

NTOMBIZODWA MHLANGA

And

BISHOP NGWENYA

And

NQOBANI NDLOVU

And

ZEPHANIA DUBE

Versus

DOUGLAS MOMBESHORA N.O

**[In his capacity as the Minister of Lands and
Rural Resettlement]**

And

OBERT MPOFU N.O

[In his capacity as the Minister of Home Affairs]

And

RAY GOBA

[In his capacity as Prosecutor General]

And

THE COMMISSIONER OF POLICE N.O

And

SIBONGINKOSI MOYO N.O

IN THE HIGH COURT OF ZIMBABWE

MATHONSI J

BULAWAYO 7 DECEMBER & 14 DECEMBER 2017

Urgent Chamber Application

Ms S.V. Padera for the applicants

P. Taruberekera for 1st, 2nd, 4th & 5th respondents

T. Hove for 3rd respondent

MATHONSI J: It is William Shakespeare, that prolific and iconic 16th century writer, who coined the expression; “hoist with own petard” in making reference to the state of bother brought about by one’s own making. The narrative of this matter suggests that the applicants, who are all members of the ZANU (PF) youth league, were encouraged to settle themselves or at least officialdom remained complicit as they unlawfully invaded tracts of land at Heany Junction Farm just outside Bulawayo in 2013. They state that the 1st respondent was aware of their settlement and the 2nd respondent who is the Member of Parliament for that

constituency and is now the Minister of Home Affairs under whose jurisdiction the police service falls gave them the assurance that their settlement was lawful and that they could build their homes therein.

Fast forward to November 2017 more than 3 years after the applicants and a lot others had built permanent homes where they have lived happily for all that time, the state, represented by all the respondents herein, has descended on that settlement intending to raze it to the ground and instructing the settlers to disappear from the surface of the earth with a dash of speed. The applicants complain that on 8 November 2017 officials from the Ministry of Lands and Rural Settlement with a contingent of 40 police officers armed to the teeth and in full riot gear arrived at the settlement in a no compromising mood. They are said to have notified the settlers that they had been sent by the Minister to evict them from the area and that if they did not do so by 1800 hours that very same day they would be arrested and detained.

When the settlers remained put the police pounced. That very night of 8 November 2017 and the following day the settlers were rounded up, arrested and detained at Queens Park Police Station before being taken to court on charges of unlawful occupation of gazetted state land in contravention of s3(1) (a) and (b) of the Gazetted Lands (Consequential Provisions) Act [Chapter 20:28]. They are currently appearing at remand court in Bulawayo.

As the respondents have threatened to evict them and demolish their homes even without a court order they have come to court on an urgent basis seeking to restrain, not just their eviction and demolition of their homes without a court order but also their prosecution, a clear case of over-stepping their rights. They seek the following interim relief;

“Interim Relief (granted)

That pending the confirmation or discharge of final order (*sic*) applicants are granted the following:-

1. That pending the finalisation of this matter, the 1st, 2nd, 4th and 5th respondents are ordered to refrain from threatening to evict, attempting to evict and or evicting or interfering with the 1st to 4th applicants and others and their families dwelling at Heany Junction Farm and from demolishing heir homesteads without obtaining a court order.
2. That pending the finalisation of this matter the 3rd respondent be and is hereby ordered to refrain from prosecuting the 1st to 4th applicants and others and their families dwelling at Heany Junction Farm until a court order has been obtained by the other respondents rendering their actions unlawful.”

Let me dispense with the second leg of the relief that the applicants’ seek straight away because it is clearly incompetent and unsustainable. This is because in terms of s260 of the Constitution the Prosecutor General is independent and not subject to the direction and control of anyone. He is imbued with the constitutional mandate to undertake criminal prosecutions on behalf of the state as provided for in s258 of the Constitution. Where he is of the view that a criminal offence has been committed, it is his constitutional mandate to prosecute offenders. This court can therefore not interdict the Prosecutor General from executing his lawful constitutional mandate.

In any event, the process of prosecution in terms of s3 of the Gazetted Lands (Consequential Provisions) Act [Chapter 20:28] is the prescribed method for obtaining an eviction order against offenders. This is because in terms of s3 (5) of the Act;

“A court which has convicted a person of an offence in terms of subsection (3) or (4) shall issue an order to evict the person convicted from the land to which the offence relates.”

Therefore the applicants cannot come to court seeking to interdict a prosecution which many result in the issuance of an eviction order that they complain has not been sought and obtained.

Regarding the threats of unlawful eviction and the demolition of the settlers’ homes *Ms Padera* for the applicants submitted that even after placing the various settlers on remand the police have not stopped making regular visits to the settlement during which they repeatedly make threats against the settlers that they would be evicted and their homes razed to the ground.

She added that the surprise is that although all the settlers moved to the area at the same time in January 2013, the 1st respondent has issued some of them with offer letters while others have not been given. This is despite assurances given by both the 2nd respondent and the District Administrator that all the settlers would be issued with offer letters.

Mr Tarubereka for the 1st, 2nd, 4th and 5th respondent submitted that the applicants and other settlers do not enjoy the protection of s74 of the Constitution because they have no lawful authority to be on that land. The section only protects lawful occupiers and owners of homes from eviction without a court order. I disagree. Section 74 of the Constitution provides;

“No person may be evicted from their home or have their home demolished, without an order of court made after considering all the relevant circumstances.”

The argument advanced by *Mr Tarubereka* would seem to suggest that the Constitution only protects lawful occupiers. One may ask; What would be the legal foundation for evicting lawful occupiers or lawful owners of homes? It does not make sense. The intention of the law-giver was to protect illegal occupiers and settlers from arbitrary eviction or destruction of their homes. It is a provision which was informed by experiences of this country where in the past such people have been subjected to arbitrary evictions by the state and demolitions which have rendered them homeless.

There has been a seismic shift in our jurisdiction in line with modern trends and thinking towards the protection of illegal occupiers. It is for that reason that the law-giver also enacted s28 of the Constitution which provides;

“The state and all institutions and agencies of governing at every level must take reasonable legislative and other measures, within the limits of the resources available to them, to enable every person to have access to adequate shelter.”

It is the constitutional obligation of the state to provide shelter to its people. A state with such an obligation cannot be seen to be evicting its citizens, demolishing their homes and rendering them homeless. It has to provide alternative land for the evictees before it can lawfully move them from where they have set up their homes. I have already expressed the view that the

location of s74 under the Bill of Rights in the Constitution means that it prescribes inalienable rights which, although in this jurisdiction we do not have legislation in place like the South African Prevention of Illegal Eviction from and Unlawful Occupation of Land Act, No. 9 of 1998, the constitutional provisions protecting the fundamental rights of individual will always override any other law and must be enforced by courts of law. See *Makani & Ors v Epworth Local Board & Ors* HH-550-14 (unreported)

In the context of municipal authorities I made the point that;

“The socio-economic rights that have been incorporated in the new Constitution were informed by past experiences which the law-giver saw fit to guard against. Municipal authorities which stood akimbo as informal settlements mushroomed all over cannot be allowed to now ride on such rights roughshod operating under the cover of darkness to perform forcible evictions and demolitions of houses they allowed to be constructed in broad day light. They must now follow the law and approach the courts for authority to do so. To allow authorities to proceed in razzmatazz style as they are fond of doing would render nugatory the socio-economic rights enshrined in the Constitution”.

I stand by that pronouncement. This is even more so in respect of the state which is required by s28 of the Constitution to provide shelter. Indeed the power of the courts is not only to correct errors and misdemeanors but all manner of misgovernment. This is done so that no wrong or injury whether private or public can happen and that when it happens it shall be reformed or punished by due course of law. Therefore the adoption of guerilla tactics in addressing land hunger cannot be countenanced in a democratic and civilized society like Zimbabwe.

The respondents have not disputed that they have threatened to move the settlers without providing them with alternative land. All that *Mr Taruberekera* could say was that at the same time public prosecutions were also commenced. It is the threats of resort to self-help and the wanton harassment and visits by government agencies which violate not only the fundamental warrant against unauthorized eviction prescribed by s74 of the Constitution but the settlers' right to personal security and their right to privacy as well. It is the kind of conduct which also tends to trample on their feelings and affront their social standing. In the words of CAMERON JA in

Tswelopele Non-Profit Organisation v City of Tshwane Metropolitan Municipality [2007] SCA 70 (RSA) paragraphs 15 and 16;

“It infringed not only the occupiers’ property rights in their materials and belongings but trampled on their feeling and affronted their social standing. For to be hounded unheralded from the privacy and shelter of one’s home even in the most reduced circumstances is a painful and humiliating indignity. And it is not for nothing that the constitutional entrenchment of the right to dignity emphasizes that ‘everyone’ has inherent dignity, which must be respected and protected.”

The constitutional gains in the form of socio-economic rights now entrenched mean that even where individuals are in illegal occupation of land, if that be state land, different and more stringent considerations may apply in light of the obligation of the state contained in s28 of the Constitution to provide shelter to its citizens. See *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Ors (Centre on Housing Rights and Evictions) & Anor, Amici Curiae* 2010 (3) SA 454 (CC).

Not only is the government required to apply to court for an eviction order, it is also required to provide alternative land before it moves occupiers who took occupation with its full blessing or acquiescence. Where the government approaches the court for an eviction order, in light of the wording of s74 which requires the court to consider “all the relevant circumstances,” it must show that it is just and equitable that the eviction be carried out. The approach of the South African courts which commends itself favourably to our jurisdiction in which s74 is similar to s26 of the South African Constitution, was succinctly shown in *Ekurhuleni Metropolitan Municipality & Anor v Various Occupiers, Eden Park Extension 5* [2013] ZASCA 162 para 12;

“In considering whether eviction is just and equitable the court must come to a decision that is just and equitable to all parties. Once the conclusion has been reached that eviction would be just and equitable the court enters upon the second inquiry. It must then consider what conditions should attach to the eviction order and what date would be just and equitable upon which the eviction order should take effect. Once again the date that it determines must be one that is just and equitable to all parties.”

In this case, I am not required to inquire into whether eviction should take place or not. The authorities have not sought an eviction order. They have taken it upon themselves to threaten eviction and demolition without any court order. What I am required to do is to determine whether they can be allowed to do so against the background of the provisions of s74 of the Constitution. The answer is a simple one. It is that the settlers cannot be evicted without a court order. As such eviction is being threatened repeatedly this is a case where an interdict should be issued. There is no justification whatsoever for taking that course of action when the matter is already pending before the criminal court which is a court of competent jurisdiction.

In the result, I grant the provisional order in terms of the amended draft. The interim relief is as follows:

“Interim relief granted

Pending determination of this matter, the applicant are granted the following relief –

1. The 1st, 2nd, 4th and 5th respondents be and are hereby interdicted from threatening to evict, attempting to evict, evicting and in any way interfering with the applicants’ and other occupiers’ occupation of their homesteads at Heany Junction Farm and from demolishing their homesteads without first seeking and being granted a court order for eviction and/or demolition of structures by a court of competent jurisdiction.”

Pundu & Company applicants’ legal practitioners
Civil Division, Attorney General’s Office, 1st, 2nd, 4th & 5th respondents’ legal practitioners
National Prosecuting Authority 3rd respondent’s legal practitioners