respondents also challenged the present application on the basis that the present application is an improper procedure. They maintained that the first respondent, in her capacity as the executrix accepted the claim to the estate. They also affirmed that the acceptance of the claim is the prerogative of the first respondent in her capacity as the executrix and as such the applicant ought to have proceeded by way of s 47 of the Administration of Estates Act seeking the review of the decision of the executrix. The first and fourth respondents also asserted that the applicant alternatively ought to have challenged the dismissal of the sixth respondent's objection.

The applicant insisted that the present application is a proper one. It is the applicant's case that s 47 of the Administration of Estates act is misconstrued by the respondents. Section 47 of the Administration of Estates Act, according to the applicant, only applies to the creditors and hence resorting to this section would be an inappropriate remedy. The applicant referred the court to Annexure L, a letter authored by the sixth respondent's legal practitioners addressed to the second respondent, attached to the answering affidavit.

Thirdly, the first and fourth respondents also attacked the founding affidavit for having paragraphs which are not consecutively numbered, in violation of the Rules. However, on the hearing day, this point *in limine* was abandoned.

Fourthly, the first and fourth respondents argued that the third respondent has no legal capacity to sue or be sued. On the contrary, the applicant opposed this assertion. The applicant insisted that the third respondent, being a trust, can be sued in terms of r 11 of the High Court Rules, 2021.

Lastly, the first respondent also maintained that the applicant lacks *locus standi* to sue on behalf of the third respondent. In the absence of a cession of right to sue from the third respondent, the applicant, according to the first and fourth respondents, cannot sue on behalf of the third respondent. It is the case of the first and fourth respondents that the third respondent can only be represented by its trustees.

The applicant maintained that he has *locus standi*. According to the applicant, by virtue of his status as a beneficiary of the Peter Lindsay Trust, he has financial interest in the benefit that may arise and accrue to him in connection with Shop A23. The applicant further affirmed that this financial interest clothes him with *locus standi*. According to the applicant, the trustees are not in agreement on the dispute of Shop A23. Consequently, it would be impossible to expect the trustees to cede the right to sue to the applicant, the applicant further affirmed. The applicant also alleged that the trustees did not even pass a resolution authorising the first and fourth respondents to oppose this matter. He further maintained that the fifth and sixth respondents are not opposing the present application, a clear sign that there is division among the trustees of the third respondent.

I will now deal with the points *in limine* not necessarily in their order. I will consider the effect of the points *in limine* and hence I will start with the ones that are capable of disposing of the present application. I will firstly deal with the first point *in limine* before moving to the last point *in limine.* The first point *in limine* will enable me to examine whether there is a proper application before the court. The last point *in limine* is also essential in being prioritised as this may inform the court whether the applicant is properly before the court. Thereafter, if need arises, I may deal with the rest of the points *in limine*.

The letter addressed to the applicant's legal practitioner dated 16 March 2022 is the basis upon which the applicant became aware that the final distribution account of the state had been confirmed. The present application was filed on 10 May 2022. The first and fourth

respondents argue that the present application was filed out of time. A mathematical calculation reflects that the present application was filed on the 55th day after the applicant had knowledge of the decision. This is less than eight weeks. Eight weeks amount to 56 days. Thus, the first point *in limine* lacks merits and accordingly it is dismissed

The first and fourth respondents argued that the applicant lacks *locus standi* to sue on behalf of the third respondent. According to Mr Mavhiringidze, the general rule is that the beneficiaries have indirect interest in the trust assets. He further argued that the trust does have direct interest in its assets. Mr. Mavhiringidze referred the court to the case of *Materia and Ors* v *Menk and Ors*[1], where MANZUNZU J opined as follows:

> "The evidence on paper is clear that the applicants brought this application in their personal capacity but seeking a relief for the benefit of the Trust. Such an action can only be brought by trustees. The applicants have no *locus standi* to remedy the affairs of the Trust in their personal capacity. This point *in limine* must succeed."

The applicant's counsel, Mr Pisirayi submitted that the applicant does have *locus standi.* He referred the court to the multitude of South African cases which support his position. However, no Zimbabwean case law was cited. I am persuaded to follow the view of MANZUNZU J in the case of *Materia and Ors* v *Menk and Ors (supra*). The applicant ought to have been authorised by the trustees. In the absence of cession of the right to sue, the applicant will be on a frolic of his own. For the applicant to have *locus standi*, he must demonstrate legal interest in the matter under consideration. Legal interest in the matter has been extensively defined in a number of authorities. In the case of *Burdock Investments P/L* v *Time Bank of Zimbabwe Ltd and Ors*[2], the court opined as follows:

> "It would appear to me that although the Supreme Court did to advert to any legal principle in the matter, it recognised that the holder of a real right may be joined to proceedings where the property over which the right exists is in dispute. As such right may be adversely affected by the judgment. In other words, the court recognised that a real right in property may be a sufficient and direct interest upon which *locus standi* can be grounded. It is also clear from the authorities that it is not every right that will be sufficient to establish *locus standi.* The interest must be legal. It must be direct. In my view, it is easier to understand what a legal interest in this regard is by defining what it is not. It is not merely a financial interest in the matter. The right must be a legal obligation or position that can be held, enforced, or defended against all the parties to the litigation in which joinder is sought. In the authorities, the two qualities of the interest are often dealt with together. Thus, the interest has been described as a direct and substantial legal interest in the subject matter of the judgement. (See *United Watch and Diamond Co (Pty) Ltd and Others* v *Disa Hotels Ltd and Another* 1972 (2) SA 409 *(CPD and Amalgamated Engineering Union* v *Minister of Labour*

[1] HH445/19.
[2] HH194/03.

> *(supra*). In my view, it is easier to understand the legal nature of the interest when all its qualities are viewed together."

In casu, the interest of the applicant in Shop A23 cannot be defined as direct or substantial in nature or scope. I do agree with the counsel for the first, third and fourth respondents that the interest is indirect. The applicant's interest in Shop A23 is not something that can be held, enforced, or defended against all the parties to the litigation in accordance with the opinion postulated in the case of *Burdock Investments P/L* (*supra).*

Resultantly, this point *in limine* is meritorious. Thus, the applicant has no *locus standi* to institute the present application on behalf of the third respondent. The asset which he seeks to recover belongs to the third respondent.

Having made a finding that the applicant has no *locus standi* to mount the present application, the present application must be struck from the roll. This decision is appropriate as this may allow the applicant to take a corrective action and remount this application if he so wishes. Dismissal would be inappropriate under such circumstances as this bars the applicant from instituting further action upon attending to the defect. Reference is made to the case of *Stanley Nhari* v *Robert Gabriel Mugabe and Ors*[3], where, in para 45, the Supreme Court opined as follows:

> "[45] I am inclined to agree with the appellant that the order dismissing the entire claim was, in the circumstances, improper. The court had found that it had no jurisdiction to entertain the claims because such claims lay in the province of labour. Having so determined, there was therefore nothing that remained before the court. There was nothing further to dismiss. In *Edward Tawanda Madza & Others* v *(1) The Reformed Church in Zimbabwe Daisyfield Trust (2) The Reformed Church of Zimbabwe (3) Naison Tirivavi (4) The Dutch Reformed Church* SC 71/14 this Court remarked as follows:-
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> 'It is a contradiction in terms to dismiss a matter on the twin bases that it not urgent and that the applicant has no *locus standi* for the latter basis indicates that a decision on the merits of the application has been made in which event the applicant is barred from placing the matter on the ordinary roll for determination. The effect of the dismissal on the latter basis is that the applicant is put out of court and is deprived of his right to have the matter properly ventilated in a court application or trial. Where, however, the matter is struck off the roll for lack of urgency, the applicant, if so advised, may place the matter on the ordinary roll for hearing." (at pp 8 – 9 of the judgment).'"

With respect to costs, the first and fourth respondents had prayed for punitive costs. I find no justification for such costs. Costs on an ordinary scale are reasonably sufficient.

[3] SC151/20.

Accordingly, it is ordered that:

The application be and is hereby struck from the roll with costs on an ordinary scale.

Nyakutombwa Legal Counsel, applicant's legal practitioners
Mavhiringidze and Mashanyire, first and fourth respondents' legal practitioners