

EDDIES PFUGARI PROPERTIES (PVT) LTD  
versus  
OFFICER IN CHARGE, DZIVARASEKWA POLICE STATION  
and  
COMMISSIONER GENERAL, ZIMBABWE REPUBLIC POLICE  
and  
THE SHERIFF N.O.

HIGH COURT OF ZIMBABWE  
MANGOTA J  
HARARE, 13 March and 27 June, 2017

### **Opposed matter**

*F Girach*, for the applicant  
Ms *O Zvedi*, for the 1<sup>st</sup> & 2<sup>nd</sup> respondents

MANGOTA J: On 13 March, 2017 I perused the documents filed of record, heard counsel and delivered an *ex tempore* judgment. It read:

“IT BE AND IS HEREBY ORDERED THAT:

1. The first and second respondents shall, within ten days of service of this order, provide the third respondent with sufficient police manpower and equipment to maintain the peace while the third respondent enforces the writ of ejectment in case number SC 45/12.
2. The first and second respondents shall pay costs of suit. [emphasis added]”

On 19 June, 2017 I received correspondence from the registrar of this court. It was to the effect that the respondents filed an appeal against my decision and were, therefore, requesting for reasons for the same. These are they:

The order which I made was preceded by the order of the Supreme Court which, in Civil Appeal number SC 45/12, confirmed the applicant as the owner of the land known as the Remainder of Whitecliff [“the property”]. This is situated in the district of Salisbury. It is 1065.7090 hectares in extent. It is held under Deed of Transfer number 10444/2000.

SC 45/12 also ordered the Minister of Lands and Rural Resettlement [“the Minister”] who was the respondent in the case and anyone who claimed occupation through him to vacate the property within five (5) days of the date of the order.

Following the issuance of SC 45/12, the applicant who had, and has, clear real rights in the property instructed the Sheriff to evict, from the property, the Minister and any person(s) who claimed occupation through him. In an effort to ensure that peace, law and order would continue to prevail during the eviction process, the Sheriff wrote and requested the first respondent to provide him with assistance in enforcing the writ.

The first respondent's attitude to the request was that of confessing and avoiding, as it were. He did not say he would assist as had been requested. He also did not state, in so many words, that he would not assist the Sheriff. He played what may, at best, be described as a game of hide and seek and, at the worst, passive resistance to assist an officer of the court to execute his lawful duties in terms of the law.

The first respondent remained in, and maintained, the see-saw mode for a considerable length of time. He initially requested for details of persons who were to be evicted from the property. Those were furnished to him as a result of which he informed the applicant that eviction would be conducted on 4 February, 2016. A day before the scheduled date, he insisted on having a meeting with the applicant's legal practitioner before eviction took place. On 5 February, 2016, he phoned the applicant and requested that he wanted to verify the situation which was then on the ground.

The first respondent's officers and the applicant's employees visited the property for the verification exercise. Thereafter he undertook to assist in the eviction on 16 February, 2016. On the scheduled date, he called off the eviction. He insisted that the applicant should advise the Minister of Local Government, Public Works and National Housing of the intended eviction. The applicant learnt later that the matter had been referred to the Minister of Lands and Rural Resettlement.

The above unclear mode of operation by the first respondent frustrated the applicant. It filed the present application as a last resort. It stated that it had a right to evict the illegal occupants from its property. It anchored its application on case number SC 45/12. It submitted that it had been deprived of possession of its property. The property, it submitted, was subdivided into residential stands some of which were sold to innocent purchasers who would like to build their homes on the same. It said it could not give these innocent purchasers vacant possession because of illegal occupiers. It averred that it could not service the land as a developer because the illegal occupiers:

- (i) randomly constructed structures some of which were sitting on roads and/or on land reserved for other infrastructure - and
- (ii) have become violent towards its officers and employees.

It said it was effectively barred from having access to its own property. It submitted that the Sheriff could not evict the occupiers without the assistance of the respondents. Their presence would ensure the maintenance of peace as, according to it, violence would most likely result from the eviction. It said it experienced such in the past. It, accordingly, moved the court to order the respondents to assist the Sheriff in evicting the illegal settlers who were on its property.

The respondents opposed the application. Their terse response read:

“ORDER SOUGHT

The order being sought by the applicant poses a difficulty to the police respondent (*sic*) to enforce in that the interested and affected parties are not cited. The police are at sea as to who is suppose (*sic*) to be evicted and the number of houses or families to be evicted so as to come up with the number of manpower (*sic*) or police details to be availed at that particular enforcement.

The names and addresses are not supplied in the application posing a challenge on the police to assist without specifications. I have personally visited the area- Whitecliff Farm to make an assessment in a bid to come up with a strategy on the deployment of manpower. It is practically not possible looking at the number of people and the scattered housing units at the farm to implement the order. There is the danger of underestimating, running the risk of police being overpowered, anarchy and chaos will reign supreme by trying removing (*sic*) these families from the area that they have called home for years without offering an alternative, it is prudent that sufficient and adequate information be at the disposal of the police. The applicant conveniently omits to mention the total number of families to be evicted. Citing and serving the interested parties would have assisted in sampling and coming up with numbers making it easy for deployment of police personnel.” [emphasis added]

I mention in passing that the first respondent visited the property. He stated as much in his opposing papers. His officers and those of the applicant also visited the same and conducted a verification exercise of the number of families who were to be evicted from the property. He was, therefore, not being candid with the court when he stated that sufficient information as to the number of family units which are at the property should have been availed to him. He has such information. At any rate the second respondent who is the head of the police force would, in the event of any disorder ensuing, marshal sufficient manpower and other resources and avail those to the first respondent to enable him to carry out his duties without any hitches.

The applicant is the owner of the property which forms the basis of the present application. It has real rights to the same. It, therefore, has a right to vindicate it from anyone who is holding that property against its will [see Silberberg & Schoeman; *Law of Property*, 3<sup>rd</sup> Ed p 273, *Stanbic Finance Zimbabwe Ltd v Chivhungwa*, 1999 (1) ZLR 262 (H); *Indium Investments (Pvt) Ltd v Kingshaven (Pvt) Ltd*, SC 40/15].

It is common cause that some persons unlawfully settled themselves on the applicant's property. They did so against the applicant's will. They are holding on to the property illegally. They should be removed from the same in a smooth and orderly manner.

The record shows that the settlers are of a violent disposition. The applicant stated as much. The respondents, in some way, confirmed the applicant's apprehension. The assertion which they made to the effect that "*there is the danger of underestimating, running, the risk of police being overpowered, anarchy and chaos will reign supreme*" only but confirms the fears which the applicant and the Sheriff harboured in their minds.

The respondents' constitutional mandate is to preserve peace, law and order within Zimbabwe. Reference is made in this regard to s 93 (1) of The Police Act [*Chapter 11:10*] as read with the preamble to the same. It reads:

"There shall be a Police Force which together with such other bodies as may be established by law for the purpose, shall have the function of preserving the internal security of, and maintaining law and order in, Zimbabwe." [emphasis added].

The above section resonates well with s 219 (1) (a) to (e) and subsection (3) of the Constitution of Zimbabwe. This reads, in the relevant part, as follows:

"219 Police Service and its functions

1. There is a Police Force which is responsible for –
  - a) detecting, investigating and preventing crime;
  - b) preserving the internal security of Zimbabwe;
  - c) protecting and serving the lives and property of the people;
  - d) maintaining law and order; and
  - e) upholding this Constitution and enforcing the law without fear or favour.
2. ....
3. The Police Service must be non-partisan, national in character, ..... professional and subordinate to the civilian authority established by this Constitution." [emphasis added].

The applicant was alive to the abovementioned pieces of legislation when it requested the respondents to assist the Sheriff in the eviction of the illegal settlers. It did not want the process to be marred with violence, chaos, lawlessness and serious disorder. It, if anything, intended a smooth eviction of those who were and are on its property.

The respondents, wittingly or unwittingly, misconstrued the applicant's request. They also misunderstood the nature and import of this application. They remained of the view that they were being asked to *enforce* the court order. The submission which they made in their opposition to the application as read with their heads only but serves to demonstrate their misunderstanding of what they were called upon to do.

The applicant moved the court to direct the respondents to assist the Sheriff to enforce the writ of ejectment. Their assertion which was to the effect that they were called upon to enforce or execute the court order was misplaced.

What is required of the respondents is to maintain their presence at the property and ensure the prevalence of peace, law and order when the Sheriff, acting in terms of the court order, proceeds to evict the illegal settlers from the property. The respondents know as such as the court does that the persons who are on the property are living outside the law. They know that the occupants of the property are criminals.

The fact that the settlers are illegally occupying the applicant's property is all the more reason which should compel the respondents to assist the applicant to assert its rights in its property. Their sworn duty as stated in the Police Act and the country's constitution is to deal decisively with law breakers. They should not be seen to be protecting the illegal settlers as appears to be their attitude *in casu*.

The respondents' statement which suggests that the illegal occupants be furnished with alternative accommodation before they are moved from the applicant's property is not only unfortunate. It is totally misplaced. Their heads of argument left a lot to be desired. They, for reasons known to themselves, appeared to suggest that the settlers have a right to remain on the applicant's property. They, in that regard, referred the court to s 74 of the Constitution of Zimbabwe. They insisted that the section guaranteed to the settlers the right against arbitrary eviction. They did not appear to have applied their mind well to the section.

The section reads:

"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 [emphasis added]."

What the respondents failed to appreciate is that the property does not belong to the illegal occupants. It belongs to the applicant. The property is not, therefore, the home of the illegal settlers. It is the applicant's home.

The respondents also failed to appreciate that the illegal settlers are not being arbitrarily evicted from where they settled themselves. Their eviction is a result of a court order. They are being lawfully evicted from the applicant's property. The court considered all the relevant circumstances when it ordered the eviction of the Minister and any person(s) [i.e. the illegal settlers] who occupied the applicant's property through him.

It is unfortunate and a sad day of the country's vibrant democracy to observe that the respondents whose duty it is to observe and enforce the law arrogate to themselves the power and authority to, as it were, review the order of the Supreme Court. They stated in para 3.5 of their heads as follows:

"3.5 By virtue of them [i.e. illegal settlers] being *bona fide* possessors, those people have acquired rights such as the one guaranteed by s 74 of the Constitution. They have the right not to be arbitrarily evicted without an order of court. In coming to its decision, the Supreme Court it is submitted overlooked the need to take into account the rights of the people affected" (emphasis added)

I shall not repeat what I said about the fact that the eviction is not arbitrary as the respondents claim. What is more worrying than otherwise is the respondents' assertion which is to the effect that the illegal occupiers are *bona fide* possessors. I view with serious disquiet the assertion by the respondents that the Supreme Court did not make an effort to consider the rights of the people who were, or are, affected by its order.

The respondents state in para 3.8 of their heads that:

". . . the Supreme Court ought to have been aware that the settled people on the ground acquired rights which were independent and separate from government . . . there is need therefore for them to be cited in the current proceedings and in the absence of their citation the police are hesitant to participate in the process." (emphasis added)

They state in para 4.9 as follows:

"The proposal being made is for the court to make a deferment of judgment in this matter pending the filing of an application by the state and any persons who have reason to believe that their constitutional rights may be violated by the enforcement of the applicant's writ of ejectment" (emphasis added).

The conclusion portion of their heads reads:

"CONCLUSION

5.1 In the circumstances, this Honourable Court is urged to give the state and any persons who may have reason to believe that their constitutional rights may be violated a period of 30 days within which to file an application with the constitutional court failing which, this Honourable Court should then go ahead to deliver its ruling.

5.2 In the event that this Honourable Court is not persuaded to defer the ruling, this Honourable Court is urged to dismiss the application on the basis that the police cannot

participate in an ejection process where the affected persons have not been cited” (emphasis added).

I am at a loss as to what the respondents meant to convey by the above cited extracts from their heads. What is clear, however, is that they took a partisan as opposed to a professional approach of the matter. They, in effect, indicated that they are not willing to assist the Sheriff in executing a lawful court order. Their assertion which is to the effect that they cannot assist until the illegal settlers are cited in the order is a polite way of telling the court that they will not abide by its order.

Illegal settlers are what they are. They should be removed from wherever they have settled themselves. *A fortiori* where the applicant is as *in casu* a holder of a court order.

The respondents cannot be allowed to pick and choose. They have no option but to comply with the court order. Their application to have the matter deferred to a future date to allow anyone to appeal the Supreme Court order to the Constitutional Court is totally devoid of merit. The Constitution of the country enjoins them to obey and comply with court orders. It does not allow them to take sides as they are doing *in casu*.

The applicant proved its case on a balance of probabilities. Its application, therefore, succeeds.

In the premise, the application is granted with costs.

*Scanlen & Holderness*, applicant’s legal practitioners  
*The Civil Division of the Attorney General’s Office*, 1<sup>st</sup> & 2<sup>nd</sup> respondents’ legal practitioners