

FARAYI B. NYAPOKOTO

VERSUS

**OFFICER COMMANDING BULAWAYO CAMPS
SUPERINTENDENT MOYO**

AND

**OFFICER COMMANDING BULAWAYO PROVINCE
SENIOR ASSISTANT COMMISSIONER MUTAMBA**

AND

COMMISSIONER GENERAL OF POLICE

AND

CO-MINISTER OF HOME AFFAIRS

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 21 JULY 2010 AND 22 JULY 2010

Mr. Muganyi for applicant

Mr L. Musika for respondents with Assistant Inspector Maphosa and Sergeant Mapfumo

Urgent Chamber Application

CHEDA J: This is an urgent application seeking to restore applicant to the peaceful and vacant possession of number 28 Fourth Street, Ross Camp, Bulawayo.

The brief background of this matter is that applicant is a Detective sergeant in the police force while first respondent is the Officer Commanding Bulawayo camps. Second respondent is the Officer commanding, Bulawayo province, third respondent is the Commissioner General of

Police and the fourth respondents are Co-Ministers of Home Affairs of which all the parties fall under. Applicant was charged for contravening paragraph 14 of the Schedule of the Police Act [Chapter 11:10]. He was tried, convicted and sentenced to 8 days imprisonment.

He was dissatisfied with that decision and filed an appeal with this court under case HC number 01/10 which appeal is pending. A lot of activities have since taken place between applicant and either one or all the respondents which ultimately led to applicant's eviction from his residence at Ross Camp, Bulawayo.

Applicant's argument is basically premised on three points. The first point is that it was unlawful for respondents to evict him without a lawful court order.

Secondly, he is presently on bail at the Magistrate court and one of the bail conditions is that he should reside at the address where he has been evicted from.

The third and final argument is that the decision for his conviction is pending before this court and as such if he is evicted he will be prejudiced in the event of the success of his appeal.

Respondents through their representative *Mr Musika* have argued that:

- (1) the appeal before this court is unprocedurally filed and as such there is no appeal at all pending before the court, and
- (2) that third respondent has a right to remove applicant from its premises as the allocation of accommodation is not part of the conditions of service. It is therefore only a privilege and not a right.

Applicant concedes that third respondent may be correct in holding the view that the accommodation given to him was not a right but a privilege. However the argument does not end there. The correct legal position, with regards to spoliation is that a person in possession

of property or right over a thing is protected irrespective of his status with regards to ownership. Applicant has no real right over respondent's property, but, is in possession thereof and is legally protected from being deprived of such ownership without due process of law. All the possessor needs to do is to prove to the court that:

- (1) at the relevant time he was in peaceful and undisturbed possession,
- (2) that he derived some benefit from the said thing/property, and.
- (3) that respondent's action was unlawful, see *Krammer v Trustees Christian Coloured Vigilance Council, Grassy Park* 1948(1) SA 748 (C)

Respondent's actions of evicting applicant from their residence amounted to spoliation as they had no court order to do so.

Applicant is on bail pending trial on a separate matter before the Magistrate court. One of bail conditions is that he should reside at the address from which he has been evicted from.

The order was made by the magistrate court which is a competent court. If applicant vacates this residence without the order of the said court altering the same it means that he will have breached one of his bail conditions and the court will be entitled to deprive him of his liberty. For that reason his removal without the court's order will be unlawful.

The third point is that he has a matter pending appeal before this court. *Mr Musika* argued that the appeal is not properly before the court. This may be so and it may be a good argument, but, what he should bear in mind is the fact that this court is now ceased with the matter and as such can not determine the question of the irregularity of the appeal before it is set down for hearing. This question should be raised during the appeal. As of now, the issue is the effect of allowing the eviction of applicant before the appeal is heard and finalised.

I find that there is indeed merit in applicant's apprehension that in the event of applicant succeeding in his appeal, the success would be brutam fulmen.

Taking into account all the factors in this matter, it is clear to me that respondents acted unlawfully in this matter. Applicant has made a good case for himself and is entitled to the relief sought.

The application accordingly succeeds and the following order is made:

It is ordered that:

Pending determination of applicant's appeal being matter no. HC 01/10

- (1) Respondents immediately upon receipt of this order restore the Applicant to the peaceful and vacant occupation of Number 28 Fourth Street, Ross Camp, Bulawayo.
- (2) In the event that the Respondents have given occupation of the said property to any third party, they be ordered to immediately upon service of this order remove the said occupant. Failing which the Deputy Sheriff, Bulawayo or his lawful Deputies be and are hereby authorized and directed to evict the said occupant and place applicant into vacant occupation.
- (3) The Respondents be and are hereby ordered to give absolute peace to Applicant in that they must not threaten, harass, victimize or do any other action which can be construed as disturbing the peace of Applicant and members of his family in occupation of the said property.
- (4) This Provisional Order to be served by the Deputy Sheriff or his lawful assistants upon the Respondents or any lawful persons found present at Mzilikazi Police Station, Bulawayo."

Cheda J.....

Messrs Dube-Banda, Nzarayapenga and partners, applicant's legal practitioners
Civil Division, Attorney-General's office, respondents' legal practitioners