NORAH MSOPERO
(In her capacity as the Executrix of Estate Late Hitler Msopero)

Versus

ELLEN MSOPERO
(In her capacity as the Executrix of the Estate Late Elliot Msopero)

And

THE MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
DUBE-BANDA J
BULAWAYO 12 & 29 June 2023

Opposed court application

T. Dube, for the applicant
L. Nkomo, for the 1st respondent

DUBE-BANDA J:

[1] This is an application to re-open the administration of a finalized deceased estate. The estate has been administered and finalized in terms of the provisions of the Administration of Estates Act [Chapter 6:01]. The applicant seeks an order couched in the following terms; that:

i. The second respondent be and is hereby directed to re-open the record of the Estate of the late Elliot Mangisi Msopero, DRKK87/08 pending finalization of Case Number HC 3094/04.
ii. The 1st respondent be and is hereby directed to amend the First and Final Distribution Account of the Estate late Elliot Mangisi Msopero DRKK87/08 to incorporate as assets of the estate, Msopero Country Inn Hotel, and stand number 470 Mbizo Township, Kwekwe.
iii. Alternatively, to 2 above, the 1st respondent be and is hereby directed to amend the First and Final Distribution Account of the Estate late Elliot Mangisi Msopero DRKK87/08 to incorporate as assets of the estate, all shares held by the late Elliot Mangisi Msopero in the company Msopero Country Hotel (Private) Limited.

iv. The costs of this application shall be costs in Case Number HC 3094/2004.

[2] The application is opposed by the first respondent. I take it that the second respondent has chosen to abide by the decision of this court.

[3] The background to this matter is that in case number HC 3094/04 Hitler Msopero (Hitler) sued Mangisi Msopero (Mangisi) seeking, in the main an order that the agreement of sale of Msopero Country Hotel entered into between the two parties be declared binding. Mangisi took a preliminary point, *viz* that he was wrongly cited instead of a company known as Musopero Country Hotel (Pvt) Ltd. The court heard the argument on the preliminary point and in *Msopero v Msopero & Another* HB 95/05 ruled that Mangisi was properly cited in his personal capacity, and directed that the matter be referred to trial with the papers filed serving as pleadings.

[4] Both Hitler and Mangisi, who were brothers are now deceased. The applicant Norah Msopero (Norah), is the wife and executor of the estate of Hitler, and Ellen Msopero (Ellen) is the wife and the executor of the estate of Mangisi. The administration of the estate of Mangisi has since been closed. A First and Final Liquidation and Distribution Account was filed, and the account was finalized and acquitted on 17 March 2021. The account excluded stand number 470 Mbizo Township; Msopero Country Hotel; and shares in Msopero Country Hotel (Pvt) Ltd (Hotel). This is the property subject to litigation in HC 3094/04. The applicant seeks that the estate of Mangisi be re-opened pending the finalization of HC 3094/04. It is so because it is in HC 3094/04 that a determination will be made whether the agreement of sale between Hitler and Mangisi is binding. It is against this background that applicant has launched this application seeking the relief mentioned above.

[5] In addition to opposing the relief claimed by the applicant on its merits, the first respondent raised three points *in limine*. The first constituted an attack on the *locus standi* of the applicant to institute these proceedings. The second is that the relief sought in the draft order is incompetent at law; and the third is the attack on the non-joinder of beneficiaries, which is argued to be fatal to this application. I heard submissions on the points *in limine* only and reserved judgment. I now turn to deal with these points *in limine.*

Locus standi

[6] The first respondent has placed the applicant's *locus standi* in dispute. *Locus standi* relates to whether a particular applicant is entitled to seek redress from the courts in respect of a particular issue. In terms of the common law an applicant must show a "direct and substantial interest" in the subject matter and the outcome of the litigation. See: *Matambanadzo v Goven* SC-23-04; *Sibanda & Ors v The Apostolic Faith Mission of Portland Oregon (Southern African Headquarters) Inc* SC 49/18; In *Makarudze & Anor v Bungu & Ors* 2015 (1) ZLR 15 (H) the court pointed out that *locus standi in judicio* refers to ones right, ability or capacity to bring legal proceedings in a court of law. One must justify such right by showing that one has a direct and substantial interest in the outcome of the litigation. Such interest is a legal interest in the subject matter of the action which would be prejudicially affected by the judgment of the court. See: *Zimbabwe Stock Exchange v Zimbabwe Revenue Authority* SC 56/07.

[7] Mr *Nkomo* Counsel for the first respondent submitted that the relief sought by the applicant in this case could only be sought by a person with a direct and substantial interest in the estate of Mangisi. The first respondent contends that the applicant is neither a beneficiary nor a creditor in the estate of Mangisi, therefore she does not have the requisite *locus standi* to compel the re-opening of the estate of Mangisi. She did not lodge a claim against the estate until it was closed. Counsel further submitted that the main proceedings in HC 3094/04 have no bearing on this case, and it has been deemed abandoned and has lapsed. This contention is anchored on the fact that HC 3094/04 was removed from the roll on 22 July 2022 and has not been set down within a period of three months as provided in *Practice Directive* 3/2013 2013 (2) ZLR 669 (S). Counsel submitted that the applicant had failed to establish a *direct* and substantial interest upon which she can anchor her case to re-open the estate of Mangisi, and therefore this application must be struck off the roll with costs.

[8] Mr *Dube* Counsel for the first respondent argued that the applicant has *locus standi* to seek the re-opening of the estate of Mangisi. Counsel argued that the judgment in HB 95/05 shows

that the applicant has *locus standi* in this matter, and case HC 3094/04 is still pending between the executors of the estates of Hitler and Mangisi.

[9] In HB 95/05 the court found that there is a dispute whether Mangisi and Hitler entered into a lease or sale agreement in respect of the Hotel. Mangisi was disputing the signature on the agreement of sale. Mangisi and Hitler died before the dispute was resolved to finality, and their respective executors are pursuing HC 3094/04 to find an answer to the question whether Mangisi and Hitler indeed entered into a sale or lease agreement in respect of the Hotel. Therefore, the applicant has *locus standi* to seek the opening of the estate of Mangisi to deal with the issue of the Hotel. And I do not agree that HC 3094/04 has been abandoned and deemed to have lapsed. I say so because HC 3094/04 is not before me at this point in time, and I cannot not make a determination regarding a matter that is not before me. Whether HC 3094/04 has been abandoned and deemed to have lapsed shall be made by a court seized with that matter. For the purposes of this application, I premise my consideration of the question of *locus standi* on the fact that HC 3094/04 is still pending. Applying the test, I am satisfied that the applicant has the requisite *locus standi*. In my view, she has a direct and substantial interest in the subject-matter of the re-opening of the estate of Mangisi which entitles her to institute these proceedings. In the circumstances, I find that the applicant has a direct and substantial interest in this matter, and that this point *in limine* challenging her *locus standi* has no merit and is refused.

Defective draft order

[10] The first respondent submitted that the relief sought in this application is incompetent, in that it is based on HC 3094/04 which has been abandoned and deemed to have lapsed. I have pointed out above, that for the purposes of this application I take the view that HC 3094/04 is still pending. The applicant abandoned paragraph 2 and 3 of the draft order, therefore the criticism directed at those paragraphs has fallen by the wayside. In any event in the circumstances of this case I agree with what was said by MATHONSI J (as he then was) in *Mabhena v Mbangani* HB 57/18 that:

> Having said that I must hasten to state that an application cannot be defeated merely on the basis of a defective draft order. The draft order is, after all, the wishful thinking of the applicant. It is for the judge or the court to grant the order and therefore he, she or it should be able to grant whatever order would have been proved in the application.

[11] The alleged defectiveness of the draft order cannot be a basis to non-suit the applicant *in limine.* It is an issue that the court may well deal with when considering the merits of this matter. The point *in limine* regarding the alleged defectiveness of the draft order has no merit and is refused.

Non-joinder

[12] The first respondent contends that this application ought to fail on the basis of a non-joinder of interested parties. It is contended that at the time of filing this application, the applicant was aware that the administration of the estate of Mangisi had been finalised and distributed in terms of the law. It is contended further that the beneficiaries who inherited in the estate of Mangisi ought to have been cited in these proceedings. Mr *Nkomo* submitted that once an estate has been administered and distributed to beneficiaries in terms of the Administration of Estates Act, there would no longer be an estate to meet the costs of litigation. It is therefore necessary that where litigation is launched seeking the re-opening of a deceased estate that has been distributed to the beneficiaries, such beneficiaries be cited as parties with a direct interest in the outcome of the proceedings. Counsel argued that the application must be struck off the roll.

[13] The applicant contends that this application does not seek to affect and undo the inheritances of the beneficiaries. Mr *Dube* submitted that the beneficiaries have no interests to protect at this time. Counsel argued further that a non-joinder of parties does not render an application fatally defective. As long as there is a dispute between the parties before court, the court may proceed and decide that dispute. Counsel argued that the preliminary point on non-joinder of the beneficiaries must fail.

[14] The test is whether or not a party has a 'direct and substantial interest' in the subject matter of the action, that is, a legal interest in the subject matter of the litigation which interest may

be prejudicially affected by the judgment of the court. According to case law the rule is that any person is a necessary party and should be joined if such person has a direct and substantial interest in any order the court might make, or if such an order cannot be sustained or carried into effect without prejudicing that party. See: *Timba v Chief Elections Officer & Ors* SC 65/15; *Capital Alliance (Private) Limited v Renaissance Merchant Bank Limited* HH 108/06; *Anabas Services (Pvt) Ltd v Ministry of Health and Others* H-B-21-03; *Chabata v Chiramba* HH 789-19.

[15] The beneficiaries of an estate have an interest to safeguard the estate and their own rights to inheritance. The applicant knows the identities of the beneficiaries in the estate of Mangisi, they are listed in the First and Final Distribution Account. They have a right to have their views known and considered by the court on whether the administration of the state has to be re-opened. I therefore entertain no doubt that theirs is an interest that qualifies as being 'direct and substantial'. In other words, it is an interest that qualifies them to be joined as parties to these proceedings. It is no argument to contend that the estate is sought to be opened for a limited purpose only, i.e., to include the Hotel. The undisputed point is that it is the estate in which the beneficiaries have an interest that is sought to be re-opened. Therefore, they are necessary parties to this matter. See: *Timba v Chief Elections Officer & Ors* SC 65/15; *Kethel v Kethel's Estate* 1949 (3) SA 598 (A). The beneficiaries have a direct and substantial interest in both the subject matter of the litigation, and its possible outcome.

[16] Rule 32 (11) of the High Court Rules, 2021 provides thus:

> No cause or matter shall be defeated by reason of the misjoinder or non-joinder of any party and the court may in any cause or matter determine the issues or questions in dispute so far as they affect the rights and interests of the persons who are parties to the cause or matter.

[17] In this matter it is not possible to decide this dispute in so far as it affect the rights and interests of the persons who are parties to this application without the joinder of beneficiaries. The estate of Mangisi has been closed and acquitted in terms of the law. The beneficiaries have received their inheritance, and such an estate cannot be re-opened behind their back as it were. They have to be parties in any litigation that seeks to re-open the estate. They have legal interest to protect. In *Henry Viljoen (Pty) Ltd v Awerbuch Bros* 1953 (2) SA 151, it was affirmed that a

party who has a direct or substantial interest in the result of any litigation and whose interests might be prejudicially affected thereby must be afforded the opportunity to be joined as a party thereto. See: *Capital Alliance (Private) Limited v Renaissance Merchant Bank Limited* HH 108/06. It is for these reasons that this matter cannot proceed without the joinder of the beneficiaries, neither can it be dismissed on the basis non-joinder. Therefore, the appropriate order is to strike this application off the roll.

[18] What remains to be considered is the question of costs. The general rule is that in the ordinary course, costs follow the result. I am unable to find any circumstances which persuade me to depart from this rule. Accordingly, the applicant must pay the first respondent's costs.

In the result, I order as follows:

i. The point *in limine* on non-joinder is upheld.
ii. The application be and is hereby struck off the roll with costs.

James Moyo-Majwabu & Nyoni, applicant's legal practitioners
Danziger and Partners, 1st respondent's legal practitioners