GILBERT TAWANDA KAGURU
versus
MASTER OF HIGH COURT
and
THOUKIDIDES DEMETRIOU N.O

THOUKIDIDES DEMETRIOU N.O HC 6236/21
(In his capacity as the Executor in the
Estate Late Eustaches Orphanides DR 463/21
versus
GILBERT TAWANDA KAGURU
and
VUSUMUZI MTHETHWA
and
DIVVYMAN ENTERPRISES (PRIVATE) LIMITED
and
REGISTRAR OF COMPANIES N.O
and
MASTER OF THE HIGH COURT N.O

THOUKIDIDES DEMETRIOU N.O HC 6243/21
(In his capacity as the Executor in the
Estate late Eustaches Orphanides DR 463/21
versus
GILBERT TAWANDA KAGURU
and
VUSUMUZI MTHETHWA
and
DIVVY ENTERRPRISES (PRIVATE) LIMITED
and
REGISTRAT OF COMPANIES N.O
and
MASTER OF THE HIGH COURT

THOUKIDIDES DEMETRIOU N.O HC 641/22
(In his capacity as the Executor of the
Estate late Eustaches Orphanides DR 463/21, sole
shareholder in Divvyman Enterprises (Private) Limited
reg No 847/2006
versus

GILBERT TAWANDA KAGURU
and
THOUKIDIDES DEMETRIOU
and
ARTHUR MUSHONGA
and
MOSES KACHIKA
and
ALISTAIR ALEXANDER CAMPBELL
and
RAYMOND ARTHUR BRINK WILKINS
and
DIVVYMAN ENTERPRISES (PRIVATE) LIMITED
and
REGISTRAR OF COMPANIES
and
MASTER OF THE HIGH COURT

HIGH COURT OF ZIMBABWE
WAMAMBO J
HARARE, 18 & 25 March 2022 and 26 November 2024

Opposed Court Application

E Mubaiwa, for the applicant in HC 2126/21
and for the first respondent in HC 6236/21, HC 6243/21 and HC 641/22
A U Sanyama, for the applicant in HC 6236/21, HC 6243/21, HC 641/22 and for the second respondent in HC 2126/21.

WAMAMBO J: Eustaches Orphanides must be turning, if not rolling in his grave over the disputes that have sprouted after his death over his company, assets and over his will. He is at the very centre of the four consolidated matters before me in this opposed application. He is represented by his executor Thoukidides Demetriou. On the other side is Gilbert Tawanda Kaguru, a former business associate of Eustaches Orphanides. Eustaches died on 23 January 2021 and his estate was registered with the Master of the High Court under DR 463/21. I will hereinafter refer

to Eustaches Orphanides as the deceased, Thoukidides Demetriou as Mr Demetriou and Gilbert Tawanda Kaguru as Mr Kaguru.

Mr Kaguru is the applicant in HC 2126/21 and the first respondent in the rest of the consolidated matters. Mr Demetriou in his capacity as the executor of deceased's estate is the applicant in HC 6236/21, HC 6243/21 and HC 641/22. Divvyman Enterprises Private Limited is the company at the very core of the consolidated matters.

Re: HC 2126/21

In this matter Mr Kaguru is challenging the will of the deceased submitted and accepted by the Master of the High Court.

Mr Kaguru in his founding affidavit makes averments as summarized below:-

His legal practitioners wrote to the Master of the High Court challenging the acceptance of the will.

Said letter is at p 13 of the record and is dated7 April 2021. The legal practitioners' firm who wrote the letter addressed to the Master of the High Court are Puwayi Chiutsi Legal Practitioners.

The letter reads on the pertinent portion as follows:-

"RE: ESTATE LATE EUSTACHE ORPHANIDES DR 463/21.

1. We refer to the above Estate and advise that we act for Mr Gilbert Tawanda Kaguru, kindly note our interest.
2. We note from the last Will and Testament filed with your office that it is claimed that the deceased bequeathed the entire shareholding in the company called Divvyman Pvt Ltd to two beneficiaries as specified in the will
3. This is impossible as our client acquired 50% of the shareholding in this company from the deceased and was just awaiting transfer of the shares.
4. There is documentary proof in the form of emails exchanged between the parties to formalize the transaction.
5. Our instructions are that another Will was dictated to same legal practitioners who filed the will in the presence of our client confirming the sale of the shares.
6. Our client is concerned that the legal practitioners instead have withheld the new Will.
7. However, our instructions are that the Will presented has glaringly different signatures on each page purportedly made by the deceased.
8. Equally the signatures of the witnesses are different leading to the conclusion that the will is forged and must be disregarded.
9. Further but most importantly our client notes that the appointed executor Mr Thoukidides Demetriou is a beneficiary in the Estate and can not be an independent Executor in the circumstances.
10. Accordingly, we are instructed to request that an independent Executor be appointed in the circumstances.

11. Further, as the deceased purportedly bequeathed property that he did not own to third parties the will is invalid and must be disregarded.
12. We have instructions to institute proceedings against the Estate for the shares and should be pleased if you advise us immediately of the appointment of the Executor.
13. Kindly further advise of the Edict meeting to enable us to make representations for the appointment of an independent Executor.
14. ……..”

Mr Kaguru challenges the deceased’s will on the grounds as specified in the letter above. He makes further and more detailed averments in his founding affidavit as follows:-

He alleges that the inventory submitted by Mr Demetriou excludes his shares in breach of s 13(1) and s 10 of the Administration of Estates Act [*Chapter 6:01*] and to that end the executor should be disqualified.

Deceased only had two shares issued to him out of 20 000 shares. Another will was dictated by the deceased to a legal practitioner Catherine Nyaradzo Magoge in his presence. This particular will recorded the agreement between the applicant (Kaguru) and the deceased.

Mr Kaguru also challenges the appointment of the executor Mr Demetriou. The order sought in HC 2126/21 is couched as follows:

“Whereupon after perusing documents filed of record and hearing counsel. IT IS DECLARED:-
1. THE Will of the late Eustache Orphanides submitted to the first respondent dated 5 May 2017 be and is declared to be invalid.
2. The appointment of the second respondent as the executor of the Estate Late Eustache Orphanides be and is hereby set aside.
3. The second respondent shall bear the costs of suit at the attorney -client scale.”

At the hearing Mr Mubaiwa for the applicant moved for the insertion of a new para 3 thus dislodging the above paragraph 3 and the proposed new paragraph 3 reads as follows:

“3. It is declared that applicant is entitled to 50% of the issued shares in Divvyman Enterprises (Private) Limited.

The second respondent is opposed to the application and raises three points *in limine* as follows. Notably the first point *in limine* is split into two paragraphs (a) and (a)(i).

“a) The application does not meet the requirements of a declaratur as stipulated in terms of a declaratur as stipulated in terms of s 14 of the High Court Rules, and therefore cannot be heard by this honourable court, because the applicant does not have an existing right, a future right or contingent right in the subject of the will, or the validity or otherwise of the will of the late Eustaches Orphanides.
(a)(i) By virtue of not being an interested party the applicant has no right, ability or capacity to bring the legal proceedings in this honourable court as he has no direct and substantial interest in the outcome of the litigation.

(b) The applicant has sued me in my official capacity rather than in my personal capacity, hence he has the wrong respondent before this court, because when he sues me in my official capacity, it is the estate of the late Eustaches Orphanides that he is suing.
(c) The applicant claims shares in a company called Divvyman Enterprises (Private) Limited and yet does not join said company as a party to these proceedings failing which the applicant becomes fatally defective."

I will presently address the points *in limine* in the order they appear above.

Firstly, I note that the relief sought is that of a declaratur by virtue of the title of the application and the manner in which the relief is couched.

Section 14 of the High Court Act [*Chapter 7:06*] provides for a declaratur as follows:

"14 High Court may determine future or contingent rights.
The High Court may, in its discretion at the instance of any interested person enquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination."

The question is has applicant proven that he has *locus standi* to institute for the declarator that he seeks as per the draft order as amended.

In *Newton Elliott Dongo* v *Joytindra Natverial NIC and Others* HH 73/18 MWAYERA J (as she was) said the following at page 2.

"It is apparent there is a condition precedent to bringing an application for a declaratory order. The applicant must be an interested person having a substantial and direct interest in the matter and such interest must relate to an existing future or contingent legal right (See *Recoy Investments (Pvt) Ltd* v *Tarcon* 2011(2) ZLR 65(H), Mpukuta v Maker Insurance Pool & Ors 2012(1) ZLR 192(H). The legislature's intention was surely not to create an absurdity where anyone in the abstract would seek a declaratur."

The Learned Judge continued as follows.

"It is settled that a legal right, and not the factual basis upon which a right may be founded ought to be shown.
See *Movement for Democratic Change* v *President of the Republic of Zimbabwe and Others* HC 129/05 *Electrical Contractors Association (South Africa) and Another* v *Building Industries Federation (2)* SA 1980 S 16 wherein NICHOLAS J emphasized that a person seeking a declaration of rights must set forth his contention as to what the alleged right is. In RK Footwear Manufacturers (Pvt) Ltd v Boka Book Sales (Pvt) Ltd 1986(2) ZLR 209 Sandura JP as he then was had occasion to identify two considerations that a court had to take into account in determining whether or not to issue a declaratory order. He stated that the court had to consider whether the applicant was an interested person in an existing future or contingent right and secondly whether the case was a proper one for the court to exercise its discretion."

The proposed order that applicant should be granted 50% of the shares in Divvyman Enterprises (Pvt) Ltd came during oral argument, effectively at the eleventh hour. To that end

respondents were not given proper notice of the amendment to the draft order. Their papers, it follows did not address this relief as sought.

The applicant concentrates on the contents of the will its form and format and the obligations of an executor. Applicant does not place emphasis on his own *locus standi* to question or file the application.

The Supreme Court had occasion to deal with the principle of *locus standi* in *Allied Bank Limited* v *Celeb Dengu and Wilson Tendai Nyabonda* SC 50/2016 where MALABA DCJ (as he then was) stated at p 6 as follows:-

> "It is quite clear that the question of *locus standi* does not arise in the present case for the following reason. The principle of locus standi is concerned with the relationship between the cause of action and the relief sought. Once a party establishes that there is a cause of action and that he/she is entitled to the relief sought he or she has *locus standi*. The plaintiff or applicant only has to show that he or she has direct and substantial interest in the right which is the subject matter of the cause of action. In the case of *Ndlovu* v *Marufu* HH 480/15 the court had the following to say concerning the concept of *locus standi*.
> "It is trite that *locus standi* exists when there is direct and substantial interest in the right which is the subject matter of the litigation and the outcome thereof. A person who has *locus standi* has a right to sue which is derived from the legal interest recognized by the law. In the case of *Stevenson* v *Minister of Local Government and National Housing and Ors* SC 38/02 the court in outlining *locus standi* in *judicio* stated that in many cases the requisite interest or special reason entitling a party to bring legal proceedings has been described as "a real and substantial interest or as a direct and substantial interest."

I will apply the above-mentioned principles to the instant case.

Applicant in para 7 of his founding affidavit alleges that he has shares in Divvyman Enterprises (Private) Limited. He also relates to the inventory filed by the second respondent Notably there is no agreement reflecting that applicant is entitled to shares in Divvyman Enterprises (Pvt) Limited. The inventory filed is a preliminary inventory. If applicant was entitled to shares in Divvyman Enterprises (Private) Limited there should have been clear documentation reflecting the same. There is none in this case. If applicant can not prove that he has an interest through his shares it follows that he has no *locus standi* for applicant is not a beneficiary to the deceased's estate.

Applicant has failed to link his interest to the will of the deceased, the executor's appointment and having shares in Divvyman Enterprises (Private) Limited. To that end I find that applicant lacks *locus standi*.

In *Allied Banking Limited* v *Celeb Dengu* case (*supra*) the Court at p 10 said the following:

> "The Court *a quo* after finding that the company has no *locus standi* to continue with the proceedings without the leave of the Court went on to strike the matter off the roll. The order creates problems. Firstly, the court made the Order after hearing arguments and finding in favour of one party. Striking off can only be done where there are no valid proceedings. The court *a quo* in making an order striking off the matter where there were valid proceedings before it. The fact that the court heard arguments from both parties and found in favour of one party means that the party in whose favour a finding on the issues was made was entitled to an order protective of its rights."

On lack of *locus standi* alone I ought to dismiss the application.

The citation of the Estate instead of or in addition thereto was also raised as an irregularity. Clearly since the application *inter alia* seeks to remove the executor he ought to have been cited him in his personal capacity as well.

I find no need to explore other points *in limine* in the light of the above. I find in the circumstances that the application stands to be dismissed. Costs are awarded against the applicant on the ordinary scale. I have not been swayed in my discretion that costs on a higher scale are applicable in the instant case.

HC 6236/21

In this case Mr Demetriou in his capacity as the executor of the deceased's estate is the applicant while Mr Kaguru, Vusumuzi Mthethwa, Divvyman Enterprises (Private) Limited, Registrar of Companies N.O and Master of the High Court are the first to fifth respondents respectively.

The order sought is couched as follows:

> "1. The appointment of the second respondent as a director of the third respondent on 23 January 2021 without the convening of an extraordinary shareholders meeting be and is hereby declared null and void for want of compliance with s 203(2) of the Companies and Other Business Entities Act [*Chapter 24:31*] and also in violation of the Administration of Estates Act of Zimbabwe.
> 2. All resolutions and acts committed by the first and second respondents from 23 January 2021 be and are hereby declared null and void, including all the resolutions in s 14.3 (a)(i)(ii)(iii)(iv)(v).
> 3. The form CR 6 dated 19th of March 2021 lodged with the fourth respondent by Network Services be and is hereby set aside.
> 4. The first and second respondents be and are hereby ordered to bear costs of suit on a legal practitioner-client scale, jointly and severally, one paying the other to be absolved."

The founding affidavit deposed to by Mr Demetriou reveals the following:-

The deceased was the sole shareholder of the third respondent and held the entire issued share capital being two shares under a share certificate number 3. Deceased was also a co-director of third respondent together with first respondent in terms of CR 14 dated 29 March 2016.

Deceased left a will appointing Mr Demetriou as executor of his estate. The will was confirmed by the fifth respondent who issued letters of administration in Mr Demetriou's name. In April 2021 first respondent filed an urgent chamber application under HC 126/21. The matter was found not to be urgent.

The applicant became aware that first respondent was claiming that third respondent was now under new management by a board comprising first and second respondents. When applicant queried the developments a form CR 6 dated 19 March 2021 with a purported list of directors for the third respondent and filed by Network Secretarial Services was filed.

Third respondent's company secretaries is Accounting and Executor Services and not Network Secretarial Services. The former have always been responsible for updating third respondent's records since 2007. The latter never dealt with third respondent, were never appointed Company Secretaries for third respondent and their involvement to the extent of filing the CR 6 is highly irregular and illegal. The former in Annexure G1 and G1 have documented that they never resigned as third respondent's Company Secretary Second respondent's appointment was not done, at an extra-ordinary shareholders meeting as required by law in cases where a vacancy in the board of directors exceeds 25% of the board. Thus, the second respondent's appointment on 23 January 2021 is a nullity as it was done in contravention of peremptory statutory provisions governing the filing of a vacancy in the event of the death of a sole shareholder and director.

Deceased died on 23 January 2021at 0200 hours, the date when second respondent's appointment allegedly took place. The deceased prior to his demise had COVID 19 and was in hospital for fourteen days and was inaccessible to members of the public including first respondent. Deceased thus did not participate in the appointment of second respondent.

After deceased's death as, the executor to deceased's estate he was responsible for managing deceased's estate. Deceased was the sole shareholder of third respondent and by reason of death third respondent became part of deceased's estate. First respondent was obliged to be accountable to the estate.

Third respondent's articles of association in Article 29 provide that the executor to deceased's estate represents deceased's interests until the authorization of the first and final distribution account. In that capacity Mr Demetriou avers he should have been invited to an

extraordinary shareholders meeting for the appointment of a new director. In the case of the appointment of second respondent this never happened rendering the CR 6 dated 19 March 2021 a nullity that should be set aside.

Resolutions passed by the improperly constituted board must thus be set aside.

The resolutions made by first and second respondents which should be nullified are reflected in para 14(3)(a) of the founding affidavit.

First respondent in the opposing affidavit raises five points *in limine*.

The first point *in limine* relates to the form employed by the applicant. First respondent avers that applicant used form 29 which is a form in terms of the repealed High Court Rules, 1979.

The second point *in limine* questions the applicant's *locus standi*. The argument being that applicant was appointed pursuant to a will that is being challenged.

The third point *in limine* is an averment that the applicant does not establish a cause of action. The legal and statutory provisions relied upon have not be traversed or particularized.

The fourth point *in limine* attacks the relief sought as contrary to statute. Further that the appointment of a director does not invalidate the decisions made by that director.

Third parties have relied upon those resolutions and said third parties are not before the Court.

The fifth point in limine raised is that the form CR 6 of 19 March 2021 is the work of a party known to applicant. That party ought to have been given an opportunity to defend the CR 6 as the allegations against it amount to a possible act of forgery. Findings that the CR 6 document was forged would be adverse to the third party and can not be made without same being heard

First respondent on the basis of the above prays that the matter should be dismissed.

I will presently deal with the five points *in limine* as raised.

The use of a wrong form is a popular point in limine that legal practitioners raise. It is to be noted that it is encouraged for legal practitioners to employ the correct forms when filing applications.

However, in this case I do not find that it renders the application fatal. I have not been drawn to any prejudice respondent may have suffered because of the use of the wrong form I also note that I can condone the use of the wrong form per Rule 7 of the High Court Rules 2021.

In *Kungstone Ringisai Makarichi* v *Agnes Mabvunza* HH 207/21 while dealing with the use of a wrong form CHAREHWA J at p 3 said:

> "The notice of application by the applicant does not conform to Form 29. Rather, applicant appears to have used form 29B which though inappropriate does not render the proceedings fatal according to the principles in *Zimbabwe Open University* v *Mazombwe* (supra)."

I dismiss the first point *in limine*. The issue of *locus standi* is raised in the second point *in limine*. The applicant's appointment as an executor according to the will, though challenged has not been dislodged. That means that he has *locus standi* to file this application. See s 23 of the Administration of Estates Act, [*Chapter 6:01*]. I dismiss the second point *in limine*.

The third point in limine speaks to applicant not having established a cause of action. It is averred that applicant not particularizing legal and statutory provisions forming the basis of the application.

A cause of action is defined as follows in *Abrahams R Sons* v *SA Railways and Harbours* 1933 CPD 626 as follows:

> "The proper meaning of the expression "cause of action" is the entire set of facts which gives rise to an enforceable claim and includes every act which is material to be proved to entitle a plaintiff to succeed in his claim. It includes all that a plaintiff must set out in his declaration in order to disclose cause of action."

The entails that I take a close look at the facts upon which applicant bases his application.

The application seeks a declaratory order. It is averred that acts have been committed contravening peremptory provisions in the statute governing companies in Zimbabwe. In paragraph 8.1 of applicant's founding affidavit reference is made to section 203(2) Office Companies and other Entities Act [*Chapter 24:31*].

The facts traverse how the deceased was a sole shareholder of third respondent the contents of the CR 14 relating to third respondent and the developments that followed. There is reference to a purpotedly defective CR 6 proved by the first and second respondents.

I find in the circumstances that applicant adequately establishes a cause of action. The third point *in limine* is dismissed.

The fourth pint *in limine* speaks to the relief sought. It is averred that the relief sought is contrary to statute. Further, that the invalidation of the appointment of a director does not make the decisions made by that director invalid. Third parties have relied on those resolutions, and have become vested with rights. Those third parties are not parties before the Court.

Firstly, the Court is empowered to order the removal of any manager, director or officer, or the appointment of any person as a manager, director or officer in terms of s 62(2)(d) of the companies and Other Entities Act [*Chapter 24:31*].

The court indeed enjoys wide powers to regulate a company's affairs and requiring said company to refrain from doing or continuing an act in complained of by the applicant or to do an act which the applicant has omitted to do.

See s 225(2)(a) and (b) of the Companies and Other Entities Act [*Chapter 24:31*].

While applicant points out the relevant provisions of the Companies and Other Entities Act [*Chapter 24:31*] the first respondent on this point fails to make any reference to the said statute. Reference is instead made to various cases, notably the Zimbabwean cases of *Hundah* v *Murauro* 1993(2) ZLR 401(S) and *Mukahlera* v *Clerk of Parliament & Ors* HH 107/05.

I did not find any direct relevance of the said cases to this case. I dismiss the fourth point *in limine*.

The last point *in limine* speaks to the CR 6 of 19 March 2021 being the work of a party known to the applicant. An order invalidating the work of that party in its absence interferes with the work of that party so the argument goes. This point is developed by first respondent in the heads of argument in paragraphs 1.6 and 1.7.

First respondent avers as follows:-

An order invalidating the CR 6 interferes with the work of its author without being allowed to defend its work. If the Court grants the order as sought it necessarily implies that applicant's allegation is correct and effectively implies that the third party is a criminal.

Applicant in turn avers that first respondent was the director and secretary who signed the CR 6. Applicant also refers to s 217(6) of the Companies and Other Business Entities Act [*Chapter 24:31*] which reposes the duty of furnishing particulars required on every director and secretary.

Applicant avers that it was only first respondent who had the capacity to author the CR 6.

I agree with applicant's submissions which resonate with the law and the circumstances of this case.

To that end this point *in limine* raised by first respondent falls away and is dismissed.

The points *in limine* raised were numerous and most of them delve into the merits. In the heads of argument applicant deals with all the points *in limine* and further submits that answers provided to the points *in limine* adequately address the merits of the case. I have dealt with the points limine and found that all of them are unmeritorious.

I turn to the merits. The order sought by applicant impugns the appointment of second respondent as a director of third respondent. It further impugns the resolutions and acts committed by the first and second respondents as from 23 January 2021. The CR 6 dated 13 March 2021 lodged with fourth respondent is also under attack.

Section 203 of the Companies and Other Business Entities Act [*Chapter 24:31*] provides as follows:-

> "203 Vacancies on board of directors
> (1) A vacancy on board of directors shall be filed by election at the next general meeting at which directors are to be elected, except that the company's articles of association may provide that the board of directors may fill such vacancy until such time, in which case it may do so but subject to subsection (2).
> (2) If at any time vacancies on a board equal twenty five (25) per centum or more of the total number of board sets, the board shall convene an extraordinary shareholder meeting to meet within two months after that event occurs, for the purpose filling the vacancies."

Applicant submits that second respondent was appointed as a director on 23 January 2021 the very day the deceased died. The applicant submits further that as executor he should have been invited to an extraordinary shareholder meeting as per Article 29 of the Articles of Association.

The CR 6 records the appointment of second respondent.

The record reflects that applicant was not invited to the extra ordinary shareholder meeting.

The CR 6 form it follows was filed after the appointment of second respondent. If the extra ordinary meeting is invalid it follows that it renders the CR 6 form filed also invalid.

I find in the circumstances that second respondent's appointment as a director is a nullity and so is the CR 6 which records the said appointment.

If the appointment of second respondent is invalid and so it follows are the acts and resolutions passed after his appointment.

I find in the circumstances that the relief sought is meritorious.

In the draft order applicant proposes that the costs be on a higher scale. The acts of the respondents in the light of the circumstances as adumbrated above calls for censure. It is in that

light that I find an order of costs on the higher scale justified. I grant the order in HC 6236/21 as per the draft order.

HC 6234/21

In this matter CHIRAU-MUGOMBA J rendered a provisional order wherein second respondent is interdicted from acting as a director of third respondent. Further, first and second respondents are interdicted from passing resolutions and accessing third respondents' accounts held in various bank. The order also interdicts the altering of the shareholding structure of third respondent and stops the institution of legal proceedings under the name of third respondent.

The final order sought is as follows.

> "1. The status *quo ante* of the third respondent company documents obtaining as at 23 January 2021 be and is hereby ordered to remain until the third respondent convince an extra ordinary shareholder meeting to fill in the vacancy of the director following the death of Enstaches Orphanides as required by s 203(2) of the Companies and Other Business Entities Act [*Chapter 24:31*].
> 2.That the first and second respondents shall bear costs of this application on the higher scale of Attorney and Client."

Applicant seeks the confirmation of the final relief as provided above.

Applicant bases the application for the confirmation of the provisional order on the following:

The first respondent convened an extraordinary as prescribed by law and appointed second respondent at that meeting as a director.

Before deceased's death third respondent had only two directors. First respondent unprocedurally and unlawfully altered third respondent company's documents.

There is need for a Court order preserving the *status quo*. The Company records are suspectable to alteration.

First respondent seeks the discharge of the provisional order. He avers as follows:-

The relief is final in nature and will stultify his powers as a director.

The company runs the risk of misappropriation of funds.

It will be noted that the points in limine raised by first respondent are at the most repetition of same raised in HC 6236/21 and have already been dealt with in the course of this judgment. The opposing affidavit also raises points pertaining to HC 2126/21 which I have already made findings on.

I have already made findings that the appointment of second respondent is a nullity. The relief sought hereunder will protect the assets of the third respondent. The second respondent has already been interdicted from performing various important duties. The final order sought seeks the protection of company document prior to the convening of a shareholders meeting in terms of the law.

I find that the order by CHIRAU-MUGOMBA J ought to be confirmed in the circumstances. I thus make an order as per the draft order.

HC 641/22

This is the last of the consolidated matters.

Applicant seeks an order couched as follows:-

"IT IS ORDERED THAT

1. The company resolution for the eighth respondent dated 23rd December 2021 passed by the applicant in his capacity as the executor of the Estate of the Late Eustaches Orphanides DR 463/21, the sole shareholder in the eighth respondent be and hereby declared valid.
   a) The removal of the first respondent as a director of the eighth respondent be and is hereby confirmed valid.
   b) The appointment of the second, third, fourth, fifth, sixth and seventh respondents as directors of the eighth respondent be and hereby confirmed valid.
2. The 9th respondent be and is hereby authorized to upon application register the changes in the directorship of the eighth respondent."

3. The party opposing to pay applicant's costs of suit on the attorney client scale.

The applicant avers as follows:-

Applicant in his capacity as executor of the Estate of the deceased passed a resolution for the eighth respondent on 23 December 2021. He seeks that same be declared valid. The resolution is attached to the application as Annexure B and appears at pages 427 – 428 of the record.

Deceased was the sole shareholder and co director of eighth respondent. Upon his death only first respondent remained as a director.

First respondent embarked on a mission to take over ownership of the eighth respondent.

First respondent made unlawful changes to the directorship of the Company and also attempted to change the signing arrangements at the banks.

To get the eighth respondent back on its feet applicant requested first respondent to convene an extraordinary shareholders meeting. The notice was deposited at the Company address and placed in the Herald Newspaper. (See Annexure 1- 2).

The said advertisement was also caused to appear in the government gazette. (See Annexures 1 -3and 1 – 4).

After the 21 day period on which first respondent was supposed to call for the extraordinary shareholders meeting same was not called for.

On 23 December 2021 the applicant convened an extraordinary shareholders meeting and made the resolution (Annexure B).

Under HC 41/22 and before MUNANGATI-MANONGWA J an order by consent was rendered by consent.

Applicant traverses in detail the processes he undertook before making a resolution as per Annexure "B" See paragraphs 20 – 34 of the application.

The suffering documentation is also attached to the application as follows.

At page 426, the letters of administration reflecting that under DR 463/21 Mr Demetion is the executor dative of the estate of the deceased.

At page 427 - 429 is the Company resolution passed by Mr Demetriou.

At pages 430 – 441 are the memorandum and articles of association of eighth respondent (Divvyman).

At page 442 – 444 is the form of annual returns for eighth respondent.

At page 445 is the CR 11 for eighth respondent.

At page 446 is a share certificate of deceased of the eighth respondent.

At page 447 – 448 is a CR 6.

At page 449 – 451 appears the provisional order granted by CHIRAWU-MUGOMBA J (and referred to earlier in this judgment).

At page 452 appears a notice of requisition to convene an extraordinary shareholders meeting in respect of Divvyman Enterprises (Private) Limited 847/66.

At page 453 appears the notice referred to at page 452 this time as proposed to be advertised in the Herald newspaper (advert and receipt).

At page 454 – 455 is the actual proof of the advertisement referred to at p 453.

At page 456 – 486 appears a document titled "Director Service Contract."

At page 487 - 488 appears a document titled "Termination of your service as a director of Divvyman Enterprises (Private) Limited directed to Mr Kaguru.

From pages 490 – 509 of the record appear certificates of service of this application to the first to tenth respondents.

As it turned out none of none of the respondents filed any opposing papers.

These is correspondence between legal practitioners' pages 510 – 516.

There is no application before me for condonation of any sort.

The applicant filed an answering affidavit and raises the preliminary point that the matter is unopposed and that first respondent is barred.

It emerges from the answering affidavit that first respondent filed an opposing affidavit using the wrong case number. That first respondent filed an opposing affidavit under HC 64/21 instead of the correct case number HC 641/21.

Applicant avers that first respondent is barred. The efforts endured by applicant to alert first respondent of the need to file opposing papers is given in detail in paragraphs 1 – 7 of the Answering affidavit.

Clearly first respondent did not file any opposing papers within the period as provided for by the Rules. At page 490 appears the proof of service on first respondent of this application. It reflects that said service was effected on 1 February 2021.

The application at page 413 reflects that the respondents ought to have filed their notices of opposition within ten (10) days after being served with the notice.

The first respondent's legal practitioners wrote a letter to applicants' legal (See page 514) practitioners explaining the error and copied it to the Register of this Court.

At page 516 in paragraph 4 first respondent legal practitioners purport to direct the Registrar to correct their error (first respondent) and place the notice of opposition in the correct file HC 641/22. The letter is dated 14 March 2022.

Rule 58(9) of the High Court Rules 2021 provides as following:

> "(9) A respondent who has failed to file a notice of opposition and opposing affidavit in terms of subrule (8) shall be barred."

No application to remove the bar was made before me.

I am of the view that first respondent ought to have made an application for condonation of non compliance with the Rules and if his application were successful than he would have been able to file all opposing papers as per the Rules and as sanctioned by an order of Court. To purport

to rely on an opposing affidavit filed under the wrong case number without a prior application to have the opposing affidavit placed in the correct file was improper.

See *Challenge Auto (Private) Limited and Others* v *Standard Chartered Bank Zimbabwe Ltd* HH 221/02.

In *Adhesive Products Manufactures (Pvt) Ltd* v *Parkam Enterprises (Pvt) Ltd & Another* HB 12/21 DUBE -BANDA J was dealing with a situation where the first respondent was barred and said as follows at page 3:-

> "I then took the view that first respondent was barred for failure to file a notice of opposition and opposing affidavit within the time allowed by the rules of Court, then the application was not opposed.
> I took the view that, in this application, Mr Mazibuko had no right of audience before court, because first respondent was barred. The effect of a bar while it is in operation, the party barred shall not be permitted to appear personally or through a legal practitioner in any subsequent proceedings in the action or suit, except for the purpose of applying for the removal of the bar. It is clear from rule 83(b) of the High Court Rules, that once a party is barred the matter is treated as unopposed unless the party so barred makes an application before that court for the upliftment of the Bar. It is also clear that in making an application to uplift the bar the party that has been barred can either file a chamber application to uplift the bar or where this has not been done the party can make an oral application at the hearing. See *Grain Marketing Board* v *Muchero SC* 59/07".

I find that first respondent is barred in the circumstances.

In case I am wrong on the barring I will also consider the merits.

Perhaps by virtue of having filed an opposing affidavit, albeit under the wrong case number first respondent was of the belief that effectively he had filed his notice of opposition on time.

Before me, counsel for applicant though raising the issue of the barring dealt with the merits of the case. Counsel for the first respondent raised the issue that first respondent should have been served personally prior to convening a meeting that sought to remove him. To that effect non service on first respondent personally renders the meeting invalid.

I do not agree with this submission. The applicant demonstrated service through notices deposited at the Company Office, the Herald the Gazette as referred to earlier.

There was no specific need to serve first respondent personally. Clearly first respondent did not want to take part in the process knowing well what it entailed.

First respondent has been served with notices through other people and indeed responded. See Certificate of Service in relation to 6236/21 at page 283 and Certificate of Service in relation to 6243/21 at p 490.

I find the order sought meritorious for the following reasons. The applicant has tendered proof of being the executor in deceased's estate. Deceased was the sole shareholder in eighth respondent. By virtue of being the executor applicant had the authority to convene an extraordinary shareholders meeting for eighth respondent. Due process was followed as can be deduced from the paper trail adduced in the application before the company resolution was made.

The appointments of the second, third, fourth, fifth, sixth and seventh directors were clearly made, after following due process. The removal of first respondent as a director is justified following the various acts attributed to him, contrary to his position and the powers reposed in him. The first respondent has been proven not to own any 50% shares in eighth respondent as he claims. If there was any such shareholding, surely a document encapsulating the same would have been tendered and would be attached to the record.

The appointment of a director without following due process are but some of the issues that are clearly exposed by applicant.

The decision to remove first respondent as a director being justified and having been done following due process it ought to be confirmed and I so find. Paragraph 2 of the draft order speaks to ninth respondent accepting the changes to the directorship.

It flows directly from the other paragraphs of the draft order.

I find the order sought under HC 641/22 justified including the order of costs on a higher scale. The first respondent appears to have been belligerent and non cooperative to resolve the issues at hand. He appears to have been belligerent in the discharge of his duties as a director. The costs on a higher scale are justified.

I note that among the respondents only first respondent appeared at the hearing. Costs should thus be awarded only against first respondent. To that end the paragraph 3 of the draft order under HC 641/22 is deleted and substituted with the following.

"3. First respondent shall pay applicant's costs on an attorney client scale."

In the circumstances it is ordered as follows:-

1. The point in limine of applicant lacking *locus standi* in HC 2126/21 be and is hereby upheld and the application be and is hereby dismissed with costs.
2. The application in 6236/21 be and is hereby granted in terms of the draft order.
3. The provisional order in HC 6243/21 be and is hereby confirmed.

4. The application in HC 624/22 and is hereby granted in terms of the draft order subject to the deletion of paragraph 3 thereof and its substitution with the following:-

"3. The first respondent shall pay costs on an attorney client scale."

WAMAMBO J:……

Nyahuma Law, applicant's legal practitioners in HC 2126/21 and first respondent's legal practitioners in HC 6236/21, HC 6243/21 and HC 641/22.
Jarvis Palframan Legal Practitioners, applicant's legal practitioners in HC 6236/21, HC 6243/21, HC 641/22 and first respondent's legal practitioners in HC 2126/21.