RICHARD MOYO-MAJWABU
(In his capacity as the Executor Dative in the
Estate of Christine Sibanda DRB 1623/19)

And

RICHARD MOYO-MAJWABU
For and on behalf of Estate Late
June Sibanda

And

KHALAYI NJINI a.k.a. KALAYI SIKHAPHAKHAPHA NJINI
(In his capacity as the Executor in the
Estate of Rachel Moyo DRB 1101/23)

Versus

HUADING NEW ENERGY TECHNOLOGY (PVT) LTD

And

DISCOVERY MINING (PVT) LTD

And

MR MAWHENDA

And

THE MINING COMMISSIONER

And

THE MINISTER OF MINES AND MINERAL RESOURCES

And

THE SECRETARY OF MINES AND MINERAL RESOURCES

And

ASSISTANT MASTER OF THE HIGH COURT

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 11 AND 26 OCTOBER 2023

Urgent Chamber Application

T. Masiye-Moyo, for the applicants
O. Mugwagwa, for the 1st respondent
B. Sengweni, for the 2nd and 3rd respondents
No appearance for the 4th – 7th respondents

KABASA J: In this urgent chamber application the applicants seek the following provisional order:-

"**TERMS OF THE FINAL ORDER SOUGHT**

That you show cause to this Honourable Court, if any, why a final order should not be made in the following terms:-

1. The mining certificate of registration number 37266 issued in favour of first respondent and the said certificate's predecessors and successors be and are hereby declared to be null and void *ab initio*.

2. Fourth, fifth and sixth respondents, their agents, appointees or any persons acting in their place and stead shall not issue any mining licence, prospecting licence, permit or any certificate in terms of the Mines and Minerals Act [Chapter 21:05] relating to any mining claim situate at Roodehueval Farm, Insiza District Matebeleland South Province, unless an Environmental Impact Assessment in respect of such claim has first been issued in terms of section 97 of the Environmental Management Act [Chapter 20:27]

3. Any mining licence, certificate, permit or prospecting licence issued to any of the respondents or to be issued to them without there first having been an Environmental Impact Assessment certificate shall be null and void.

4. First, second and third respondents jointly and severally, the one paying the other to be absolved, shall pay the costs on a higher scale.

INTERIM RELIEF GRANTED

Pending confirmation or discharge of this provisional order:-

First, second and third respondents be and are hereby interdicted from setting up or preparing up a mining site at Roodeheuval farm, Insiza District, Matebeleland South.

SERVICE

Service of this provisional order shall be effected by the Registrar of the High Court through the IECMS platform provided that if this urgent application is not opposed, then service of this provisional order shall be effected by the Sheriff."

The applicants, as articulated in their founding affidavits aver that first to third respondents or their agents invaded Roodehueval Farm for purposes of engaging in a mining operation without first obtaining an Environmental Impact Assessment Certificate and without consultation or involvement of the farm owners. The land upon which such mining is to commence is grazing land which will be destroyed in the process, to the owners of the farm's detriment.

The brief background to the matter is this: - Roodehueval Farm was co-owned by June Sibanda and Jobe Moyo who died on 1 September 2009 and in the 1990s respectively. The widows of the deceased were later appointed executors in their respective husbands' estates. Sibanda's wife was issued with Letters of Administration on 25 August 2011 while Moyo's wife was issued with a Certificate of Authority on 21 August 1995. Sibanda's wife, Christine, subsequently died on 15 April 2019 before winding up her late husband's estate. Moyo's wife, Rachel also died on 22 July 2021 without attending to what she had been empowered to do in terms of the Certificate of Authority. The first applicant was then appointed executor dative for the late Christine Sibanda's estate on 5 September 2023 while the third applicant was appointed executor testamentary for the late Rachel Moyo's estate on 12 July 2023.

In May 2023 first respondent engaged the occupiers of the farm with a view to negotiate possible compensation for the portion of land it intended to mine on but such negotiations were not finalised. In September 2023 first applicant was made aware of some activity at the farm, activity which was related to the mining venture that had earlier been discussed with no resolution. The third applicant was also made aware of these activities on 6 September 2023. This apparent invasion of the farm which was accompanied by the erection of some temporary structures and clearing of land informed the applicant's decision to approach the court with the present application.

The application was opposed by first, second and third respondents. The fourth, fifth, sixth and seventh respondents did not participate, an indication of their intention to abide by the decision of the court.

In opposing the application first respondent took points *in limine*, which points *in limine* second and third respondents also adopted. I asked the parties to address the court on both the points *in limine* and merits on the understanding that should the points in limine find favour with the court the matter would end there and the converse would hold in the event that the points *in limine* were ruled merit less.

I intend to deal with these points *in limine* first. These are they:-

1. No urgency

2. No *locus standi* and

3. Misjoinder

Mr. Mugwagwa, counsel for the first respondent abandoned the misjoinder issue after the court pointed out that the certificates the applicants seek to impugn are the legal documents first respondent anchors its justification for any mining activity it intends to embark on at the said farm. I therefore do not intend to exercise my mind on this misjoinder issue.

On urgency it was counsel's argument that overtures were made to the occupiers of the farm as early as May 2023 and as at that date the applicants became aware of the matter and ought to have taken action then if they were so inclined. The first respondent has not invaded the farm and so there is nothing creating urgency. Even if first respondent had moved on the farm the activities would be lawful as first respondent has the requisite certificate of registration from the fourth respondent and the Environmental Impact Assessment Certificate in terms of the Environmental Management Act. The certificate of urgency was said to be irregular and inaccurate displaying a failure by the legal practitioner to apply his mind properly as expected of one certifying a matter as urgent.

As regards lack of *locus standi*, counsel contended that the applicants are Executors in the estates of the wives to the owners of the farm whose estates were not wound up as the wives who had been appointed executors died before discharging that mandate. The first and third applicants do not have *locus standi* to bring an action which relates to property forming the estate of June and Jobe. Only an executor of the two estates or the Master in the absence of such executors has the authority to litigate on behalf of the estates. *Mr. Sengweni,* counsel

for second and third respondent associated himself with *Mr. Mugwagwa's* submissions, adding that where there is no executor the estate goes back to the custody of the Master.

Mr Moyo-Masiye, counsel for the applicants held a different view. Counsel argued that the beneficiary to the estate has *locus standi*. June's wife Christine was a beneficiary of June's estate and so the estate of the late Christine is properly clothed to act in preserving the estate of the late June. There cannot be a void, first applicant and third applicant therefore have *locus standi* by virtue of being executors of the deceased men's now deceased wives' estates.

I turn now to consider the points *in limine* in turn:-

1. **IS THE MATTER URGENT?**

The issue of urgency has been stated and re-stated in a plethora of decisions. In *Documents Support Centre P/L* v *Mapuvire* 2006 (2) ZLR 240 at 244 C-D MAKARAU JP (as she then was) put it thus:-

> "… urgent applications are those where if the court fail to act, the applicants may well be within their rights to dismissively suggest to the court that it should not bother to act subsequently as the position would have become irreversible and irreversibly so to the prejudice of the applicant."

In Gwarada v J*ohnson* 2009 (2) ZLR 159 urgency was articulated as follows:-

> "Urgency arises when an event occurs which requires contemporaneous resolution, the absence of which would cause extreme prejudice to the applicant. The applicant must exhibit urgency in the manner in which he has reacted to the event or threat." (See also *Triple C Pigs & Another* v *Commissioner-General* 2007 (1) ZLR 27, *Kuvarega* v *Registrar General & Another* 1998 (1) ZLR 188).

The applicants accept that in May 2023 the first respondent engaged the farm occupiers on the issue of compensation. That issue occupied the parties' conversations and correspondence from the applicants' counsel shows that efforts to get the first respondent to make an offer were not responded to. No communication was made to resolve the matter and the applicants subsequently received news of the "farm invasion" in September 2023. Efforts were then made to ascertain the identity of the "invaders". A son to June and Christine then sought to have an executor appointed and the first applicant was eventually appointed executor to Christine's estate.

The third applicant was out of Bulawayo until 11 September 2023. The application was then filed on 13 September 2023 after all the applicants required in order to mount the litigation were now in place.

In May the issue of compensation could not have caused panic necessitating the bringing of an urgent chamber application. The farm invasion and the setting up of structures including clearing of land is the event that created the urgency to act.

The fact that the first respondent has the requisite legal papers does not take away the applicants' apprehension regarding the harm they anticipate. The applicants' thrust is that whatever certificates were obtained such certificates were obtained without the farm owners' participation as it is the harm to the farm environment they seek to have addressed which ought to have warranted their participation before issuance of the requisite certificates.

The identity of the people who constructed the structures and cleared the land was through some investigative efforts on the part of Mr Mbandeni who deposed to a supporting affidavit. The fact is Mr Mbandeni's visit to the farm saw him interacting with the people who were responsible for the setting up of these structures. The citation of the first to third respondents was as a result of information gathered on site.

The argument that there is no urgency because there was no invasion, the first respondent holds the requisite papers allowing for legitimate activity at the farm, second and third respondent have not invaded the farm and that talk of pending activity started in May does not persuade me to hold that the matter is not urgent.

The attack on the certificate of urgency which chronicled the events of what happened regarding the operations at the farm and the apprehension the owners of the farm have should action not be taken to halt the said activity, did not make much sense. I found nothing irregular about the certificate of urgency. A legal practitioner who certifies a matter as urgent must apply their mind but they do not apply their mind in a vacuum. They must appraise themselves of the matter, find out what is happening or what is about to happen, what effect that would have and attest to the urgency of the matter. It is my considered view that this is what comes out of the certificate of urgency. The fact that the 1st respondent or the second and third respondent do not agree with such narration does not make the certificate irregular or the legal practitioner dishonest.

The need to act arose in September and action was taken in response to that threat. The applicants exhibited urgency in reacting to the "invasion." This is therefore not self-created urgency.

The point *in limine* on urgency was therefore not properly taken and stands dismissed.

The next point is on *locus standi*. Do the applicants have *locus standi* to litigate in respect of this farm? Can the first applicant be clothed with the requisite *locus standi* by virtue of being an Executor in the estate of Christine and third applicant in the estate of the late Rachel?

The late Christine was a beneficiary of the late June's estate, so was Rachel in the late Jobe's estate. The respective estates of June and Jobe were not administered as their wives died before they could do so. In essence therefore there are two estates for Abnezzer, the son to June and Christine, to contend with. There are also two estates for Njini to contend with, Jobe's and Rachel's. Both Richard Moyo-Majwabu and Khalayi Njini are executors in the wives' estates, not the husbands'. The farm in question is a property in the two husbands' estate.

Section 21 of the Administration of Estates Act, [Chapter 6:01] "the Act" provides for the interim custody of assets of an estate pending the appointment of an executor. There is a difference between taking custody of such property and litigating on behalf of an estate. Section 21 cannot therefore be construed as endowing such custodian with powers to litigate.

There are no executors for the estates of June and Jobe. The first applicant appears to be taking steps to be appointed as executor for the estate of the late June. It appears nothing is as yet afoot to deal with the estate of the late Jobe.

In *Chiangwa* v *Katerere & Ors* S 61-21 the Supreme Court cited, with approval, KUDYA J's (as he then was) articulation of the legal position as regards the one who has power or authority to litigate or represent the estate of a deceased person.

> "In *Clarke* v *Barnacle NO* & Ors 1958 R & N 358 (SR) at 349 B-350 A MORTEN J stated the legal position that still obtains to this day in Zimbabwe. It is that "whether testate or intestate, an executor, either testamentary or dative, must be appointed … so that the executor and he alone is looked upon as the person to represent the estate of the deceased person.

> He left no doubt that towards the rest of the world the executor occupies the position of legal representative of the deceased with all the rights and obligations attaching to that position and that because a deceased's estate is vested in the executor, he is the only person who has *locus standi* to bring a vindicatory action relative to property, alleged to form part of the estate."

Does this mean there will be a void as argued by *Mr Masiye*? Section 25 of the Act empowers the Master to step in and address a situation where an executor predeceases the deceased or an appointed executor refuses or becomes incapacitated to act as such. This provision is meant to ensure an estate is not left without an executor to represent it.

Section 29 of the Act states that:-

> "When by reason of any testamentary or assumed executor whom Letters of Administration have been granted having died or become incapacitated to act as such, or having been removed from his office by the decree of any competent court or a Judge thereof there does not remain for the administration of the estate any executor whatever, or so many executors, either testamentary or assumed, as by the provisions of the will or Codicil by which such executors were appointed or permitted to be assumed, are required to form a quorum of executors, and when it happens that any executor dative, after Letters of Administration have been granted to him, dies or becomes incapacitated or is removed in manner aforesaid, then and in every such case proceedings for the appointment of an executor in place of such executor so dying or so becoming incapacitated or removed, shall be taken by the Master in like manner in all respects as provided in section twenty-five, twenty-six and twenty-seven."

There is therefore no issue of a void if the law is invoked and the needful done whenever an estate is left without an executor for whatever reason.

It follows therefore that the applicant cannot represent June's estate under the auspices of being Christine's estate's executor dative and the same applies to Njini. Their executorship of Christine and Rachel's estates does not extend to the estates of their respective husbands. If it did the first applicant would not be in the process of being appointed executor of June's estate.

The first applicant sought to clothe himself with authority to represent June's estate by virtue of his executorship of Christine's estate. He can only represent June's estate once

appointed, a process he appears to be embarking on. Once so appointed he can then represent June's estate.

The point *in limine* on lack of *locus standi* was therefore properly taken.

With the success of this point *in limine* the court cannot proceed to consider the merits. The application unfortunately suffers a stillbirth.

As regards costs the applicants proffered arguments on *locus standi* which exercised my mind. Their conduct and the reasons behind such is not deserving of censure. A case for punitive costs has therefore not been made.

In the result I make the following order:-

1. The point *in limine* on urgency is meritless and is accordingly dismissed.

2. The point *in limine* on *locus standi* has merit and is accordingly upheld.

3. The application is accordingly struck off the roll.

4. The applicants shall pay the costs of suit at the ordinary scale.

Masiye-Moyo and Associates (Incorporating Hwalima; Moyo & Associates), applicants' legal practitioners
Magwaliba and Kwirira, 1st respondent's legal practitioners
Sengweni Legal Practice, 2nd and 3rd respondents' legal practitioners