

**CATHRINE MOYO (in her capacity as Executrix
Datave of the Estate of the Late Hadson Moyo) N.O.**

Versus

JOSMAN CHIKAHWI

And

MASTER OF THE HIGH COURT (N.O.)

And

OFFICER COMMANDING MIDLANDS PROVINCE (N.O.)

And

COMMISSIONER OF MINES, MIDLANDS PROVINCE (N.O.)

IN THE HIGH COURT OF ZIMBABWE
MAKONESE J
BULAWAYO 27 APRIL & 17 MAY 2018

Urgent Chamber Application

Ms T. Janhi for the applicant
K. Mahereni for the 1st respondent

MAKONESE J: This is an urgent application for a spoliation order. The matter was opposed by the 1st respondent. The 1st respondent contends that the matter is not urgent and further, and in any event, that the bulk of the allegations forming the basis of this application are based on falsehoods.

The factual background

The late Hadson Moyo entered into an agreement of sale with the 1st respondent in respect of a mine called Darkhorse 99 Mine situate at Marrivale Ranch in the District of Kwekwe. A written agreement of sale was concluded and signed by the parties on the 10th November 2014. The agreement of sale is attached to the 1st respondent's notice of opposition.

For some reason, the applicant attached portions of an agreement of sale dated 5th May 2016. The applicant averred that she was unable to secure the rest of the pages of the written agreement of sale despite a diligent search. At the hearing of this application it became apparent that the agreement referred to by the applicant in her urgent application was either fraudulent or did not exist. The 1st respondent admits that after signing the written agreement in November 2014, the late Hadson Moyo paid a deposit of US\$2 000. The agreement, according to 1st respondent was terminated after the late Hadson Moyo failed to pay the balance of the purchase price. It should be noted that in terms of the agreement the total purchase price for the mining claim was US\$32 000. After payment of this deposit of US\$2 000, the late Hadson Moyo was required to pay a further amount of US\$10 000 by the 15th December 2014. This sum of US\$10 000 was never paid. The entire balance of the purchase price in the sum of US\$30 000 was never paid. In terms of the agreement the risk and profit in the property was to pass from the seller to the purchaser on the date of transfer. No transfer was ever done. There is no dispute that before his death, the late Hadson Moyo had breached the agreement. 1st respondent states that he repossessed his mine before the death of the buyer. 1st respondent avers that the late Hadson Moyo never raised any issue regarding the repossession of the mine. 1st respondent believed that the matter had been resolved and he remained on the mine. 1st respondent points out that before his death, the late Hadson Moyo carried out mining activities on an adjacent mining claim which belonged to him. The applicant herself never raised the issue of the agreement of sale relating to Darkhorse 99 Mine, following the death of her husband. She did not seek to obtain transfer and did not attempt to pay the balance of the purchase price. Applicant makes the unsubstantiated claim that her husband moved onto the mining claims in dispute before his death. She further claims without proffering any proof that the balance of the purchase price was paid to 1st respondent. The applicant confirms in her founding affidavit that her late husband owned an adjacent claim known as Darkhorse 72 of Marrivale. At the time of his death there was no dispute that applicant's late husband worked on the mining claims known as Darkhorse 72 of Marrivale. There is thus clearly, a dispute regarding the applicant's ownership and occupation of Darkhorse 99 of Marrivale. Whilst the applicant claims that she was despoiled of her possession of the property on 4th April 2018, this is disputed by 1st respondent. The applicant has not established her occupation of the property. Whilst the face of the application reflects that this is

an urgent application for a spoliation order, in her founding affidavit applicant suggests that this is an application for an “interdict against respondents for the restoration of possession of the property on the basis that the dispossession was illicit and an act of spoliation ...”It is not clear whether this is an application for an interdict or spoliation.

Whether the application is urgent

It is clear from the brief synopsis of the background to this matter that this is not a simple matter for spoliation. The applicant avers that 1st respondent’s employees invaded the mining claims with picks and shovels on the 4th of April 2018. This application was only filed on 20th April 2018. The applicant has not treated this matter as urgent. It is now settled law that a matter can only be regarded as urgent when the need to act arises. The background set out indicates that applicant’s late husband entered into an agreement to purchase Darkhorse 99 of Marrivale in November 2014. There is no indication that this agreement was still in place at the time of the death of the late Hadson Moyo. There is no proof that the mining claims were ever transferred into the names of the late Hadson Moyo. There is no indication that the applicant was in undisturbed possession of the mining claims at any stage. A plethora of cases have established the requirements of urgency, see *Kuvarega v Registrar-General* 1998 ZLR (1) 188.

It seems to me that where the alleged urgency arises from a background based on misrepresentation and falsehoods, the court should show its displeasure by not entertaining the application at all. An applicant who approaches the court on an urgent basis seeks to be heard ahead of other litigants. It becomes imperative for an applicant who brings an application under a certificate of urgency to exhibit a high degree of honesty and to place before the court accurate and credible information. In this instance, there can be no doubt that the applicant’s assertions in the founding affidavit cannot withstand scrutiny. Firstly, the agreement of sale relied upon is alleged to have been breached by the applicant’s late husband during his lifetime. Secondly, the agreement or portions of the agreement filed by the applicant appear fraudulent. Thirdly, and most importantly, it is not disputed that applicant works the claims at Darkhorse 72 Marrivale, a claim adjacent to the claims in dispute. If applicant seeks to assert her perceived rights in respect

to the disputed claims she must do so by way of a court application. There is clearly no urgency in this matter. This urgency alleged by the applicant is contrived.

In the circumstances, and for the foregoing reasons, the application is dismissed with costs.

Mhaka Attorney c/o Mathonsi Ncube Law Chambers, applicant's legal practitioners
Mutatu & Partners c/o Dube-Tachiona & Tsvangirai, 1st respondent's legal practitioners