PATIENCE ZARANYIKA
versus
THE MASTER OF THE HIGH COURT
and
SIMPLISIUS JULIUS CHIHAMBAKWE N.O
and
THE KABELO FAMILY TRUST
and
MAUD ZARANYIKA

Counter Application

MAUD ZARANYIKA
versus
PATIENCE ZARANYIKA
and
THE MASTER OF THE HIGH COURT
and
SIMPLISIUS JULIUS CHIHAMBAKWE N.O
and
THE KABELO FAMILY TRUST

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 10, 20, 21, 27, 28 June, 1, 4, 5, 8 and 10 July, 23 July and 25 July and 31 July 2019.

Opposed Matter

F Mahere, for applicant and 1st respondent in counter application
No appearance for the 1st respondent and 2nd respondent in counter application
T Zhuwarara, for the 2nd respondent
T Mpofu, for 3rd respondent and 4th respondent in counter application
S Hashiti for 4th respondent and applicant in counter application

CHIRAWU-MUGOMBA J: The applicant in the main matter is a daughter to the late Abraham Zaranyika (the testator). The applicant in the counter-application was married to the testator in 1967 in terms of the Marriage Act [*Chapter 5:11*]. As has been remarked, *"A family feud can often defy all laws of rationality. Invariably the warring parties consider that if they are able to mass superior legal forces to those of their family rivals they will emerge*

victorious. Sadly, litigation of this kind invariably ends in costly trench warfare and with no sensible resolution in sight"- See *Douglasdale Dairy and ors* v *Bragge and anor*- (371/2017) (2018) ZASCA 68 (25 May 2018). For the sake of convenience I will refer to the parties as Patience, the Master, the executor, the Trust (Kabelo Family Trust) and Maud. The bone of contention centres on the last will and testament of the testator. Patience is aggrieved by the approval by the Master of the final liquidation and distribution account in the estate of her late father. On the other hand Maud is aggrieved by conditions in the will relating to a conditional bequest of an immovable property situate in Milton Park, Harare. The condition is that upon her death or remarriage, the property should go to the Abraham Zaranyika Trust (the testamentary Trust).

The background to the matter is as follows. The late Abraham Zaranyika died on the 4th of February 2001. In his will, the testator made certain bequests that have come to haunt his family. The executor was appointed in terms of clause 2 of the will. In clause 5 of the will, the testator bequeathed to his wife Maud[1] the following:- a house situate at no. 21 Van Praagh Avenue, Milton Park (the property), all his businesses (i.e. the general dealer, bottle store, butchery, grinding mill) and a homestead situate in Murewa. Also bequeathed was an immovable property situate in Seke Township, all vehicles, all cattle and chicken, all household property and 20% of the shareholding in a company called Day and Nite TV sales and repairs (Pvt) Ltd. The testator made this bequest conditional as follows:-

> *"Subject to the condition that on her death or remarriage after me, the property herein bequeathed to her shall devolve upon and be held by a trust to be established under the name ABRAHAM ZARANYIKA TRUST (hereinafter referred to as "the Trust". The trustees shall be the executor/administrator, my wife, my two sons and my two daughters. The Trust shall hold the property and/or invest any income therefrom for the benefit of my children and/or their children per stirpes[2] in accordance with the shareholding set out herein. "Remarriage shall include customary marriage and/or living with a man as husband and wife.*

To his nine children who include Patience, the testator bequeathed 10 % share to some and 5% share to others of Day and Nite TV sales and repairs (Pvt) Ltd (the company). He bequeathed to his other unknown children who proved that they were sired by him a further 5% shareholding. The testator further directed that no property bequeathed shall be sold except clothes and wearing apparel subject also to certain conditions. In clause 9, the

[1] The 4th respondent had initially been left out in the main application but made a successful application for joinder under HC 7517/18

[2] For a fuller discussion of the *per stirpes* concept see – *In Re Estate Late Bellinah Mhlanga,* HH- 816-17

testator bequeathed Stand 2829 of Seke Township to the testamentary trust as well as the residue of his estate of whatsoever nature, kind or wherever situate. In a further clause he directed that no benefit was to form or constitute a portion of communal or joint estate of such beneficiary and should they marry in community of property or under customary law any benefit accruing should be excluded from the community of property. Further that should any beneficiary divorce, their share shall be excluded from the matrimonial property. The testator then included the standard reservatory clause. During the winding up period an important event occurred in relation to the estate. The property was sold to the Trust for the sum of US$350 000 in 2012. After a period of sixteen years, the Master approved the estate account on the 23rd of March 2017. The approved account omits the Seke property, the Company, motor vehicles and does not mention that the Milton Park property has been disposed of. Aggrieved, Patience seeks that the approval of the account be set aside and framed the grounds of review as follows:-

a. The Master committed a gross irregularity in that he approved a first and final liquidation and distribution account without capturing conditions set out in the last will and testament no. LW412/99 which was executed by the late Abraham Zaranyika.
b. The Master committed a gross irregularity in that he approved a first and final liquidation and distribution account which excludes some of the estate property and no explanation has been proffered by the executor regarding the exclusion of part of the estate assets.
c. There was bad faith, bias, favour and disfavour on the part of the executor in exercising his duties in his capacity as Executor mainly in that he took sixteen years to wind up the estate and in so doing never updated Patience and all other beneficiaries except for Maud (surviving spouse) and Harrison Zaranyika of the progress he was making in winding up the estate. He went on to work in cahoots with Maud and Harrison Zaranyika to dispose estate property unlawfully in order to benefit Maud and Harrison Zaranyika and this amounted to disinheriting Patience and other beneficiaries.
d. The executor exercised his powers as executor in a manner which constitutes abuse of power in that he participated in the sale of an immovable estate property without the Master's consent as required by law.

e. The executor exercised bad faith in his capacity as executor in that he participated in an unlawful disposal of immovable estate property contrary to the provisions of the last will and testament of the late Abraham Zaranyika who made it clear in his will that none of his assets should be disposed or sold.

f. The action taken by the Master in approving the first and final liquidation and distribution account without putting the executor to task to account for all estate assets as provided for in the last will and testament of the late Abraham Zaranyika was so unreasonable that no reasonable person in his right senses would have do (*sic)* so.

Patience accordingly sought the following relief:-

1. That the first and final liquidation and distribution account of estate late Abraham Zaranyika DR 4080/2002 which was approved by the Master on 23 March 2017 be set aside.
2. The executor be ordered to draw up a proper first and final liquidation and distribution account to include and account for all estate assets listed in the last will and testament i.e. LW 412/99.
3. The executor be ordered to ensure that the first and final liquidation and distribution account shall comply with the testator's special condition that all immovable property bequeathed to Maud Zaranyika shall devolve upon and be held by a trust to be established under the Abraham Zaranyika Trust.
4. The Master shall only approve the first and final liquidation account of Estate Late Abraham Zaranyika DR 4080/2002 only if it complies with the terms of this order.
5. The agreement of sale of stand no. 2790 Salisbury Township of Salisbury Lands also known as no. 21 Van Praagh Avenue, Milton Park, Harare entered into by and between the executor and the Trust prior to the winding up of the Estate Late Abraham Zaranyika DR 4080/2002 be and is hereby declared null and void.
6. The Master and the executor be ordered to pay costs on the higher scale of legal practitioner and client one paying the other to be absolved if they both unsuccessfully oppose this application.

I will deal with the main application first. In motivating Patience's case Ms *Mahere* submitted as follows. The Master erred in accepting the first and final liquidation and distribution account which is silent on the conditional bequest. The Master has since admitted that he erred in one of his reports. The estate account also omitted the Company and the

Chitungwiza property. There was no evidence presented by the executor that the company was bankrupt as alleged and that the Chitungwiza property had been donated to the testator's brother. There was no income and expenditure account filed in respect of the rentals collected for the Milton Park property and this shows collusion between the Master and the executor. Although the purchase price for the property was US$350 000, the estate account showed a value of US$100, 000 which is clearly deceitful on the part of the executor. His actions are tantamount to falsifying an inventory. Maud sold this property unlawfully. The sale itself is therefore illegal and of no force and effect. The will is very clear that no assets should be sold.

In his notice of opposition, the executor gave a detailed account of the circumstances surrounding what he viewed as his good relationship with the testator and the making of the will. He stated that the testator's intention was always that of protecting his wife, Maud. The testator could not fathom a situation however in which Maud re-married and the remaining assets would be taken by her to her new family or if she passed away, then her relatives would benefit from the assets. It was on that basis that the conditions were inserted into the will though at his prodding as the proposed executor. He denied that the testator had given Maud a *usufruct* over the property as alleged. He explained the delay in winding up the estate as due to a lack of information that he required. A deposit to cover initial costs was requested but he was not put in funds to enable him to proceed with the winding up.

The executor contended that the sale of the Milton Park property was driven by one Harrison Zaranyika a son to the testator who informed him that the family had realised that Maud as the surviving spouse did not need to keep a big matrimonial home which was too expensive to maintain and that she had decided to sell the property and buy a smaller one. Harrison Zaranyika requested the executor to look at the draft agreement of sale before it was signed. He saw nothing amiss with the agreement which was by consensus of the family. He explained to Harrison that he (the executor) would have to legally sign the agreement. In 2001, the value of the property was US$100 000 but at the time of the sale, it was sold for US$350 000. The Company was left out of the inventory because it was bankrupt. Harrison Zaranyika attempted to resuscitate it but to no avail. He genuinely believed what the former told him that the company was bankrupt. He had no reason to doubt the fact that Stand number 2829 does not belong to the estate but to one Dennis Zaranyika a brother to the testator. Mr *Zhuwarara* for the executor submitted that the Master had approved the first and final liquidation and distribution account and therefore no fault could be attributed to the

executor. The relief sought did not meet the requirements of a review in that it had not been shown that the decision of the Master was grossly unreasonable in its defiance of logic. In *casu*, there is no allegation that the Master was bribed and hence his decision to accept the estate account should not be impugned. If the allegation is that some property was left out of the estate account, the remedy lies in the filing of a supplementary affidavit and not in setting it aside.

The Trust denied that the sale of the Milton property was null and void or unlawful. Further that Maud had real rights over the property which she could dispose of. It gave a detailed account of the circumstances relating to the sale and that it had effected massive improvements to the property. The property is currently valued at US$1,100,000 (One million one hundred thousand United States Dollars) and in support of this contention, it attached a property valuation report. Further that part of the relief sought will prejudice the Trust since it is an innocent purchaser. Mr *Mpofu* at the hearing raised a preliminary point that citing a trust is improper since it ought to be represented by its trustees. On the merits he made the following submissions. The proper remedy where an executor is alleged not to have performed their duties is to apply for their removal in terms of section 117 of the Administration of Estates Act [*Chapter 6:01*] after a complaint has been raised with the Master of the High Court. The property could be sold because the will did not create a *usufruct* but gave full title to Maud that she could exercise. The Trust is an innocent purchaser who has not been put on notice. Vindication is not being sought and the fact that the Trust has effected massive improvements ought to be taken into account. The conclusion of an agreement of sale cannot be subject to a review. The question is whether or not a sale is valid or invalid and that cannot be decided through a review process. Part of the relief sought by Patience cannot consequently be granted.

In her notice of opposition, Maud gave a detailed history of her marriage to the testator and how the matrimonial assets including the house were acquired. Although the property was registered in the name of the testator only, it constituted the matrimonial home and she was entitled to it. She was made to understand that being the holder of real rights in the property, she was free to deal with it as she saw fit. This is more so in view of the fact that she has not died or remarried. The company was no longer an asset after falling into serious financial crisis after the testator fell sick. He had advised her prior to his death that the Seke property had been donated to one Dennis Zaranyika his brother with whom he was very close to. She had no reason to doubt her husband. She attached a supporting affidavit from her son

with the testator one Harrison Zaranyika who gave a detailed account of the company and its alleged demise. He also supported her version that the Seke property had been donated to one Dennis Zaranyika. Mr *Hashiti* for Maud submitted that Patience had not exhausted the remedies provided for in the Administration of Estates Act. The intention of the testator was clear that he was leaving the Milton Park property to Maud. The will did not create a *usufruct* but gave her full title.

Order 32 R 229A(1) permits the filing of a counter application. R 229A (2) states that the matters shall be dealt with at the same time unless the judge and the court orders otherwise. Under R 229 A(4) for good cause shown, a main and counter application may be heard separately. In *casu,* I did not perceive that there was a good cause why the two matters should be heard separately especially in view of the fact that the main bone of contention is the last will and testament of the late Abraham Zaranyika. I also find that there are no disputes of fact in relation to the resolution of the legal issues that arise in both the main and counter application.

Turning to the main application, in my view, the legal issues to be resolved are as follows:-

a. Is the Trust properly cited (preliminary point)?
b. Did the executor properly take into account all the bequests and conditions in the will in the first and final liquidation and distribution account?
c. In the event that the first and final liquidation and distribution account is set aside, should the agreement of sale between the executor and the Trust be invalidated?

The legal position relating to whether or not a trust can sue or be sued in its own name has been decided in this court in a plethora of cases.

In *Musemwa and ors* v *Estate Late Tapomwa,* HH-136-16, and DUBE J stated as follows:-

> Trusts do not have juristic personality and therefore cannot sue and be sued in their own names unless *locus standi* or juristic personally is conferred upon them by statute. Trusts have been incorporated into our rules. Our rules make provision for trusts in Order 2A……Order 2A was introduced by Statutory Instrument 192 of 1997.Order 2 rule 7 equates an associate with a trustee. A trust is included in the definition of an association trust. An associate may either be a natural person or a corporate entity like a company. A trustee on the other hand is a natural person. Rule 8 provides that an associate may sue and be sued in the name of the association. This means that a trustee can sue and be sued the name of the trust. Rule 8 also clothes a trust with power to sue and be sued in its own name. These rules modify trust law to permit and create *locus standi* for a trust. The rules give a trust independent *locus standi* from its trustees. This position has been endorsed in our jurisdiction. See *Women & Law in Southern Africa Research and Education Trust and Elizabeth Shongwe and Ors (supra). In Gold Mining and Minerals Corporation* v *Zimbabwe Miners Federation HH 20/06,* the court reviewed a number of legal authorities that support the proposition that a

> trust is merely a legal relationship and is not legally clothed with *locus standi* to bring proceedings in its own name. The court relied on and agreed on the sentiments of Dr Ribbens (*supra*) and other authorities for the proposition that a trust is not a legal *persona*. The court also observed that our rules clothe trustees with legal personality, entitling them to sue and be sued in the name of the trust. I agree entirely with the sentiments expressed in these judgments. I also come to the conclusion that a trust is merely a legal relationship and is not at common law a legal persona. Rules 7 and 8 permit a trust to sue and be sued in its own name. What is provided for in the rules is contrary to accepted legal principles governing the law on *locus standi*. The rules create an absurdity in the law which our courts have no choice but to embrace. Perhaps it is time that the Rules Committee and the Law Development Commission reconsidered the position as provided in the rules.

In *Benatar Children's Trust* v *Benatar,* HH-124-17, CHITAKUNYE J came to the same conclusion with reference to Order 2A that, *"It is thus clear from rule 8 that a trustee may sue or be sued in the name of the trust*" and further that, "*Rule 8 A then provides clearly what happens when a trustee has not been cited.*." I fully associate with the *ratio* in relation to the citing of the Trust in the decisions above.

Accordingly there is no merit in the contention that the Trust cannot be cited in its name.

In *casu,* the duties of a testator were brought to the fore. It is trite that a beneficiary in a will only has a mere hope (*spes)* that at the time of death, the bequeathed items will still be in existence. Section 15(4) of the Wills Act [*Chapter 6:06*] recognises that a testator may revoke a will if they voluntarily sell, donate or otherwise dispose of any property that is the subject matter of a legacy in a will. This is against the backdrop of the overall right of a testator to revoke their will wholly or partly and either absolutely or conditionally. The executor however must ensure that they have compiled a correct inventory and hence there is provision for a preliminary and additional inventory- see section 38 of the Administration of Estates Act [*Chapter 6:01*]. An executor is expected to gather all the assets of the estate and ascertain liabilities. Where an item has been bequeathed in a will but is no longer available at the date of death of the testator, the executor is expected to ascertain its whereabouts and indicate in the final liquidation and distribution account the status of such item. The overall duty of the executor is to, "…….*administer and distribute the estate in respect of which he is appointed according to law and the provisions of any valid will relating to that estate"* see s 52 (1) of the Administration of Estates Act.

There is a penalty for a false inventory – see s 39 of the Administration of Estates Act. In testate succession, an inventory may not be as difficult to compile as in intestate succession because a testator may indicate all their assets in the will. Although an executor

can delegate their functions, they cannot abdicate their role – see *Nyandoro* v *Nyandoro and ors*, HH-89-08.

Section 52 (2) (3) lay out the period and what is expected by the Master as follows:-

> (2) As soon as may be after the expiration of the period notified in the *Gazette* in manner hereinbefore in this Act provided, and not later than six months from the day on which the letters of administration were issued to him, or within such further time as the Master may upon sufficient cause being shown allow, the executor shall frame and lodge with the Master an account showing the administration and distribution of the estate up to the date when the account was lodged, together with a **TRUE** copy of that account. ***(My emphasis)***
> (3) If any such account is not the final account it shall set forth all debts due to the estate and still outstanding and all property still unrealized, and the reasons why the same have not been collected or realized, as the case may be.

Essentially an estate account must be a true and correct one in relation to the assets and liabilities of an estate. An executor can be called upon to render a proper account – see *Alcork* v *Swartz* –SC -167-91. An estate account is not only of interest to beneficiaries, professional executors and creditors but the fiscus due to payments such as the Masters Fees and estate duty as applicable. In deciding whether or not to confirm an estate account, the Master must be guided by the supporting documents these being a will in testate succession and in both testate and intestate succession, the inventory (preliminary, executors, additional) as applicable. For testate succession, the Master must literally look at all clauses of the will and compare this to the estate account and must insist on explanations for any variances. If a deceased property has been receiving rentals, an income and expenditure account should be compiled. Such account must reflect all the money received and use and if there is any balance, this is transferred to the estate account. If an estate is dutiable, the relevant documents from the tax authority must be attached. The estate file must have proof of the advertisements placed in the newspapers and the Government Gazette in relation to a call on creditors and debtors to come forward and also the estate account as lying for inspection. These should guide the Master in whether or not to approve the estate account. An executor may also as the Master directs, render periodical accounts of his or her administration and distribution until the estate is finally liquidated- see section 52(4) of the Administration of Estates Act.

I will now turn to the grounds for review.

Ground (b) and (f) all address the exclusion of some assets from the estate account. A consideration of the last will and testament and the estate account clearly reveals that not all the property bequeathed in the will is reflected in the final liquidation and distribution

account. Although Patience, the executor and Maud all gave a detailed account and history of the Company's alleged demise that is not the gist of the matter. Even if the company was bankrupt, the executor ought to have given a detailed report to the Master on its status. The estate account should have had notes showing that the shares in the company were no longer available for distribution as per the testator's wishes if that was indeed the situation prevailing as at the date of the filing of the estate account. It seems that the executor abdicated his role in the running of the company to the testator's son. He could as executor delegate but not abdicate his role – see *Nyandoro* case (*supra*).

I have already stated that a beneficiary has a mere hope (*spes*) that they will inherit but this does not take away the duty of an executor to gather together all assets and account. That money was required to undertake the exercise of ascertaining the issue of shares is neither here nor there since an estate is responsible for its own debts. Beneficiaries can also contribute to the estate expenses if they want to avoid realisation of assets. I did not see any evidence of the executor having contacted all the beneficiaries of the company seeking that they contribute to an exercise to ascertain its status. The executor indicated that there was an attempt to resuscitate the company but gave no details to the Master on the nature of this attempt and the income/losses generated which should have been accounted for in an income and expenditure account as it had a bearing on the value of the shareholding.

The executor ought to have indicated in the estate account that the house or houses in the communal land should not be considered and state the basis if any for that assertion. The Communal Lands Act [*Chapter 20:04*] deals with vesting, use and control of all communal land. All such land belongs to the state through the President of the country. I do not read it to state that buildings on such land have no value in monetary terms. Nothing was mentioned about the motor vehicles. The executor ought to have indicated the status of the motor vehicles because at the time of the making of the will, there were presumably in existence. The same should have been done regarding the chickens and cattle. The latter have a commercial value and anyone who possesses such in Zimbabwe must have a stock card. Nothing was mentioned about them. The testator specifically stated in clause 7 that if his clothes and wearing apparel was not given to relatives, they should be sold and proceeds paid into the testamentary trust. The estate account does not indicate what happened to the clothes. The account is silent on the status of the household goods and effects which have a monetary value. Stand 2829 of Seke Township is missing from the estate account with no explanation given. The executor and Maud were at pains to state that it had been donated to a brother of

the deceased. This might have been the case but there was no indication of what investigations if any were undertaken to establish the authenticity of the donation. The said brother could have deposed to an affidavit stating that it had been donated to him assuming that this was true and also whether or not names had changed at the municipality or deeds office if it has title. If not the question is how then will be it ceded or transferred to this brother if it does not appear in the estate account which account is required as part of the documents to support cession or transfer.

The Master was in possession of the agreement of sale in relation to the immovable property showing that it was sold for $350 000 United States Dollars but the estate account indicates $100,000 without explanation. In my view, what matters is the time of the submission of the estate account and at the relevant time the house had been sold for $350 000. Whilst the executor may have been labouring under an assumption that he needed to show the value as at the date of death, the figure of $100,000 was not supported by any documentary evidence. The distribution account does not also show that the Milton Park property has been disposed of. Estate property can be disposed of before the filing of a final liquidation and distribution account but what is crucial is that the property must still be included but the account should reflect this as a, "proceeds from the sale of", as applicable. The estate account in *casu* creates an erroneous impression that this property is still available for transfer to Maud. I have already stated that an estate account is of interest not only to the beneficiaries and creditors but also to the tax authorities who expect their pound of flesh as applicable. This is why before it is finalised, it must lie for inspection for a period of 21 days so that those who are interested can inspect it and raise objections if any in terms of section 52 (9) of the Administration of Estates Act. That section constitutes the *audi alteram partem* rule for all interested parties who have a right to lodge an objection. It follows that this right should be exercised based on a correctly presented first and final liquidation and distribution account.

Ground (c) of the review is that the executor took a period of 16 years to wind up the estate and that he never updated the other beneficiaries and worked in cahoots with Maud and her son. In my view grounds (c) and (e) are all similar except for the period of time that it took to wind up the estate. I have noted that there are some estates that are taking long to wind up but the Administration of Estates Act has a remedy. In terms of s 116, the Master is the supervisor of the process of estate administration. That section should be utilised to the full to bring errant estate administrators to book. There is also s 53. The reason why that

section exists is that an estate is expected be wound up within a period of six months. This is not by accident but by design to ensure that assets are gathered together and that heirs and legatees enjoy their benefits. Taking long to wind up an estate may mean that assets depreciate, bank balances are wiped out or lose value and some beneficiaries pass away. It may be worth detailing section 53 below:-

> **53 Summons if account has not been lodged within six months**
> (1) As often as any executor fails to lodge with the Master the account mentioned in section *fifty-two*, the Master or any person having an interest in such estate may at any time, after the expiration of six months from the day on which the letters of administration were granted to such executor, ***summon him to show cause before the High Court*** why such account has not been so lodged as aforesaid.
> (2) The Master, or such other person as aforesaid, shall not later than one month before suing out any such summons apply by letter to the executor in default requiring him to lodge his account on pain of being summoned to do so under this section.
> (3) An executor receiving any such application from the Master, or such other person as aforesaid, may lay before the Master such grounds and reasons as he may be able to advance why he has not lodged his account and the Master, should such grounds and reasons seem to him sufficient, may grant to such executor such an extension of time for the lodging of such account as he in the circumstances deems reasonable; reserving always the right of any person having an interest in such estate to bring in review before the High Court, or any judge thereof, by motion the decision of the Master under which any such extension is granted.
> (4) Any such executor so in default, if he fails to satisfy the Master that he ought to receive an extension of time, may apply to the High Court, or any judge thereof, by motion of which he shall give notice to the Master and such other person as aforesaid, for an order granting to such executor an extension of time in which to lodge his account.

Section 117 allows the Master to apply for the removal of an executor from office – see *Master* v *Moyo and ors* HH-11-09. A beneficiary such as Patience despite section 117 still has a right to apply for the removal of an executor – see *Katirawu* v *Karirawu and ors,* HH-58-07. I agree with Mr *Mpofu* and Mr *Hashiti* that the remedy of removal of an executor was and still is available to Patience. In my view the fact that this remedy is available does not bar Patience from seeking a review based on the time it has taken to wind up the estate. Even if the executor in *casu* is removed, the complaint in relation to leaving out assets listed in the will still remain. What matters is whether or not it is an appropriate ground for review. In my view it is not an appropriate ground since Patience as a beneficiary can still seek removal of the executor – see *Katirawu* case. I do not see how failure to wind up an estate is tantamount to connivance between the executor and Maud. I also do not see how this long period is tantamount to disinheriting beneficiaries as submitted by Patience.

Ground (d) states that the executor exercised his power in a manner which constitutes abuse of power in that he participated in the sale of the immovable estate property without the

Master's consent as required by law. This ground cannot be divorced from ground (a) which speaks to the conditions in the will.

Section 120 of the Administration of Estates Act states as follows:-

> **120 Sale of property otherwise than by auction**
> If, after due inquiry, the Master is of opinion that it would be to the advantage of persons interested in the estate to sell any property belonging to such estate otherwise than by public auction he may, if the will of the deceased contains no provisions to the contrary, grant the necessary authority to the executor so to act.

Contrary to Ms *Mahere's* submission, s 120 of the Administration of Estates Act does not apply because the will made it clear that no bequeathed property should be sold and whether or not consent was obtained is irrelevant to the issues at hand.

Although there is reference in the court application to s 5 of the Administrative Justice Act [*Chapter 10:28]* none of the parties relied on it in their arguments. In the final analysis, the court is constrained to consider whether or not the grounds for review wholly or partly fall within the four corners of s 27 of the High Court Act [*Chapter 7:06]*. In an application for review the court is guided by s 27 which reads as follows:-

> (1) Subject to this Act and any other law, the grounds on which any proceedings or decision may be brought on review before the High Court shall be:-
> (a) absence of jurisdiction on the part of the court, tribunal or authority concerned.
> (b) interest in the cause, bias, malice or corruption on the part of the person presiding over the court or tribunal concerned or on the part of the authority concerned as the case may be.
> (c) gross irregularity in the proceedings or the decision.
> (2) Nothing in subsection (1) shall affect any other law relating to review of proceeding or decisions of inferior courts, tribunals or authorities".

I do not agree with Mr *Zhuwarara's* contention that the remedy lies in the filing of a supplementary affidavit. The Master approved the first and final liquidation and distribution account and thus became *functus.* A supplementary account can only be filed before the approval or at the stage when objections are received which may in the Master's opinion be capable of being resolved through the filling of a supplementary account. As already observed, an executor may be permitted to file periodical estate accounts but the one that matters in the final analysis is the final liquidation and distribution account. In *casu,* the executor never carried out proper investigations or brought forward information relating to the missing assets on the estate account as he was expected to. A supplementary account could not have cured such an anomaly. The approval by the Master of the final liquidation and distribution account in the estate of the late Abraham Zaranyika DR 4080/02 is grossly

irregular for reasons stated above and thus entitles Patience to relief based on s 27 (1) (c) of the High Court Act.

Having found that the approval of the estate account was irregular, the next issue for consideration is whether or not the sale of the Milton Park property between the executor and the Trust should be set aside. *Mr Mpofu's* contention is that even if the court were to find that there is a gross irregularity in the approval of the final liquidation and distribution account, an agreement of sale cannot be set aside through an application for review.

The answer as to whether or not the sale ought to be set aside through an application for review lies in a consideration of the purpose of a review. In *Mugugu vs. Police Service Commission and anor*, HH-157-10, GOWORA J (as she then was) stated as follows:-

> "It is appropriate at this juncture to consider the function that a court is exercising when it reviews the actions or decisions of an administrative body. Judicial review is a process which is concerned with the examination and supervision by the courts of the manner in which administrative bodies have observed their obligations when related to the legislative requirements. It is a process in which the three arms of government, the executive, the judiciary and the legislature are enmeshed in a trilateral relationship. The power to review is inherent in courts of superior jurisdiction, but such power is limited to the legality of the administrative action or decision."

Further that,

> The process of review is for the court to examine the circumstances under which the administrative body reached its decision, and it is not open to the court, in a judicial review, to scrutinize the decision lest the court is accused of usurping the powers of the administrative body. See *Chief Constable* v *Evans*[3], where at p 154 LORD BRIGHTMAN stated:
>
> > "Judicial review is concerned, not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power."

The purpose of the review process is to ensure that an individual receives fair treatment at the hands of the authority to which he has been subjected. It is however not within the ambit of the reviewing court's power to substitute its own opinion for that of the administrative body. The function of the court is to ensure that the administrative body does not abuse the lawful authority entrusted to it by treating the individual subjected to it under that lawful authority unfairly. In the event if the circumstances under which the decision was made are proof that the decision was reached fairly and in a reasonable manner then clearly the court does not have the power to intervene.

[3] 1982 (3) All. E.R 141

I agree with Mr *Mpofu* that Patience cannot through a review process seek the setting aside of the sale of the Milton Park property. The court is confined to setting aside or correcting the proceedings, in this case the approval of the final liquidation and distribution account as per section 28 of the High Court act –see also *Fikilani* v *AG* 1990(1) ZLR 105(S); *Secretary for transport and anor* v *Makwavarara* 1991(1) ZRL 18(S) and *Affretair (Pvt) Ltd and anor* v *MK Airlines (Pvt) ltd* 1996 (2) ZLR 15 (S). Accordingly I will not grant the relief sought in respect of the setting aside of the sale.

I will now turn to the counter application.

In the counter application, Maud seeks an order as follows:-

1. That stand 2970 Salisbury Township of Salisbury Township Lands be and is hereby declared the matrimonial home for the purposes of the administration and winding up of estate late Abraham Zaranyika.
2. The proviso and condition to Clause 5 of the Last Will and Testament of the late Abraham Zaranyika (L.W 412/99) be and is hereby declared invalid in as far as it relates to the matrimonial property, being Stand 2970 Salisbury Township of Salisbury township Lands.
3. The matrimonial house, being stand 2970 Salisbury Township of Salisbury Township lands be and is hereby awarded to the surviving spouse MAUD ZARANYKA who inherits full rights of ownership thereof and is entitled to deal with it as she deems fit.
4. That the 1st respondent shall pay costs of suit if she opposes the counter application.

Maud submitted as follows. The Milton Park house was at all material times the family's matrimonial house including at the time of the deceased's death having stayed in it from 1987 to 2012 when it was sold. The proviso to the bequests falls foul of section 5(3) (a) of the Wills Act [*Chapter 6:06*] because it prejudices her rights as a surviving spouse to inherit the matrimonial home. Had the testator died intestate, she would have been entitled to it in terms of the Deceased Estates Succession Act [Chapter *6:02*]. The proviso is *ultra vires* the 2013 Constitution in that it fails to protect her marriage and her family to which as a spouse she is entitled to and that the proviso is out of sync with public policy considerations because it infringes upon her rights to inherit as a surviving spouse. As a result, the testator's freedom of testation ought to be limited to an extent that it gives her unconditional ownership

to the property. In motivating the counter application Mr *Hashiti* submitted that the property ought to devolve to the Maud without conditions.

Patience strenuously opposed the relief sought. She initially raised a point *in limine* that the counter application had prescribed but this point was not persisted with at the hearing. In her view, what Maud was granted in the will was a *usufruct* and that she was not disinherited at all. Maud sold the property contrary to the testator's wishes and this is the real reason why she now sought the setting aside of the conditions in the will. Ms *Mahere* for Patience submitted that the testator is protected by the freedom of testation doctrine and hence he made a lawful provision, disposition and direction in terms of section 5(1) (c) of the Wills Act. It remains open for a testator to make conditions in a will and in *casu,* the conditions imposed did not violate any law. Section 5 (3) (a) of the Wills Act does not apply because matrimonial property is not relevant to the devolution of property in terms of testate succession. The condition in the will constitutes a *fidei commissary* which is a lawful disposition. The testator's clear intention in including the remarriage clause was to protect other beneficiaries in the event of remarriage and there is nothing unlawful about such a condition.

Despite undertaking to abide by the court's decision in the counter application, the Trust through Mr *Mpofu* passionately made submissions in support of Maud as follows. The conditions imposed are not valid at law. There cannot be as a matter of law a condition that disturbs title outside the provisions of s 8 of the Deeds Registries Act *[Chapter 20:05] [Chapter 20:05]*. The conditions imposed are *contra bonos mores* and misogynistic in nature and form. The conditions do not constitute a *fidei commissary* substitution. The conditions make a mockery of the investment that a wife makes to the acquisition of property but the title deed is in the name of a husband. At death, a husband then takes away the rights of the wife without just cause.

The legal issues to be considered in the counter-application in my view are as follows:-

1. Are the conditions in the will in relation to remarriage and the bequeathing of the property to a testamentary trust in the event of Maud's death valid and enforceable?
2. Did the will create a *fidei commissary* substitution or a *usufruct?*

The Zimbabwean legal landscape is characterised by a dearth of authorities on conditions in a will. However the main starting point is that freedom of testation as correctly

submitted by Ms *Mahere* remains the cornerstone of testate succession. More than a century ago in *Robertson v Robertson's Executors* 1914 AD 503 at 507, Innes ACJ noted as follows;

> *'Now the golden rule for the interpretation of testaments is to ascertain the wishes of the testator from the language used. And when these wishes are ascertained the Court is bound to give effect to them, unless we are prevented by some rule or law from doing so.'*

The right to freedom of testation finds resonance in section 71(2) of the constitution in which the right of every person to acquire, hold, occupy, use, transfer, hypothecate, lease or dispose of all forms of property is recognised. Will making remains in the domain of private law and courts are loath to interfere.

HLA Hart, in *The Concept of Law* (1961) at pp 40 – 41 states as follows:-

> *'Rules conferring private powers must, if they are to be understood, be looked at from the point of view of those who exercise them. They appear then as an additional element introduced by the law into social life over and above that of coercive control. This is so because possession of these legal powers makes of the private citizen, who, if there were no such rules, would be a mere duty-bearer, a private legislator. He is made competent to determine the course of the law within the sphere of his contracts, trusts, wills and other structures of rights and duties which he is enabled to build.'*

When interpreting a will, the court starts from the premise that a testator 'knows' best. The rules of interpreting a will support the notion of freedom of testation. In *Zvobgo* v *Madondo N.O,* HH-96-06, the court re-stated the three cardinal principles in the interpretation of wills as follows:-

a. The main rule of construction is to ascertain the intention of the testator

b. The testator's intention, as ascertained from the will may be supplemented if necessary by "armchair" evidence that may be admissible; and

c. The court cannot make, or remake, a testator's will for him. It cannot change the devolution of his estate as he has directed – see also *ex Parte Bosch,* 1943 C.P.D 369@372.

Freedom of testation includes the power to create a testamentary trust that has been described as follows:-

> "This type of trust comes into existence when a person known as the testator states in his will (and last testament) that he leaves or bequeaths property in his will to a trustee so that the trustee can administer the property for a specified beneficiary or beneficiaries. A trust created in accordance with the provisions of a will is called a trust *mortis causa* and it becomes operational after the death of the testator"- see Ngwende Oscar Fungai in *The Imperial Journal of Interdisciplinary Research (IJIR),* vol 3 Issue 1 -2017, *Unpacking the law of trusts in Zimbabwe.*

The coming into operation of the testamentary trust depends on the validity of the will, meaning that if the will is declared invalid, so is the testamentary trust. I could not find any authorities in Zimbabwe on the registration of a testamentary trust. In South Africa, the Trust Property Control Act 57/88 requires that the Master of the High Court issue a letter of authority for the administration of the testamentary trust. This is after the filing of the deceased's last will and testament, the completion of the acceptance of trusteeship form, the filling of auditor's acceptance and bond of security by all the trustees. There is no legal requirement for the registration of the testamentary trust. Non-registration does not invalidate it.

A key feature of the trust is that the beneficial enjoyment is separated from the ownership of the property. In *Estate Kemp.* v *Macdonalds Trustees,* 1915 AD 491 SOLOMON JA stated as follows:

> "The underlying conception is that while the legal dominium of the property is vested in the trustees they have no beneficial interests as trustees in it but are bound to hold and apply it for the benefit of some person or persons".

The intention to create a trust must be clear – see *Estate Price* v *Baker and Price,* 22 SC 321. The trust property must also be defined with sufficient certainty so that it can be ascertained. The beneficiaries must be clearly defined and ascertainable- see *Batt* v *Batts Widow,* 1835 2 MENZ 408.

In relation to conditions, and based on freedom of testation, a testator remains at liberty to impose conditions in a will be it an inheritance or a legacy. Such conditions may have the effect of postponing or suspending the vesting of the bequest. The question to ask is whether or not freedom of testation is absolute? In recent years, the Zimbabwean courts have grappled with the question of freedom of testation in relation to the disinheritance of a spouse in a will. The courts have adopted different positions in this regard- see: - *Estate Late Wakapila* v *Matongo*- 2008(2) ZLR 43(H); *Estate Late Roche* v *Estate Late Chester Bruk-Johnson & anor*- HH-198-16; *Mujuru. Mujuru* –HH-404-17; *Chiminya v. Chiminya* HH-275-15; *Chigwada* v *Chigwada & ors* HH-69-16[4] and *Nyamushaya* v *Nyamushaya HH*-693-17. Outside conditions, the only other instance that may interfere with the freedom of testation is through the provisions of the Deceased Persons Family Maintenance Act [*Chapter 6:03*]

[4] At the time of this judgment, a decision is awaited from the Supreme Court on this issue in the *Chigwada* case.

section 8 (1) (i) in terms of which a will may be varied so as to meet maintenance for a dependant.

With conditions however, the preponderance of authorities suggest that the condition imposed must be lawful, possible to fulfil and not *contra bonos mores.* If a court sets aside a condition, it is treated as *pro non scripto,* in other words of no force or effect. The bequest will still be effected minus the condition. This means that in respect to conditions, freedom of testation is not absolute. This reflects the tension between the constitutionally recognised right to deal with one's property as one deems fit and the need to ensure that a condition imposed in a will does not fall foul of the law. A further complication arises in conditions that are perceived as being *contra bonos mores.* Human nature is ever evolving and what was perceived as being contrary to public morals years ago may not be the case in later years. For instance in the South African and Botswana jurisdictions, adultery damages have been outlawed – see *RH* v *DE* (594/2013) [2014] ZASCA 133 (25 September 2014) and *Kgaje* v *Mhotsha* CVHT 000237-17.

Conditions in a will can at best be seen as an attempt to rule from the grave. In *Ex Parte Dessels,* 1976(1) SA 851, the testator bequeathed to his widow, an annuity payable until death or remarriage. The bequest was subject to the condition that payments were to cease if (a) a widow lived a life that would be regarded as immoral (b) she permitted any strange person to live with her except one regarded as a visitor who stayed no longer than one week a year and if male, he was accompanied by his wife and (d) she in any way uttered derogatory words about the testator. Conditions b-d were set aside but condition (a) was found not to be against public policy. The conditions in the *Dessels* case, fall into the category of morality clauses as the one in contention in *casu.*

In *De Wayer* v *SPCA,* 1963(1) SA 71, the testatrix, a divorcee who had remarried bequeathed the residue of her estate both movable and immovable to her 'new' spouse on condition that he remained unmarried after her death. In the event that he remarried, he would only be entitled to the movable assets, with the rest going to the SPCA Johannesburg. It was held that the condition attaching to the bequest was invalid in that it embodied a restraint on marriage which was contrary to public morals. The effect of the decision was that the condition fell away and the gift in favour of the SPCA also fell away. The spouse was entitled to the bequest minus the condition that is, he received an unconditional bequest.

In *Ex Parte Cronje,* 1942 OPD 86, it was stated that the condition not to remarry can be imposed on a surviving spouse because s/he is charged with the duty of looking after the children of the marriage.

In *Ruben* v *Altschul,* 1961(4) SA 251, the testator made a bequest to his divorced wife with the condition that should she marry after the testator's death, her portion would accrue to their daughter. It was held that the condition was not invalid as the condition was made with the probability in mind that if the woman married again, the testator's child might not be well cared for especially if the mother had a second family.

In *Aronson.* v *Estate Hart,* 1950(1)SA 539(AD) it was held that a condition should not be a naked prohibition, that is there must be some provision as to what is to happen in the event of the condition not being satisfied.

Apart from public policy, conditions can also be affected by constitutional considerations- see M.J De Waal- The social foundations of the law of succession- 1997 *Stellenbosch L.R* 162. In Zimbabwe, in section 3(1) (g) of the constitution under founding values and principles states that Zimbabwe is founded on among others the value of gender equality and section 3(2) (i) (iii) recognition of the rights of women. In section 26(d) the state is called upon to ensure that in the event of dissolution of a marriage, whether through death or divorce, provision is made for the necessary protection of any children and spouses. In section 56 (3) some of the grounds for non-discrimination include custom, culture sex, gender and marital status. Section 58 recognises the right of every person to assemble and associate. Section 80 (3) states that all laws, customs, traditions and cultural practices that infringe the rights of women conferred by the constitution are void to the extent of the infringement.

The rights discourse is not without its controversies as the reality is that rights do compete. The South African Constitutional Court illustrated this tension amongst the many rights in *De Lange* v *Methodist Church and anor,* 2016(2) SA 1(CC) 77 as follows:-

> *'Rights sometimes compete, as we know. The right to equality, for instance, often competes with the rights to free expression, dignity, privacy and freedom of association. Even values like freedom and equality may compete. Therefore they often have to be weighed, balanced and limited. The limitation clause provides for this.'*

In the Protocol to the Africa Charter on Human and People's Rights on the Rights of Women in Africa Article 20(c) the right of a widow to remarry a person of their choice is recognised. The SADC Protocol on Gender and Development with the year 2030 targets

recognises the right of a widow and widower to an equitable share in the inheritance of the property of their spouses in article 10 (1) (c) and the right to remarry any person of their choice in article 10 (1) (d). Just as in the Protocol to the African Charter on the Rights of Women in Africa, there is no qualification to the right to remarry.

In *casu,* two other conditions played a dominant role both in the papers filed of record and in arguments before the court. These are the usufruct and the *fidei commissary* substitution.

P. J Badenhorst, Juanita M Piennar and Hanri Mostert, *Silberberg and Schoeman's The Law of property,* 5th edition pp 339-340, describe a usufruct as follows:-

> "A usufruct may be defined as a real right in terms of which the owner of a thing, (often referred to as the grantor) confers on the 'usufructuary' the right to use and enjoy the thing to which the usufruct relates. The thing may be movable or immovable, whether corporeal and incorporeal. A usufruct may be constituted over a collection of things, (*universitas facti* or *rerum (distantium)* such as a herd of cattle or flock of sheep and even the entire estate of the grantor. It furthermore extends to the accessories of the thing that is subject thereto. A usufruct over a farm, for example will normally extend not only to al buildings but presumably also to the livestock, farming equipment and the furniture in the homestead, provided of course a contrary intention does not appear from the will or agreement *inter vivos,* as the case maybe. As the usufructuary is only entitled to the use and enjoyment of the property he or she does not acquire the ownership over it, though he or she is of course entitled to its possession……."

At p 340, the authors make it clear that a usufructuary has not only rights but also responsibilities as follows:-

> "The usufructuary has no entitlement to consume and destroy the thing (*isu abutendi*) and is obliged to preserve its substance. ……..The obligation to preserve the substance of the property means that the usufructuary is bound to maintain it……As the usufructuary is not the owner of the property that is the subject matter of his or her right, he or she cannot alienate or encumber it"

On the other hand, a *fidei commissum* falls into the class of resolutive conditions. In its simplest sense, a *fidei commissum* is a disposition by which one person transfers property to a beneficiary subject to a provision that if a certain condition is fulfilled, the property is to go over to a further beneficiary. The relationship is therefore three way with the testator being the first party, the fiduciary the second party and the *fidei commissary* being the third party. In *Kemp* v *Estate Kemp,* 1915 AD 491 @500 it was held that the general presumption where a testamentary disposition is expressed in the form of a *fidei commissum,* is that the testator intended to postpone any vesting in the *fidei commissary* heirs until the happening of a specified condition. Pending that, the *dominium* is in the fiduciary and a mere *spes (*hope) in

the remainderman. But this presumption must yield to the clearly expressed intention of the testator to the contrary. Everything depends upon the intention of the testator.

The following passage, cited in the *Douglasdale Dairy and others* case (supra) is illustrative of the rights that accrue in a *fidei commissary* substitution-

> In *British South Africa Company* v *Bulawayo Municipality* 1919 AD 84 at 95, this court laid down the key principles pertaining to fiduciary and *fideicommissary* interests. Innes CJ said as follows: 'a direction to an heir to hand over the inheritance to another upon the happening of a condition is sufficient to constitute a fideicommissum; if and when the condition happens the final beneficiary acquires a real right in the inheritance. Following upon this principle, the court in *Eksteen and another v Pienaar and another* 1969 (1) SA 17 (O), dealt more fully with the question of ownership when the *fideicommissum* matures, upon the death of the fiduciary. Smit JP laid down certain key principles in particular at 19D: 'The owners in the case of a *fideicommissum* which has matured, are without a doubt the *fideicommissaries* themselves and not the fiduciary's estate. They obtained a real right on the death of the deceased fiduciary.' Smit JP cited with approval at 19H a work by Tambyah Nadaraja, The Roman-Dutch Law of *Fideicommissa* as applied in Ceylon and South Africa (1949): 'In the modern law, it would seem that in all cases the transfer of ownership takes place automatically at the time prescribed by the testator for the vesting of the fideicommissary's interest, and the fideicommissary is entitled from that time to the use and enjoyment of the property and to enforce his claims to the property against the fiduciary, his representatives, or other possessor.'

In *Brits* v *Hopkinson* 1923 AD 492 at 495 Wessels JA stated as follows:-

> "Before the Court can construe a testamentary disposition to be a *fideicommissum* it must be satisfied beyond a reasonable doubt that the testator intended to burden the bequest with a *fideicommissum.* To impose a *fideicommissum* for the benefit of succeeding generations, the words employed must not be vague and indefinite, but must be sufficiently clear to show an intention on the part of the testators that the heirs are not free to deal with the property either during their lifetime or after their death, but that they must allow the property to go to their heirs. (*Van Heerden v Van Heerden's Executors*, 1909, T.S at p. 291)."

King N.O and ors v *De Jager and ors,* Case no 21972/2015 a case from the Western Cape High Court illustrates the tension between freedom of testation and the principle of equality in the context of a *fidei commissum* . In that matter, the first and the second substitutions limited the *fidei commissary* beneficiaries to descendants of the male gender. The applicants sought a *declaratur* that those provisions of the will that exclude the deceased's daughters as fiduciary heiresses to the *fidei commissary* property are *contra bonos mores,* unconstitutional and should be amended. The court framed the question on public policy as follows:-

> "Notwithstanding these factors the question must be whether public policy has advanced to the extent that courts should be empowered to act as the final arbiter of whether a testator may discriminate, even unfairly so, in his or her private will".

Ultimately, the court held that,

> "In the particular circumstances of this matter, I do not consider that the general public would regard that the testators' decision to impose the *fideicommissary* condition discriminating against female descendants as so unreasonable and offensive that such provisions must be considered as offending against public policy."

In the event of a hardship, a fiduciary is not entitled to any 'mercy' in interpreting a *fidei commissary* substitution. In *Estate Marks,* 1924 OPD 236 @ 237-238, the applicant had incurred losses in his farming operations and was in need of money to purchase sheep and other goods for carrying on the farming operations. He had sought to mortgage the farm which had been ultimately left for the descendants of the applicants. In dismissing the application, it was stated as follows:-

> "We are therefore compelled to dismiss the petition. We do so with regret as the applicants' position is a hard one, but such cases of hardship are bound to arise continually so long as the law allows this often senseless and mischievous tying up of property. In the majority of cases no other object is sought or served than the posthumous gratification of the testator by the retention of the property in his family name"

The fiduciary is entitled to possession of the property subject to the *fidei commissum.* The fiduciary, whether a real or a juristic person is entitled to control and administer the property in question and is entitled to demand from the executor the transfer of the property subject to the relevant condition once the liquidation and distribution account has been finalised. A fiduciary is also entitled to the use and enjoyment of the property.

Despite the doctrine of freedom of testation, it has also been recognised that a fiduciary can alienate their interest in the property where it is clear that the preservation of the property or the welfare of beneficiaries is at stake, i.e. where there is need the court will allow alienation *ob causum necessarium* (for reasons of necessity). In *Ex Parte Strauss,* 1949 (3) SA 929, the following reasons were stated:-

a. To pay debts of the testator or make provision for the legacies from the estate; this would be at the initial stages of the distribution of the estate
b. To discharge statutory burdens of the estate such as rates and taxes.
c. To provide necessary maintenance for the dependants of the fiduciary especially where they are the ultimate beneficiaries of estate, a case of live now rather than die earlier.
d. To pay necessary expenses for the protection and preservation of the *fidei commissary* property so that it can be transmitted to the *fide commissaries* in a reasonable condition, i.e. the type of work that they would have to do when they finally get the property, so why put it off and exacerbate the situation.

In *Muller* v *Muller,* 1935 CPD, 452, it was held that perishable goods which include those with a short commercial life such as drugs from a medical practice could be alienated. The preponderant view is that courts are reluctant to interfere with the wishes of a testator no matter how logical it may be to do so. Major beneficiaries can however consent to a suggested course of action but this cannot operate where there are minor beneficiaries. This includes disposal of the *fidei commissum* property.

Part of the relief sought by Maud is that the proviso and condition to Clause 5 of the Last Will and Testament of the late Abraham Zaranyika (L.W 412/99) be and is hereby declared invalid in as far as it relates to the matrimonial property, being Stand 2970 Salisbury Township of Salisbury township Lands. Based on the authorities cited above, I am hesitant to find that the conditions in the will on re-marriage offends the constitution. This is in view of the competing nature of rights and the need to fully consider this matter perhaps as a constitutional one. I have however no hesitation in holding that the condition on re-marriage is *contra bonos mores* as correctly submitted by Mr *Mpofu.* In *casu,* the testator even went a step further to define re-marriage to include a customary marriage and co-habitation. This carrot and stick approach especially one which has the effect of asking a surviving spouse to choose to remain in the matrimonial home or leave upon re-marriage has no place in modern day society. This provision is invalid and therefore treated as *pro non scripto.*

The condition regarding death however in my view is lawful and does not offend public morals. It does not take away the right of Maud to live in the property. Its effect is simply that upon her death as the surviving spouse, the Milton Park home is to go to another fiduciary, in this case the Abraham Zaranyika Trust. Therefore as long as Maud is alive, she will be entitled to own the property. The protection afforded is that of a life time. The condition regarding death creates a *fidei commissary* substitution and not a *usufruct* as correctly submitted by Ms *Mahere.* The parties are the testator, Maud (the fiduciary) and the testamentary trust (the *fidei commissary).* If the testator had specified that Maud could stay until her death without further mentioning that the property should go to the testamentary trust thereafter, that would have been a *usufruct.* Whereas in a *usufruct,* ownership does not change and the remainderperson retains the bare *dominium,* in a *fidei commissary,* the fiduciary takes ownership subject to the condition(s) imposed.

The duties of the trustees are specified in the will as being, "…..*to hold the property and/or invest any income therefrom for the benefit of my children and/or their children per stirpes in accordance with the shareholding set out therein".* Further in clause 11:3 that,

'The trustees shall administer the trust in any income generating manner and shall use the net income for the benefit of the beneficiaries and/or their children per stirpes in accordance with their shareholdings or their entitlement". The property that should fall into the trust was clearly stated as were the trustees and the beneficiaries. Although there is no need legally to register a testamentary trust, the testator went a step further in clause 11:4 to specifically direct that the trustees shall register the trust with the deeds registries office and shall formulate such rules which will enable the trust to operate as smoothly as possible. Contrary to assertions that the testamentary trust is still to be established, in my view, the trust was established at the death of Abraham Zaranyika on the 4th of February 2001 with the trustees named in the will as the executor, Maud and the testator's two sons and two daughters. The fact that such trust has not been registered does not make it invalid. The registration becomes a matter of form. The executor and the named trustees still have the duty to register it.

Part of the relief also sought is that stand 2970 Salisbury Township of Salisbury Township Lands be declared the matrimonial home for the purposes of the administration and winding up of estate late Abraham Zaranyika. In my view this is misguided as the testator clearly bequeathed the property to Maud subject to certain conditions. Perhaps Maud was relying on section 3A of the Deceased Estates Succession Act that states that in intestate succession for persons married under general law, the surviving spouse inherits the house or other domestic premises in which the surviving spouse as the case maybe lived immediately before the person's death. I am aware that this court has dealt with cases in which the applicants have argued the meaning and legal implications of the phrase – living immediately before death –see *Ndoro* v *Ndoro* HH-198-12. *And anor, Matera and ors* v *Mbambo,* HH-26-14 and *Chirowodza* v *Chimbari N.O and ors*, 2016(2) ZLR 591. In *casu,* Maud was not disinherited.

The other relief sought is that the matrimonial house, being stand 2970 Salisbury Township of Salisbury Township lands be and is hereby awarded to the surviving spouse MAUD ZARANYKA who inherits full rights of ownership thereof and is entitled to deal with it as she deems fit. Just as the relief sought as enunciated above, this is also based on a misconception because the basis of distribution is under the laws of testate succession. The property was awarded to Maud subject to certain conditions and there is no basis that it be declared awarded to her as if the will excludes her. Contrary to assertion, she was not disinherited at all.

Maud sought costs against Patience if she opposes the counter application. I will repeat this over and over again that every person in Zimbabwe has the right to approach the courts of law as the *dominus litis* or the defendant/respondent. It is unprofessional on the part of legal practitioners to 'entice' a party not to oppose litigation based on the fact that they will not bear the costs that are in any event at the discretion of the court.

Before concluding two issues exercised my mind. First is the issue on the appropriateness of a legal practitioner who is appointed to act as an executor to charge legal fees. In my view, such a legal practitioner is **NOT** *(my emphasis)* entitled to charge legal fees but is entitled to charge only fees that are legally due to executors as prescribed by law- see section 56 of the Administration of Estates Act on remuneration of executors. I make this observation because it seems to me that some legal practitioners appointed as executors are charging astronomical legal fees which they are not entitled and would be due to them when they are representing the estate not as executors but as legal practitioners. The last issue relates to the time period within which some estates are taking to be wound up. As observed already, delays are prejudicing beneficiaries and causing unnecessary complications especially when beneficiaries die before getting their legacy or inheritance. To that end, the Master should be stricter with supervision of winding up of estates.

As I have already observed, the main and counter application are intertwined. The approval by the Master of the first and final liquidation and distribution account cannot stand. The condition in the last will and testament relating to remarriage cannot also stand.

In relation to costs, the main protagonists have been partially successful in both the main and counter applications. In my view an order that each party meets its own costs will be appropriate.

The Registrar of the High Court is directed to bring this judgment to the attention of the Master of the High Court.

DISPOSITION

The main and counter applications are disposed of as follows:

It is ordered that:-

1. The final liquidation and distribution account in the estate of late Abraham Zaranyika DR 4080/2002 which was approved by the Master on the 23 March 2017 be and is hereby set aside.

2. Subject to paragraph (3) of this order, the executor be and is hereby ordered to draw up a first and final liquidation and distribution account that takes into account all conditions and estate assets listed in the last will and testament of the estate of the late Abraham Zaranyika (L.W 412/99). Such estate account shall be advertised and lie for inspection in terms of section 52(6) of the Administration of Estates Act [Chapter *6:01*]
3. The condition to Clause 5 of the Last Will and Testament of the late Abraham Zaranyika (L.W 412/99) that MAUD ZARANYIKA loses her bequest in relation to Stand 2970 Salisbury Township of Salisbury township Lands otherwise known as Number 21 Van Praagh Avenue, Milton Park, Harare upon her remarriage defined to include a customary marriage or living with a man as husband and wife be and is hereby declared invalid.
4. Each party shall bear its own costs

Chitapi and Associates, Applicant's legal practitioners in the main and 1st respondent's legal practitioners in the counter application. *Chihambakwe, Mtizwa and Partners,* 2nd respondent's legal practitioners in the main and 3rd respondent in the counter application.
Musunga and Associates, 3rd respondent's legal practitioners in the main and 4th respondent in the counter application.
Chirorwe and Partners, 4th respondent's legal practitioners in the main and applicant in the counter application.