

MARIPE J.

**IN THE HIGH COURT OF THE REPUBLIC OF BOTSWANA
HELD AT MAUN**

Case No. MAHMN-000075-22

In the matter between:

GQWIHABA RESOURCES (PTY) LTD

Applicant

And

MINISTER OF MINERALS AND ENERGY

1st Respondent

ATTORNEY GENERAL

2nd Respondent

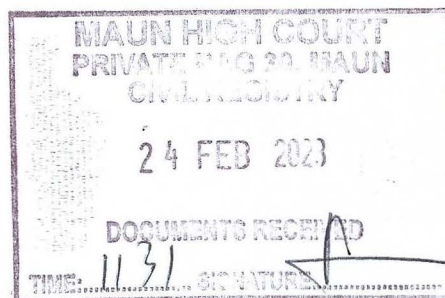
ANSWERING AFFIDAVIT

I, the undersigned,

LEFORO M. MOAGI

do hereby make oath and state that:

1. I am an adult male of full legal capacity resident in Ramotswa. My address for purposes hereof is that of the respondents' attorneys, Attorney General Chambers, Private Bag 009, Gaborone.



LM
MM

2. I am the Honourable Minister of Minerals and Energy of the Government of Botswana.
3. By virtue of my position, I am duly authorised to depose hereto.
4. The facts contained herein are within my personal knowledge and unless the context indicates otherwise, are to the best of my knowledge and belief both true and correct.
5. Where I make submissions of law, I do so on the strength of legal advice obtained by me from my legal representatives in this matter, which advice I verily believe to be true and correct.
6. I have read and understood the contents of the founding and supplementary affidavits of MOAGI NTUKUNUNU on behalf of the applicant and I hereby respond thereto as follows below:
7. AD PARAGRAPHS 1 – 7

The contents therein are admitted.

8. AD PARAGRAPHS 8 – 8.1

Renewal of Prospecting License No. 020/2018 has been a subject of contentions between the Ministry of Minerals and Energy, Department of Mines and Gcwihaba Resources. The contentious issue has been that the Prospecting License boundary encroaches into the Okavango Delta Heritage Site buffer

L. M. M.
MM

zone, which is against the government deliberate decision to restrict prospecting and mining activities within the core and buffer zones of the delta, for protection of the World heritage site against adverse impact on the outstanding universal value of the property.

9. AD PARAGRAPHS 8.1.1 – 8.2

The Department and Ministry's position is that in line with Operational Guidelines for the Implementation of the World Heritage Convention, prospecting and mining activities are prohibited within the buffer zone of the Okavango Delta World Heritage Site, and if permitted, they are to be subjected to the stringent Environmental Impact Assessment Measures in accordance with the Environmental Assessment Act and Environmental Regulations. Further, the Environmental Assessment Act and Environmental Regulations stipulates that extractive and associated industries, which includes prospecting and mining must undertake Environmental Impact Assessment, especially when considering undertaking such activity in an areas with wet lands, or containing rare or endangered flora and fauna.

10. AD PARAGRAPHS 8.3 – 8.5

In the year 2008, the Minister of the then Ministry of Minerals, Energy and Water Resources granted to Gcwihaba Resources, seven (7) contiguous Prospecting Licenses Nos. 386/2008 to 392/2008 for metals in terms of the Mines and Minerals Act. The Prospecting Licenses were valid for an initial term of three (3) years and were subsequently renewed a number of times.

L.M.N
MM

11.AD PARAGRAPH 8.6 – 8.8

- i) In 2014, the Okavango Delta was declared a World Heritage Site by the United Nations Educational, Scientific and Cultural Organisation (UNESCO). By virtue of this status the Delta was subject to protection from activities that could compromise the property, including exploration and mining activities. When the Delta was nominated for registration as a world Heritage site, a buffer zone was established around the delta.
- ii) In terms of the Operational Guidelines for the Implementation of the World Heritage Convention, all prospecting and mining activities are prohibited within the core of the Okavango Delta World Heritage Site. The buffer zone around core zone of a World Heritage Site is intended to provide effective protection of the property, and should have complementary legal and/or customary restrictions placed on its use and development in order to give an added layer of protection to the core.
- iii) After the declaration of the Okavango Delta World Heritage site it was noted that some mineral concessions which were already granted fell within the buffer of the World Heritage Site. Then, the Ministry through the Department of Mines started engagements with companies that held mineral concessions within the Okavango World Heritage Site and/or its buffer zone, including Gcwihaba Resources. The engagements were aimed at getting the companies holding Mineral Concessions to agree to voluntarily relinquish portions of the license areas that fell within the Okavango World Heritage Site and/or its buffer zone.

L.M.N.
M.M.

12.AD PARAGRAPH 8.9 – 8.11

12.1 As a result of the engagements, at a meeting on the 14th December 2015, Gcwihaba Resources agreed to give up Mineral Concessions or portions thereof, which fell within the Okavango World Heritage Site and/or its buffer zone. The Department agreed with Gcwihaba Resources that the company will move out of the Delta and its buffer zone, and in return the company will be compensated by being granted new areas outside the buffer zone and in addition, the remaining licenses or portions were to be granted fresh licenses with a longer, three year tenure, instead of the usual two year renewal tenure (See record of resolution carried in the Department's letter of 15 December 2015, reference no. CP337 XII (11). Gcwihaba Resources later reneged on what was agreed and insisted that some of their Prospecting License remain within the Okavango Delta World Heritage Site Buffer Zone (See Gcwihaba Resources letter of 16 December 2015).

12.2 The Department and the Ministry have continued to engage Gcwihaba Resources on giving up portions of the Mineral Concessions within the Okavango World Heritage Site and/or its buffer zone. Gcwihaba Resources has been reluctant to move their license areas outside the buffer zone as evidenced by their relinquishment of license areas or portions in a piecemeal manner, rather than addressing all the encroachment areas at once.

12.3 As a compromise and to compensate Gcwihaba Resources for areas lost through relinquishments to move away from the Delta, the Ministry issued to Gcwihaba Resources new Prospecting Licenses nos. 020/2018 to 026/2018 in replacement of licenses nos. 386/2008 to 392/2008. The new licenses had a longer three (3) years tenure, compared to the normal two

L.M.M
MM

year renewal. Despite the compromise by the Ministry, Gcwihaba Resources still insisted on some of these new licenses being in the buffer zone of the Delta, and eventually the Ministry obliged.

13.AD PARAGRAPHS 8.12 - 13

13.1 On 2 July 2021, Gcwihaba Resources submitted an application for renewal of Prospecting Licenses Nos. 020/2018 to 024/2018 and proposed to relinquish all of Prospecting Licenses Nos. 025/2018 and 026/2018. (See correspondence from Gcwihaba Resources dated 30 June 2021 and submitted to the Department of Mines on 2nd July 2021). The Department of Mines advised that the areas applied for encroached into the Okavango Delta Heritage Site Buffer (See Prospecting License Application Checklist of 2 July 2021). The company revised the application coordinates and the boundaries of Prospecting Licenses Nos. 021/2018 to 024/2018 fell outside the buffer zone and consequently renewal of the licenses was granted by the Minister on 30th November 2021. The revised coordinates for Prospecting License No. 020/2018 continued to encroach into the buffer zone and the Department continued to engage with Gcwihaba Resources with a view to convince the company to realign the boundaries of the license with those of the buffer zone.

13.2 Noting that Gcwihaba Resources was insisting on retaining license no. 020/2018 with a portion of it within the buffer zone, eventually the Department of Mines made recommendations to the Minister to give Gcwihaba Resources a written notice as to why he is unable to renew the license. (See Department of Mines Correspondences, one dated 10 December 2021, reference no. CP 215 XIV (11) and the other dated 14 April 2022, reference CP 215 XIV (21)).

L.M.N.
MM

13.3 The Minister issued a letter to Gcwihaba Resources, citing the reasons why he is unable to renew the license (See letter of 26 April 2022, reference no. CMMGE 7/3/56 III(11)). This letter is not intended to be a rejection letter, but rather its purpose is to give Gcwihaba an opportunity to remedy their application, to enable grant of renewal.

13.4 Further engagements were held with Gcwihaba Resources, whereupon the company at some points indicated willingness to give up the portion of the license within the buffer zone, but they raised conditions that the Department of Mines and Ministry were not agreeable to. (See Gcwihaba Resources letters of 21 December 2021 and 19 May 2022). The Minister responded to Proposals by Gcwihaba Resources, in which he indicated willingness to renew, but disagreed with the conditions set forth by the company. (See letter of 7th June 2022, reference no. CMMGE 7/3/56 I (2)). Again this letter is not intended to be a rejection of the application: the aim is for the issue of the buffer zone and the conditions to be agreed upon before the renewal can be granted.

13.5 The Ministry's position currently is that continuation of encroachment of Gcwihaba Resources' Prospecting License has gone on for too long and it exposes Botswana to risks of adverse publicity from International Environmental Pressure Groups, possible sanctions or boycotts as a result of possible perception that Botswana Government is flouting guidelines for protection of World Heritage Sites by continuing to license prospecting activities within the buffer zone without an approved Environmental Assessment Statement.

L.M.N
MM

13.6 Further, the Ministry's position is bolstered by the fact all these years that since the declaration of the Okavango Delta as World Heritage site, while Gcwihaba Resources has insisted on keeping Prospecting Licenses within the delta's buffer zone, the company has not undertaken an Environmental Impact Assessment study for the licenses falling within the buffer as per requirement of the guidelines. This causes further concern that the company wants to retain a Prospecting License that it is not doing any prospecting work on, but rather the license is possibly only kept for speculative purposes or raising funds from investors who are not aware of the location of the license and the implications thereof.

13.7 As Gcwihaba Resources admits, from engagements with Department of Mines, the company has previously relinquished some licenses that fell within the Delta's buffer zone, and it has been adjusting the coordinates of the boundaries of Prospecting License No. 020/2018. It is the Ministry's view that the company has to do one final adjustment so that all the licenses are completely outside the Delta and its buffer zone, to ensure full compliance by Botswana with World Heritage Site requirements.

13.8 Delays in granting of renewals of Prospecting Licenses have for the most part been caused by attempts by the Ministry and the Department of Mines to engage with Gcwihaba Resources in attempts to get the company to relinquish portions of Prospecting Licenses within the delta's buffer zone, where likely the company was not doing any prospecting work. This is currently the case with renewal of Prospecting License No. 020/2018.

13.9 It may be worth pointing out that at this point, the Minister of Minerals and Energy has not yet rejected the application for renewal of Prospecting

L.M.V.
MM

License No. 020/2018 as per Mines and Minerals Act. Rather, the Minister's position is that he is prepared to grant the renewal as long as Gcwihaba Resources can submit coordinates of application area, falling outside the delta's buffer zone. Gcwihaba Resources still has opportunity to get the renewal granted if they could meet the condition of realignment of the boundary of the area.

RESPONSE TO APPLICANT'S SUPPLEMENTARY AFFIDAVIT

14. AD PARAGRAPH 1 - 5

The contents therein are admitted.

15. AD PARAGRAPH 6 - 9.

16. The contents therein are admitted.

17. AD PARAGRAPH 10

It is worth noting that the letter of 15th December 2015 from Department of Mines labelled "SUP1" captures what were resolutions from the meeting of 14th December 2015, between a representative of the Department of Mines, Mr. Tebogo Segwabe and Director and Chief Operating Officer of Gcwihaba Resources, Dr. Michael C. J. de Wit. The letter does not specify which side (East or West) of the Delta panhandle were the licenses to be relinquished, but rather it conveyed the understanding from the meeting that Gcwihaba Resources were willing to relinquish all licenses areas that fell within the buffer zone of the Okavango Delta World Heritage Site, and these were to be replaced with areas outside the buffer zone. The Department had offered, in addition to new areas outside the buffer zone, to grant the Prospecting Licenses as

L.M.M
MM

new (with a longer tenure of three (3) years) as opposed to renewals which will have a shorter tenure of two (2) years. From the response letter of the 16 December 2015, labelled "SUP2", clearly the author, Dr. Michael C. J. de Wit, had a change of position after having discussions with Chairman and Chief Executive Officer of Tsodilo Resources Limited, the owner of Gcwihaba Resources, on the outcome of the 14 December 2015 meeting with Department of Mines. The issue of giving up rights to only licenses on the eastern part of the panhandle was only introduced by Gcwihaba Resources through their letter of 16 December 2015. Clearly at times there were signs of misalignment between the Dr. Michael C. J. de Wit and Mr. James M. Bruchs, when Dr. Michael C. J. de Wit went into engagement meetings with the Department he will agree to things, and later Mr. James M. Bruchs will query decisions reached in engagement meetings.

18. AD PARAGRAPH 11

The letter of 16th December 2015, authored by Dr. Michael C. J. de Wit, labelled "SUP2", conveyed a change of position from what was agreed during the 14 December 2015 meeting, following discussions with Chairman and Chief Executive Officer of Tsodilo Resources Limited. The understanding from the initial meeting of 14 December 2015 was that Gcwihaba Resources were willing to relinquish all licenses areas that fell within the buffer zone, not just those on the eastern panhandle.

19. AD PARAGRAPH 12

The parties did not reach an agreement in 2015, however, engagements on the relinquishment of areas of Prospecting Licenses lying within the buffer zone continued, and typically engagements peaked around times of renewal of the licenses.

L.M.M
MM

20. AD PARAGRAPH 13 -14

The contents therein are noted.

21. AD PARAGRAPH 14.1

The Department issued the license in January 2018 with the areas reduced on the understanding at the time of submission of the application that Gcwihaba Resources were willing to move the license areas outside the buffer zone in exchange for the licenses being issued as new, with a three (3) year tenure instead of the normal two years for renewal. It is noted that when the Managing Director learnt of the arrangement, he queried the decision and demanded that the licenses be restored to their original boundaries. It may be worthy to point out that while the Gcwihaba Resources was interested in the three year tenure, and the Ministry obliged, they enjoyed the longer tenure but at the same time they were not willing to relinquish all the areas falling within the buffer. As evidence of engagements and convergence during discussions, Gcwihaba Resources were relinquishing portions of some licenses falling within the buffer, albeit relinquishing piece meal, and not all at once.

22. AD PARAGRAPH 14.2

Noted. However, the Directors based in Botswana who were submitting applications were aware of the arrangement of trimming the licenses that overlapped with the buffer zone in exchange for a longer tenure period. Since this process began, engagements would happen between Botswana based Directors and the Department of Mines and things will be agreed only for the Managing Director to later query the decisions taken and demand restoration of original license area.: This is typified in the letters of 2015 labelled "SUP1" and "SUP2" as well as the issuance of the licences in 2018.

L.M.M
MM

23. AD PARAGRAPH 14.3

The letter was intended to convey the message that it was not the intention of the Department to remove Gcwihaba Resources' licenses from the buffer zone by force.

24. AD PARAGRAPH 14.4

The letter labelled "SUP3" is proof that engagements continued beyond 2015, as the letter refers to an agreement between the Company and the Department on relinquishment of licenses. As per "SUP4", the Department obliged upon realizing that Gcwihaba Resources was going back on its earlier position of relinquishment, since the Department's intention was not to forcefully remove the licenses from the buffer zone, but rather to get to an agreement whereby Gcwihaba Resources will willingly give up areas in the buffer zone.

25. AD PARAGRAPH 14.5

The Department obliged on realizing that Gcwihaba Resources was reneging on its earlier position, since the Department's approach was not to force things.

26. AD PARAGRAPH 14.6

The contents therein are noted.

L.M.M
MM

27. AD PARAGRAPH 14.7

The Department has never had intentions to forcefully remove the licences from the buffer zone, but rather to get to an agreement where Gcwihaba will willingly move its licences out of the buffer zone. Departments obliged upon realizing that Gcwihaba Resources had changed its earlier position of relinquishment.

28. AD PARAGRAPH 15 -26

As indicated in Paragraph 10, the Department's letter of 15th December 2015 labelled "SUP1" captures what had been resolved during the meeting between a representative of the Department of Mines, Mr. Tebogo Segwabe and Director and Chief Operating Officer of Gcwihaba Resources, Dr. Michael C. J. de Wit. The letter does not specify which side (East or West) of the Delta panhandle were the licences to be relinquished, but rather it conveyed the understanding from the meeting that Gcwihaba Resources were willing to relinquish all licences areas that fell within the buffer zone of the Okavango Delta World Heritage Site, and these were to be replaced with areas outside the buffer zone. The Department had offered, in addition to new areas outside the buffer zone, to grant the Prospecting Licences as new (with a longer tenure of three (3) years) as opposed to renewals which will have a shorter tenure of two (2) years. The letter of the 16 December 2015, by Gcwihaba Resources' Dr. Michael C. J. de Wit, "SUP2", indicates a change of position after having discussions with Mr. James M. Bruchs, Chairman and Chief Executive Officer of Tsodilo Resources Limited, on the outcome of the 14 December 2015 meeting with Department of Mines. Further, during process of engagements, Gcwihaba Resources will relinquish portions of some licences falling within the buffer zone, but they did not relinquish all the licences. As promised during engagements, the Department has in fact granted the three year tenure and offered areas outside the buffer area, but Gcwihaba Resources along the way reneged on its promises to leave the buffer zone.

L.M.M
M.M.M

29.AD PARAGRAPH 16

Gcwihaba Resources have agreed to voluntarily relinquish mineral concessions falling within the buffer zone of the Okavango World Heritage Property as evidenced by the recent application for renewal in 2021 in which they revised in their application, coordinates of boundaries of Prospecting Licences Nos. 021/2018 to 024/2018 to fall outside the buffer zone and consequently renewal of the licences was granted by the Minister on 30th November 2021. While Gcwihaba Resources insist that they will not relinquish its prospecting rights in the buffer zone, unfortunately they are not willing to abide by the guidelines intended for protection of a heritage site against adverse impact or potential danger on the Outstanding Universal Value of the property. Gcwihaba Resources has not undertaken any Environmental Impact Assessment measures as required in a World Heritage Site despite holding licences in the site over several years.

30.AD PARAGRAPH 17

The Ministry of Minerals and Energy has never embarked on a mission to disseminate false information to UNESCO. The information shared with UNESCO at the time reflected that the licences had been removed from the buffer and the licences had been cropped and removed from the buffer as agreed was as per agreement

31.AD PARAGRAPH 18

Noted. However, there are stringent Environmental Impact Assessment Measures which are required in accordance with the Environmental Assessment Act and Environmental Regulations and in line with Operational Guidelines for the Implementation of the World Heritage Convention (WHC.21/01 2021). These stringent measures are to restrict/prohibit prospecting and mining activities within the core and buffer zones of the Okavango Delta, for protection of the World heritage site against

L.M.M
MM

adverse impact or potential danger on the Outstanding Universal Value of the property. It may be worth noting that since engagements started in 2015 between the Department of Mines and Gcwihaba Resources regarding encroachment into the World Heritage Site buffer zone by the licenses held by the company, it has not undertaken any Environmental Impact Assessment measures as required. This is despite the fact that the company insists that it will not relinquish its prospecting rights in the buffer zone.

32. The Department of Mines processes applications for mineral concessions on behalf of the Minister responsible for minerals as provided for under the Mines and Minerals Act. Upon making recommendations to the Minister for grant or rejection of an application, all the documents submitted by the applicant are forwarded to the Minister.

33. AD PARAGRAPH 18.1

It was an understanding between the Department of Mines and Gcwihaba Resources that Gcwihaba Resources will relinquish licence areas falling within the buffer, in exchange for longer tenure of the licence, through the licences being granted as fresh, instead of renewals. Unfortunately each time, when the Department is ready to proceed to implement that arrangement, after the granting of the licences, Gcwihaba Resources has always reneged on its promises. As evidenced by the three (3) year tenure granted to Gcwihaba Resources in 2018, in line with what was agreed, the Ministry has always moved to fulfill its promises, while on the hand, Gcwihaba has often changed positions on the last minute or when the ministry has already done its part. The licences we granted outside the buffer as per the parties engagements, but later Gcwihaba Resources changed its position and demanded that the licences be restored to their initial boundaries.

L.M.M
MM

34. AD PARAGRAPH 18.2

The position of the Ministry is that whatever activity one undertakes in the buffer zone, will likely have an adverse impact or potential danger on the Outstanding Universal Value of the Okavango Delta World Heritage Site.

35. AD PARAGRAPH 19

The Ministry's position on renewal of Prospecting Licence No. 020/2018 is that prospecting activities by Gcwihaba Resources will likely have an adverse impact on the Outstanding Universal Value of the World Heritage Site. Concerns about Gcwihaba Resources' prospecting activities arise from the fact that the company has held prospecting licences over the buffer zone for several years now, yet they have never undertaken any environmental impact assessment for prospecting activities and gotten it approved by the relevant authority.

36. AD PARAGRAPH 20

The logic and reasoning of the Ministry on the matter of renewal of Prospecting Licence No. 020/2018 is that whatever activity one Gcwihaba wishes to undertake in the buffer, if any, will likely have adverse impact or potential danger on the Outstanding Universal Value of the World Heritage Site. Concerns about Gcwihaba Resources activities arise out the fact that they have held prospecting licences over the buffer zone for several years now, yet they have never undertaken any environmental impact assessment of prospecting activities.

L. N. M
MM

37. AD PARAGRAPH 21

Indeed there were engagements between Gcwihaba Resources and the Ministry. However, in the correspondence labelled "SUP11" the proposal by Gcwihaba Resources was disingenuous, in that Gcwihaba Resources wished for the Minister to grant a temporary renewal in order for Gcwihaba Resources to approach and dupe Minerals Development Company Botswana (MDCB) to invest in the Gcwihaba Resources Project, on the basis of resources in the buffer zone that most likely will not be accessible for mining. The proposal by Gcwihaba Resources was that after receiving the investment funds or getting an investment deal, the portion of the licence in buffer area will be relinquished. The Ministry could not agree to such a scam intended to trick not just MDCB, but other investors, and stakeholders.

38. AD PARAGRAPH 22

Noted. However, the approach to have Minerals Development Company Botswana (MDCB) invest in the Gcwihaba Resources Project, on the basis of resources that most likely will not be accessible for mining and to even go to the extent of relinquishing the area after getting the investment is dishonest.

39. AD PARAGRAPH 23

Noted. However, it is the Ministry's view that investment and renewal decisions should not be tied, as they are not based on the same law.

L.M.M
MM

40. AD PARAGRAPH 24

The disingenuous proposal is intended to benefit Gcwihaba Resources at the expense of MDCM and the Government: this is not a win-win situation for all parties.

41. AD PARAGRAPH 25

In 2021 when applying for renewal of licences nos. 020 -024/2018, following engagement with the Department, Gcwihaba Resources relinquished rights to portions of prospecting licences Nos. 021/2018; 022/2018; 023/2018 and 024/2018, which fell within the buffer zone: only licence no. 020/2018 remains over the buffer zone.

42. AD PARAGRAPH 26

The Applicant has held prospecting licenses around the Okavango Delta before it was declared a world heritage site and a buffer zone designated around it. That is why the Department of Mines has been engaging with the Applicant to show them the change in status of the area they have licenses over and the implications, and trying to get the Applicant to relinquish freely their portions of the licenses falling within the buffer zone intended to protect the World Heritage Site. Now, the license in question, no. 020/2018 was first granted in the year 2018.

43. AD RELIEFS SOUGHT

43.1 The Orders being sought by the applicant are unreasonable in that 1st respondent is not privy to the letter dated 29 June 2022 through which it is


L.M.M.
M.M.

said the renewal application for Prospecting License no. 020/2018 was rejected. In fact, the 1st respondent has not rejected the application: the 1st respondent has issued two letters to the applicant on the matter of the renewal of Prospecting License no. 020/2018, one dated 26 April 2022, and the other dated 7th June 2022. In Both letters the 1st respondent did not reject the application for renewal of the license, but rather he was engaging with Gcwihaba Resources with a view to get the company to consider moving their license boundaries outside the buffer zone.

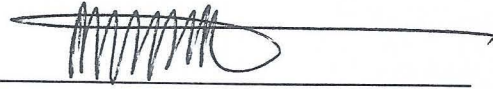
- 43.2 The Applicant is praying for an Order that the effective dates of licenses nos. 020 – 026/2028 be aligned to the renewed validity period for prospecting license no. 020/2018. However, the Applicant (Gcwihaba Resources) in June 2021 on their own, relinquished, without any request from the Ministry, Licenses nos. 025/2018 and 026/2018. As such, these licenses no longer exist.
- 43.3 Gcwihaba Resources has held Prospecting Licence area under licence no. 020/2018 from the time the Delta was declared a World Heritage Site, but they have never attempted to undertake an Environmental Impact Assessment on the area, in line with the Guideline for World Heritage Site.
- 43.4 The damages sought by the Applicant are unreasonable and it is not clear what informs the figure. Gcwihaba Resources has not had any audited statement of expenditure on the specific prospecting license submitted to the Department, and further, the company has not held any mining rights so as to be in a position to claim the value of the mineral resources, since there was no guarantee mining rights will be granted over the area in question.

L.M.M
mm

WHEREFORE the respondents pray for the dismissal of the application with costs.


.....
DEPONENT

THUS done and Signed Before Me at Gaborone on the 23rd day of February 2023 at 0830 AM/PM, The Deponent having Acknowledged that he understands the Contents of this Affidavit and has no objection to taking the prescribed oath.



COMMISSIONER OF OATHS

NAME MONTHUSI MAZEBEDI

RANK SERGEANT

