NOT REPORTABLE

CASE NO. A 283/2010

IN THE HIGH COURT OF NAMIBIA

In the matter between:

JAN CHRISTIAAN ALBERTUS CHRISTOFFEL LABUSCHAGNE	**1st APPLICANT**
STEFANUS JACOBUS DANIëL LABUSCHAGNE	**2nd APPLICANT**
MARTHA MARIA FREDERIKA COMBRINK	**3rd APPLICANT**

and

MASTER OF THE HIGH COURT OF NAMIBIA	**1st RESPONDENT**
STANDARD BANK NAMIBIA LIMITED	**2nd RESPONDENT**
JOHANNA SUSANNA LABUSCHAGNE	**3rd RESPONDENT**
THE REFORMED CHURCH GOBABIS	**4th RESPONDENT**
ANNA FRANSINA BOSMAN	**5th RESPONDENT**
WILLEM MARTHINUS LABUSCHAGNE	**6th RESPONDENT**
JACOBUS JOHANN VISSER	**7th RESPONDENT**
JAN ABRAHAM PIENAAR	**8th RESPONDENT**
REGISTRAR OF DEEDS	**9th RESPONDENT**

CORAM: CORBETT, A.J

Heard on: 14 November 2011
Delivered on: 10 July 2012

JUDGMENT

CORBETT, A.J:

[1] This matter concerns a main application brought by the applicants and a counter-application brought by the second, seventh and eighth respondents. The applicants are three of the children of the late Stefanus Labuschagne ("the deceased"). The second respondent is the executor in the estate of the deceased. The seventh respondent is one of the trustees of the various trusts established which became owners of farms previously owned by the deceased. The eighth respondent is one of the trustees of an *inter vivos* trust established by the deceased under the name of the Labuschagne Family Trust.

[2] The main application is brought in terms of the provisions of section 35 (10) of the Administration of Estates Act, No. 66 of 1965 ("the Act"). However in substance the application is one brought in terms of Rule 53 for the review of certain decisions taken by the Master of the High Court. The main application is

only opposed by the second, seventh and eighth respondents. The Master elected not to oppose the main application and filed an affidavit indicating that she would abide the decision of the Court.

[3] The counter-application is premised upon the circumstance that a general power of attorney furnished by the deceased to the eighth respondent had lapsed due to the incapacity of the deceased. The applicants only oppose prayers 2.5 and 2.6 of the counter-application.

[4] The background facts are as follows:

> [4.1] The deceased, apparently a man of considerable means with extensive farming interests, was diagnosed as suffering from dementia in the form of Alzheimer's disease. On 24 September 2001 the deceased gave a written power of attorney to the eighth respondent in terms whereof the latter enjoyed wide powers to manage the deceased's farming activities. In May 2001 the deceased had set up the Labuschagne Family Trust, as an *inter vivos* trust. The deceased passed away on 5 April 2008 leaving a wife and nine children. The applicants are three such children. In terms of the provisions of the will of the deceased the residue of his estate was bequeathed to the Trust.

[4.2] On 11 June 2010 the amended first and final liquidation and distribution account in the estate of the deceased dated 12 March 2010 was advertised, purportedly in accordance with section 35 (5) (a) of the Act. The distribution of the deceased's estate was drawn up in accordance with the deceased's last will and testament dated 23 May 2001, including codicils thereto dated 14 August 2001, 29 January 2003 and 17 July 2003.

[4.3] The applicants claim that by the time of the deceased's death a number of his immovable properties had already been irregularly transferred from his estate to the various trusts. It is further alleged that various movables belonging to the deceased's estate were transferred by the eighth respondent to various unknown destinations. It is also claimed that the transfers were effected by the executor without the necessary authority to do so;

[4.4] The applicants state that the transfers were effected by the executor on the basis of the general power of attorney dated 24 September 2001, which power of attorney was at the time of the transfers null and void. I pause to mention that it was common cause between the applicants and the second, fifth, seventh and eighth respondents that the power of attorney lapsed and was of no further force or effect by 29 November 2001. The power of attorney had been declared null and void by this Court on 10 August 2007 and the Master was aware of this fact.

[4.5] On 1 July 2010 the applicants lodged an objection against the account with the Master in terms of section 35 (7) of the Act. By way of a letter dated 18 August 2010 the Master indicated, *inter alia*, that she had decided that the objections against the account were not well founded and fell to be rejected. The Master accordingly accepted the account.

[5] The applicants disagreed with this decision. They accordingly filed the main application in terms of section 35 (10) of the Act, whilst invoking the procedure provided for in terms of Rule 53 of the Rules of this Court, by way of summary seeking to review and correct or set aside the decision of the Master taken on 18 August 2010:

[5.1] that none of the objections lodged by the applicants against the amended first and final liquidation and distribution account of the deceased were well founded, and therefore rejecting such objections;

[5.2] not to reject the general power of attorney dated 24 September 2001 and everything done by eighth respondent on the basis thereof;

[5.3] not to direct that all farms previously belonging to the deceased and subsequently transferred to various trusts on the basis of the general

power of attorney, be transferred back to the estate of the deceased and thereafter to the Labuschagne Family Trust;

[5.4] not to direct that all movable assets previously belonging to the deceased and subsequently transferred to various trusts on the basis of the general power of attorney, be transferred back to the estate of the deceased and thereafter to the Labuschagne Family Trust in accordance with the deceased's last will and testament, and in the event that this be impossible, that the monetary value thereof be recovered;

[5.5] not to direct that a recount of the game be conducted on the deceased's farms so that the correct value thereof be reflected in the account;

[5.6] not to direct that the necessary steps be taken to have a forensic audit conducted to ensure that all the assets, or their value, be transferred to the Labuschagne Family Trust and further, that the costs occasioned by such audit be borne by the deceased's estate.

[6] Before addressing the merits of the main application, the respondents raised several points *in limine*. I shall deal with these points at the outset.

LOCUS STANDI

[7] Mr Tötemeyer, who appeared together with Mr Barnard, on behalf of the respondents stressed that the applicants brought the main application in terms of the provisions of section 35 (10) of the Act, and in the founding affidavit make the allegation that they are "*…beneficiaries to the deceased's estate…*". Should this indeed be the case, the applicants would have *locus standi* to bring the application in terms of the provisions of section 35 (10) and probably also have *locus standi* to bring a review application relevant to the decision-making of the Master concerning the administration of the deceased's estate. However, it is contended on behalf of the respondents that the annexures to the founding affidavit reveal that the applicants were not beneficiaries in the estate of the deceased, and thus lack *locus standi* in this matter.

[8] As indicated, in terms of the provisions of the will of the deceased, the residue of his estate is bequeathed to the Trust. The will further provides that in such a case the deceased's children shall benefit from the Trust in equal shares, it being expressly stated by the testator that:

> [8.1] "I direct that the net income of the trust may be assigned at the discretion of the trustees to the beneficiaries, provided that the said beneficiaries shall benefit equally. Any surplus income shall be reinvested and capitalized from time to time."

[8.2] “My children WILLEM MARTHINUS LABUSCHAGNE, JAN CHRISTIAAN ALBERTUS CHRISTOFFEL LABUSCHAGNE and ANNA FRANCINA BOSMAN shall not be entitled to any income and/or capital from the trust fund thus bequeathed by me to the trust, but such capital and/or income shall devolve upon their lawful issue after their death, and failing any such descendants, to my surviving children.”

[8.3] “I direct that the decisions taken by the trustees shall be taken in terms of the provisions of the trust deed of the LABUSCHAGNE FAMILY TRUST.”

[9] It was submitted by respondents’ counsel that the will must thus be read together with the provisions of the Trust. The relevant paragraphs of the Deed are the following:

[9.1] “BENEFICIARY OR BENEFICIARIES refer to income and/or capital beneficiaries depending on whether the expression beneficiaries is used in an income or capital context in the trust document, and includes the following persons and trusts:

(a) Income beneficiaries: shall refer to the persons to benefit from the income of the trust in terms of the discretionary powers of the trustees, and which beneficiaries can be selected from the ranks of:

(i) Stefanus Jacobus Daniël Labuschagne;

(ii) The capital beneficiaries;

(iii) Any trust established in terms of the authorities granted to the trustees in paragraph 15 of the trust deed;

(iv) Any trust established on behalf of any beneficiary or group of beneficiaries mentioned in (i) and (ii);

(v) Any institution enjoying tax exemption in accordance with the Income Tax Law, as amended.

(b) Capital Beneficiaries: The beneficiaries to whom the trust fund is made over during the existence or upon termination thereof, in terms of the provisions of the trust deed, and which beneficiaries shall be specified in terms of the provisions of the trust deed from the ranks of:

(i) The children of Stefanus Jacobus Daniël Labuschagne;

(ii) The lawful issue of the beneficiaries mentioned in (i) above;

(iii) Any trust established in terms of the authorities granted to the trustees in paragraph 15 of the trust deed;

(iv) Any trust established on behalf of any beneficiary or group of beneficiaries mentioned in (i) and (ii)".

[9.2] "VESTING DATE refers to the date on which the trust comes to an end with regard to the trust fund, in whole or in part, on which date the trust fund or any part thereof is made over to the beneficiaries to whom it is allocated, and shall vest in them, namely on any of the following dates:

(a) The date on which the trustees make over interim payments to beneficiaries in accordance with the authorities that they hold;

(b) The date which the trustees may determine at any time in their exclusive discretion as the vesting date in respect of a portion or the entirety of the trust fund;

(c) The date (if any) determined in terms of the stipulations of paragraph 27.1.1".

[9.3] "11.2 The trustees have at all times all such powers as necessary to manage the trust assets as they may deem necessary in their exclusive discretion to manage the trust fund at best for the benefit of the beneficiaries…".

[9.4] "12. UTILISATION OF CAPITAL

The trustees shall be entitled in their sole discretion:

12.1 …

12.2 to utilise at any time up to and until the termination of the trust, however, subject to the exercising of the testamentary reservation established in sub-paragraph 27.1, the entire or any part of the trust fund for the benefit of any one or more of the beneficiaries in such relation of shares, if more than one, and in such manner and subject to such conditions and limitations as the trustees may determine from time to time and also without necessarily upholding and applying the principle of equality between beneficiaries. The trustees' discretion in that regard shall be final and binding to the beneficiaries".

[9.5] "13. UTILISATION OF INCOME

The trust is a discretionary trust concerning the utilisation, allocation and distribution of trust income and the trustees can allocate income to any beneficiary qualifying as an income beneficiary in their sole discretion or withhold same from him, and they are more specifically entitled to …".

[9.6] "22.1 Until such time a beneficiary obtained a legal claim in respect of a benefit or allocation in terms of the trust deed, such beneficiary shall not have a claim to the income or capital of the trust or a claim for the delivery or disposal of any trust property to him".

[10] It follows that in terms of the deed of trust the trustees have the power of appointment in their absolute discretion. In terms of such power it is the trustees who appoint the beneficiaries and not the creator of the trust. The trustees must appoint such beneficiaries from a group of potential beneficiaries. Until such time as the trustees have "*selected*" or "*specified*" beneficiaries there are no beneficiaries with rights, or even contingent rights, but only the group from which the beneficiaries may be selected. That much is clear from the above quoted provisions of the trust deed. Counsel on behalf of respondents accordingly submitted that there had been no vesting of any benefits or rights from the trust in the applicants.

[11] In terms of the provisions of section 35 (7) of the Act only "*…a person interested in the estate…*" may object to an account. In terms of the provisions of section 35 (10) of the Act "*Any person aggrieved by any such direction of the Master or by a refusal of the Master to sustain an objection so lodged, may apply by motion to the court …*".

[12] Mr Tötemeyer correctly points out that there is little authority on the interpretation to be given to the provisions of section 35 (10) of the Act. However, he urged the Court to have regard to the analogous provisions of section 407 of the Companies Act No. 61 of 1973 and the provisions of section 111 of the Insolvency Act No. 24 of 1936, where the Master exercises a similar discretion.

The meaning of the words "*aggrieved person*" has been considered in the following contexts:

[12.1] In regard to the provisions of section 111 of the Insolvency Act it has been held that an aggrieved person must be a person who has suffered a legal grievance, a person against whom a decision has been pronounced which has wrongfully deprived him of her of something, or wrongfully refused him or her something, or wrongfully affected his or her title to something[1];

[12.2] In regard to the provisions of section 407 of the Companies Act it has been found that the subsection gives an objector *locus standi* where such person has an interest in the company, but not where an objector's interest is merely in seeing that the liquidation is properly handled or that the liquidator executes his or her duties. Moreover an insolvent shareholder in a company has no *locus standi* as he or she only has a residuary interest in his or her insolvent estate [2];

[12.3] The meaning of the concept "*aggrieved person*" has been considered in the context of Article 18 of the Constitution by Strydom J (as he then was) in the matter of *Kerry McNamara Architects v Minister of Works, Transport and Communication* [3]. The Court found that the trend

[1] C P Smaller (Pty) Ltd v The Master and Others, 1977 (3) SA 159 (TPD), 163 F
[2] Nieuwoudt v The Master and others NNO, 1988 (4) SA 513 (AD), 531 D – F; Tongaat Paper Co v The Master, 2011 (2) SA 17 (KZP), 25 E
[3] 2000 NR 1(HC)

both in the South African jurisdiction and decisions of English Courts was to interpret an "*aggrieved person*" as someone whose legal rights have been infringed – a person harbouring a legal grievance [4]. The effect of the judgment is that an aggrieved person (for the purposes of Article 18 of the Constitution) is someone who would otherwise have *locus standi* in terms of common law principles, and that the Constitution did not widen the scope of *locus standi* in this context [5]. It was submitted by counsel for the respondents that the same interpretation should be given to a "*person* "*aggrieved*" referred to in section 35 (10) of the Act. Such person must have a "*direct and substantial*" interest in the litigation[6].

[13] Counsel thus reasoned that a person such as either of the applicants is not an "*interested person*". The Labuschagne Family Trust, rather than the applicants, are the heirs to the deceased's estate. They are also not beneficiaries of the Labuschagne Family Trust. At best, they have a hope to become beneficiaries in the future. At this stage the decision of the Master does not deprive the applicants of anything and they accordingly do not have *locus standi* to bring this application.

[14] Mr Heathcote, who appeared together with Ms Van der Merwe, strenuously contended that the Court should take a different view of the issue of *locus*. He referred the Court to the decision of O'Regan AJA in the matter of

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[4] Kerry McNamara *supra*, 11 D - J
[5] Kerry McNamara *supra*, 10 – 11
[6] Kerry McNamara Architects, *supra*, 11 B; United Watch and Diamond Co. (Pty) ltd and Others v Disa Hotels Ltd and Another, 1972 (4) SA 409 (C), 415 B; Clear Channel Independent Advertising v Trans Namib Holdings, 2006 (1) NR 12 (HC), 138 G – H and the authorities there referred to

Trustco Insurance Limited t/a Legal Shield Namibia v Deeds Registries regulation Board[7] where the Supreme Court, whilst finding it unnecessary to consider the scope of the phrase "*aggrieved persons*" referred to in Article 25 of the Constitution, stated that the "*rules of standing should not ordinarily operate to prevent citizens from obtaining legal clarity as to their legal entitlements*" [8]. However, I do not understand the Court to have broadened the scope of standing in that the Court found that the appellant indeed had a direct and substantial interest in the outcome of the proceedings.

[15] More persuasive, in my view, was the argument advanced on the basis of the decision of Appellate Division in the matter of *Gross and Others v Pentz*[9]*.* In that matter the Court was required to determine whether a contingent beneficiary of a testamentary trust (viz one who had merely a contingent interest in both the future income and capital thereof) had *locus standi* to institute action against a co-trustee for maladministration amounting to breach of trust and resulting in pecuniary loss to the trust estate. Corbett CJ observed that the general rule was that the proper person to act in legal proceedings on behalf of a deceased estate was the executor thereof, and the same principle applied to a trustee appointed in terms of a testamentary trust[10]. A distinction had, however, to be drawn between actions brought in a representative capacity on behalf of the trust, such as to recover trust assets, and " *actions brought by trust beneficiaries in their*

[7] 2011 (2) NR 726 (SC)
[8] At 733, para [18]
[9] 1996 (4) SA 617 (AD)
[10] At 625A/B – E

own right against the trustee for administration of the trust estate …[11], which latter actions the Court described as direct actions. The general rule only related to representative actions[12]. Because a delinquent trustee could not be expected to sue himself or herself the rule in *Beningfield v Baxter*[13](a decision of the Privy Council on appeal from the Supreme Court of Natal) constituted an exception to the general rule. The Court stated:

> "In my view, the *Beningfield* exception should be recognised and the general rule modified to this extent. Clearly a defaulting or delinquent trustee cannot be expected to sue himself. The only alternative to allowing the *Beningfield* exception would be to require the aggrieved beneficiaries to sue for the removal of the trustee and the appointment of a new trustee as a precursor to possible action being taken by the new trustee for the recovery of the estate assets or other relief for the recoupment of the loss sustained by the estate. This, in my opinion, would impose too cumbersome a process upon the aggrieved beneficiaries.
>
> The next question is whether a representative action in terms of the *Beningfield* principle is available to beneficiaries who have no vested right to the future income or *corpus* of the trust. While the rights of such beneficiaries are contingent, they do … have vested rights in the proper administration of the trust. Although there does not appear to be any authority directly on point, I am of the view that such a beneficiary may bring a representative action(cf *Van Rensburg v*

[11] At 625F - G
[12] At 625E - F
[13] (1886) 12 AC 167 (PC), 178 - 179

Registrar of Deeds and Others 1924 CPD 508 at 510; *Mare v Grobler NO* 1930 TPD 632 at 636 – 7)" .

[16] I find that the applicants, despite having no vested right to the future income or *corpus* of the Labuschagne Family Trust, are clothed with *locus standi* insofar as they have vested rights in the proper administration of the Trust. It accordingly follows that the applicants must be persons "*interested in the estate*" and have *locus* on this basis to exercise their rights to object to the account in terms of the provisions of section 35 (10) of the Act. It further follows as a matter of logic that should the applicants have *locus standi* to object to the account, upon the refusal of the Master to sustain the objection, the applicants constitute persons "*aggrieved*" by any such decision. I am accordingly of the view that the applicants have *locus standi* to bring this application.

THE PROCEDURE ADOPTED BY THE APPLICANTS

[17] The respondents contend that the procedure adopted by the applicants by bringing the application in terms of Rule 53 is incorrect. Review procedure is an extraordinary remedy with tactical advantages, including early discovery of the record, which applicants do not ordinarily enjoy. Where an applicant has other adequate and effective procedures these should be pursued. It is further

submitted that no case has been made out in the founding affidavit justifying the use of Rule 53[14].

[18] There is some merit in this argument. An application in terms of section 35 (10) of the Act is an application *sui generis*. The application is not confined to the facts which served before the Master. An aggrieved person can seek relief broader and on a different basis to the confined issue of whether the Master's direction or refusal to sustain an objection is correct[15]. However, although an application in terms of Rule 53 is not a review *strictu sensu* it does at one level have as its goal the setting aside of the decision of the Master, an officer "*performing judicial, quasi-judicial or administrative functions*" as understood by Rule 53. Despite the savings clause in Rule 53, the Act does not limit the ambit of the application brought in terms of section 35 (10) to one exclusive of an application invoking Rule 53. This interpretation is reinforced by the provisions of section 35 (10) which bestows on the Court a wide discretion to make such order as it may think fit. I am accordingly of the view that, in bringing an application in terms of section 35 (10), an applicant may also invoke Rule 53 procedure. The respondents' second point *in limine* is thus dismissed.

[14] Open Learning Group v Secretary, Ministry of Finance, 2006 (1) NR 275 (HC), at paras [116] and[117]
[15] South African Bank of Athens v Sfier and Others, 1991 (3) SA 534, 536 E – 537 E

DECISION BY THE MASTER

[19] The relief sought in prayers one to four of the notice of motion are premised on the contention that the Master should have taken a decision that the power of attorney furnished by the deceased to the eighth respondent on 24 September 2001 had lapsed due to the fact that the deceased had no legal capacity at the relevant time due to dementia brought about by Alzheimer's disease. The consequential relief relates to setting aside a decision of the Master not to direct that various moveable and immovable property belonging to the deceased and transferred by virtue of the power of attorney, be retransferred back to the estate and thereafter to the Labuschagne Family Trust.

[20] In dealing with objections in terms of section 35 (7) of the Act, the Master does not decide factual disputes[16]. It is also beyond the powers of the Master to refute the presumption that the deceased was presumed to have legal capacity. The Court must pronounce on this issue of status, a power which vests solely with the Court. The Master also does not have the power to determine whether the deceased was mentally incapacitated when numerous moveable and immovable property was transferred from the deceased's estate to various trusts. There is accordingly no basis for the relief sought in paragraphs one to four of the notice of motion. The Court can also not make any such declaration of

[16] CP Smaller case *supra,* 163D
Fourie's Poultry Farm (Pty) Ltd v Kwanatal Food Distributors (Pty) Ltd (in liquidation) And Others, 1991 (4) SA 514 (N)

incapacity since the relief sought in the main application goes no wider than the reviewing of the Master's decision in relation to the objection.

[21] The applicants further seek an order setting aside the decision of the Master to refuse to direct that a recount of game take place. The applicants claim that the value of the game reflected in the account is the value as at 2008. The Master indicated that a game count would be performed on 30 October 2010 when the lease agreement on the relevant farm was due to expire. In the answering affidavit filed by the respondents it is confirmed that a game count was indeed done on 26 October and 16 November 2010 (subsequent to the objection being lodged). In the circumstances, I find that the applicants have failed to make out a case for the setting aside of the Master's decision in this regard.

[22] The applicants seek an order setting aside the decision by the Master to refuse to direct that the necessary steps be taken to have a forensic audit done to ensure that all assets or their value be transferred to the Labuschagne Family Trust. The record reveals that the Master had insight into the report of the *curator bonis* appointed for the deceased. She satisfied herself that a forensic audit was not necessary. The applicants' allegation that "*assets to the tune of many million Namibian Dollars disappeared from the deceased estate*" lacks factual substantiation. The report of Julia Engels, upon which the respondents rely, was not before the Master when she took the relevant decision. In any event, Johan Visser, the seventh respondent and a chartered accountant puts in

issue the conclusions reached by Julia Engels. Eric Knouwds, also a chartered accountant appointed as curator bonis for the deceased was instructed to investigate the affairs and administration of the Labuschagne Family Trust and related trusts. Whilst stating that there were defects in the administration of the trusts he did not recommend a more intensive investigation, citing expense. All the allegations in support of the need for a forensic audit create factual disputes, all of which were foreseen. In terms of the provisions of Rule 6 (5) (g) relief should ordinarily be refused in such circumstances[17].

[23] A review is based on the facts which served before the decision-maker at the time the decision was taken, and it is not the role of the Court to usurp the function of the decision-maker (who has specific expertise), but rather to determine whether the decision-maker could reasonably have reached a decision on the facts before him or her[18]. I find that she did. In the circumstances, I am satisfied that the Master was correct in refusing to direct that a forensic audit be undertaken.

[24] I accordingly find that no case has been made out for the review relief sought in the main application. The issue of costs is addressed below.

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[17] Room Hire Co (Pty) Ltd v Jeppe Street Mansions, 1949 (3) SA 1155 (T), 1163; Doeseb and Others Kheibeb and Others, 2004 NR 81 (HC), 93

[18] Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs, 2004 (4) SA 490 (CC), 511D – 513G

THE COUNTER-APPLICATION

[25] In the counter-application, as amended at the hearing, the respondents seek (by way of summary) the following orders:

[25.1] that the power of attorney dated 24 September 2001 granted by the deceased to the eighth respondent lapsed and was of no force or effect by 29 November 2001;

[25.2] that all transactions after 29 November 2001 concluded and executed in terms of the power of attorney and specified in the order be declared void *ab initio*;

[25.3] that the executor be authorised and directed to recover all of the aforesaid assets;

[25.4] that all codicils to the will of the deceased be declared of no force and effect;

[25.5] that costs of the counter-application be paid on a punitive scale from the deceased's estate, except in the event of opposition, in which such costs be paid by those persons opposing.

[26] The applicants and the fifth respondent pertinently consented to the relief sought in prayers 2.1 to 2.4 of the counterclaim. The amendments granted do not detract from this agreement. On the basis of the medical evidence tendered I am of the view that a case has been made out that the due to the dementia in the form of Alzheimer's disease suffered by the deceased the power of attorney granted by the deceased to the eighth respondent on 24 September 2001 lapsed and was of no force or effect from 29 November 2001.

[27] A claim that restitution take place in respect of all transactions done in terms of the power of attorney is not a competent claim. This is a contractual claim which is not available where no contract ever existed.[19] The contracts in respect of the items transferred under any invalid power of attorney are thus void. A party to a void contract does not have contractual remedies such as a claim for restitution. Such a party will have a vindicatory claim, as in the present case, or a claim based upon enrichment by means of the *condictio sine causa*.[20]

[28] The parties to the contracts of donation of the items set out in the counterclaim were all cited and are before court. The claim in respect of these items is a vindicatory claim. As already mentioned, this relief is not opposed. I am satisfied that a case has been made out on the papers and grant the relief referred to in paragraphs 2.1 to 2.4 of the counter-claim.

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[19] Laco Parts (Pty) Ltd t/a ACA Clutch v Turner's Shipping (Pty) Ltd, 2008 (1) SA 279 (WLD Full Bench), paras [16] and [17]

[20] McCarthy Retail Limited v Shortdistance Carriers CC, 2001 (3) SA 482 (SCA); First National Bank of Southern Africa Limited v Perry NO and Another, 2001 (3) SA 960 (SCA)

[29] The respondents abandoned the relief set out in in paragraph 2.5 of the counter-claim.

[30] Finally, there is a further issue to be addressed. In the main application the applicants did not seek an order that a forensic audit be done. However, in the answering affidavits to the respondents' counter-application the applicants and the fifth respondent sought to amend the relief sought in the counter-application to introduce a prayer that " *… the relief granted should facilitate a complete forensic investigation*". I agree with the respondents' contention that this tactical move is really an attempt to introduce additional substantive relief not sought in the main application or the counter-application. I am of the view that it is impermissible for the applicants to seek this relief by way of an amendment of the prayers in the counter-application. It should have been sought from the outset and a foundation should have been laid for such relief in the founding papers. I accordingly refuse to grant this amendment sought.

[31] In view of the approach I have adopted in this matter it is not necessary to canvass the further issues and contentions raised in argument, including a consideration of the striking out application brought by the respondents.

COSTS

[32] As regards costs, the proceedings in this application have some peculiar features. The applicants were unsuccessful in the review of the Master's decision. The respondents were substantially successful in the counter-application. There is a considerable overlap between the intended purpose of the relief sought in the main application and the relief sought in the counter-application. The matter was simplified by the stance taken by the applicants not to oppose the relief sought in paragraphs 2.1 to 2.4 of the notice of motion in the counter-application. The respondents also expressly abandoned and did not proceed with the relief sought in prayer 2.5 of the counter-application. It was contended by Mr Tötemeyer that no adverse cost order should be granted against the respondents in respect of their abandoning of this prayer.

[33] The matter was set down for two days but argument was concluded in a day. In effect the relief I granted in the counter-application took care of some of the concerns of the applicants in bringing the main application. Given the complexity of the matter I am satisfied that the parties were justified in employing the services of two instructed counsel. In the exercise of my discretion, I consider that the appropriate order as to costs should reflect these realities and that the estate should bear the costs of both the main application and the counter-application.

[34] I accordingly make the following order:

[34.1] The main application is dismissed.

[34.2] The relief set out in paragraphs 2.1 to 2.4 of the counter-application, as amended, is granted.

[34.3] Costs in the main application and the counter-application are to be paid from the estate, such costs to include the costs of one instructing and two instructed counsel in respect of both the applicants and the respondents .

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CORBETT, A.J

ON BEHALF OF THE APPLICANTS

Adv. R Heathcote SC

Assisted by: Adv. B van der Merwe

Instructed by: Scholtz Law Chambers

ON BEHALF OF THE 2nd, 7th and 8th RESPONDENTS

Adv. R Tötemeyer SC

Assisted by: Adv. P C I Barnard

Instructed by: Fisher, Quarmby & Pfeifer