

WILLIAM ARCHIBALD STANDER
v
THE STATE

CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, GWAUNZA JA,
GOWORA JA, HLATSHWAYO JA, GUAVA JA,
MAVANGIRA AJA, CHIWESHE AJA & MAKONI AJA
HARARE, JULY 9, 2014

N Majuru, for the applicant

F Kachidza, for the respondent

MALABA DCJ: After hearing counsel for both parties, the Court dismissed the application with no order as to costs. It was indicated that the reasons for the decision would follow in due course. These are they.

The applicant was charged in the Magistrates Court with the offence of occupying gazetted land without lawful authority in contravention of s 3(2)(a) as read with s 3(3) of the Gazetted Land (Consequential Provisions) Act [Cap. 20:28]. During the proceedings in the lower court the applicant raised a number of constitutional questions which he requested the magistrate to refer to the Constitutional Court for determination. The applicant made the request in terms of s 175(4) of the Constitution of the Republic of Zimbabwe Amendment (No. 20), 2013 (“the Constitution”). Being of the opinion that the request was not frivolous or vexatious, the

learned magistrate referred the Constitutional questions to the Court for determination. The questions are:

1. Whether the eviction of the applicant from the farm without paying him compensation for the improvements effected on the land before it was compulsorily acquired amounts to unlawful deprivation of property in terms of s 72(3) (a) and (b) of the Constitution.
2. Whether the eviction of the applicant who is a physically disabled person from the land constitutes a breach of the constitutional obligations of the State imposed by s 2 of the Constitution and therefore a violation of his fundamental right enshrined in s 83 of the Constitution.
3. Whether the eviction of the applicant from the land without first compensating him amounts to subjecting him to physical or psychological torture or cruel, inhuman or degrading treatment or punishment in violation of his fundamental right enshrined in s 53 of the Constitution.

The applicant is the former owner of the Remainder of Lot 18 of Nuanetsi Ranch in the district of Mwenezi (“the land”). The State compulsorily acquired the land for the public purpose of settlement for agriculture on 22 June 2012. In terms of the law, the applicant had 90 days within which to vacate the land. He did not do so. On 22 September 2012 the State extended the period of his stay on the farm to 11 December 2012.

The applicant did not vacate the land within the extended period as he had undertaken to do. The State charged the applicant with the offence of occupying compulsorily

acquired agricultural land without lawful authority. The applicant is a bilateral below knee amputee having lost both legs in 1978. He lived in the homestead at the farm compulsorily acquired by the State. He carried on the business of cattle ranching on the farm. The applicant does not deny that he committed the offence with which he was charged. Mr *Majuru* said that the applicant does not deny that he is liable to eviction from the land in question.

It was the applicant's contention that seeking to evict him before ordering that he be paid compensation for improvements amounts to unlawful deprivation of property contrary to the provisions of s 72(3)(a) and (b) of the Constitution. There is, however, no law that requires the State to pay the former owner or occupier of compulsorily acquired agricultural land compensation for the improvements effected on the land before he or she is evicted. The former owner or occupier is evicted from the land following a conviction for occupying State land without lawful authority.

The decision to prosecute a former or occupier of compulsorily acquired land is dependant upon his or her conduct of remaining in occupation of the land and using it for agricultural purposes in defiance of the law. The decision is not dependant upon payment by the State of compensation to the former owner or occupier for improvements effected on the land. At the time the eviction is ordered, the former owner has no real right in the land as it would have been acquired by the State.

The right to remain in occupation of the residence and the land for the prescribed period is a statutory right which terminates at the expiry of the prescribed period. There is no

deprivation of the accused of property in the land by the State when an order for his eviction from the land is made upon conviction for criminal conduct. See *CFU v Minister of Lands & Ors* 2010(2) ZLR 576 at 592A.

Eviction from State Land following conviction for unlawful occupation of the land cannot be made conditional upon payment of compensation for improvements effected on the land because that would make the eviction dependent upon payment of compensation and upon conviction for the offence. The purpose of an eviction order granted by a court after convicting a former owner or occupier of unlawful occupation of compulsorily acquired land is to remove the criminal from State land. The purpose is not to deprive him or her of the right to apply to the Compensation Committee in terms of Part VA of the Land Acquisition Act [Cap. 20:10] for the assessment and payment of the compensation payable.

The State has not denied the applicant the right to compensation. He has the right to invoke the procedures put in place for the enforcement of the obligation on the State to pay compensation for the improvements on the compulsorily acquired land. That right subsists whether or not the applicant is prosecuted and evicted from the State land. As an eviction order would not deprive the former owner or occupier of compulsorily acquired land of the right to compensation from the State for improvements that were on the land when it was acquired, s 72(3)(a) and (b) of the Constitution is not infringed.

Once the agricultural land has been compulsorily acquired and the former owner or occupier continues to occupy the land without lawful authority, he or she commits a criminal

offence regardless of his or her status as a disabled person. The applicant cannot claim the benefits of the protection of the rights of disabled persons under s 83 of the Constitution to defeat the enforcement of the obligation imposed on him by s 3(2)(a) as read with s 3(3) of the Act.

The right to claim compensation vested in the applicant because he was the owner of the agricultural land at the time it was compulsorily acquired by the State in terms of s 72(2) of the Constitution. It did not vest in him because he is a physically disabled person. The State is under an obligation to assess and pay the payable compensation in terms of an Act of Parliament.

It would be effecting an amendment to the Constitution to say a person is entitled to payment of compensation for improvements effected on the land before it was compulsorily acquired by the State because he or she is physically disabled or elderly. The person would be entitled to payment of compensation not because he or she is physically disabled or elderly. He or she would be entitled to payment of compensation because he or she is a former owner or occupier of the agricultural land compulsorily acquired and effected improvements on the land before it was acquired by the State.

There are procedures prescribed by the law for the protection by a former owner or occupier of compulsorily acquired land of his or her right to payment of the compensation by the State for improvements that were on the land when it was acquired. The remedies include the right to approach courts in the event of a dispute over the question of payment of the compensation. The criminal proceedings leading to an order of eviction of a former owner or

occupier from compulsorily acquitted land do not affect the applicant's right to compensation for improvements effected on the land before its acquisition.

The evidence showed that the applicant did not take any step to enforce his right to payment of compensation for improvements effected on the land before it was compulsorily acquired. He admitted that he knew that his defiant conduct constituted the offence with which he was charged. He sought to have his continued commission of the offence authorized by the magistrate through a suspended order of eviction from the gazetted land. The imposition of an order of eviction on a former owner or occupier of the gazetted land following conviction for its unlawful occupation and use is mandatory. The magistrate has no discretion in the matter. Section 3(5) of the Act provides that a court which has convicted a person of an offence in terms of subss. (3) or (4) shall issue an order to evict the person convicted from the land to which the offence relates. The order of eviction is not part of the sentence in respect of the assessment of which the magistrate has a discretion. It is in addition to the sentence imposed by the magistrate. See CFU case (*supra*) at 692D.

The criminal proceedings and the eviction of the applicant from State land which he occupied and used unlawfully do not affect his rights against society as a disabled person. Even if the applicant was evicted from the land he would still be entitled to payment of compensation for improvements effected on the land before compulsory acquisition. Equally he would still be liable to eviction even if he was paid compensation and remained in possession of the land without lawful authority up to the time of conviction. More importantly he would still be entitled to the protection afforded to disabled person by society.

It would not be legally correct to declare that the eviction of a former owner or occupier of compulsorily acquired land following his conviction for the occupation of the land without lawful authority before payment of compensation for improvements effected on the land before acquisition deprives him or her of the right to compensation. The purpose of prosecution and evicting a former owner or occupier from the compulsorily acquired land is to put a stop to the continuation of criminal conduct.

There is nothing inhuman or degrading in a process the purpose and effect of which is the prevention of a continued commission of a crime. The law applies equally to every former owner or occupier of compulsorily acquired land who behaves in a criminal manner by refusing to vacate State land. Protection of a right guaranteed to a person presupposes that he or she acts in accordance with the obligations imposed on him or her by the law. Once it is accepted that the eviction is necessitated by and follows a conviction for criminal conduct, all the other allegations of violation of the fundamental human rights made by the applicant are not sustainable.

At the end of the day the eviction of a former owner or occupier of compulsorily acquired agricultural land in terms of s 3(5) of the Act is an exercise of State power sanctioned by the Constitution. As a product of a due process it cannot be said to be in violation of the fundamental rights of the applicant enshrined in s 72(3)(a) and (b), 21, 22, 83 and 48(1) of the Constitution. The process does not need the aid of a condition of prepayment of compensation by the State for improvements effected on the land before acquisition for the achievement of its purpose. No law requires a magistrate to order the State to pay a former owner or occupier of

compulsorily acquired land compensation for improvements effected on the land before his eviction from the land he or she is found to be occupying illegally.

The prosecution and eviction of a former owner or occupier of compulsorily acquired land is a process undertaken to achieve the purposes of a constitutionally valid statute. As such it would be absurd to say that compliance with the requirements of the provisions of a constitutionally valid law is a violation of any of the fundamental human rights alleged by the applicant to have been infringed. Such an approach would have to ignore the fact that s 72 of the Constitution which gives the State the power to compulsorily acquire land is in Chapter 4 of the Constitution dealing with the Declaration of Rights. It is clear from the provisions of s 72 of the Constitution that the common good is intended to override the rights of the individuals who continue to occupy and use compulsorily acquired agricultural land illegally.

For the above reasons, the Court dismissed the application for lack of merit with no order as to costs.

CHIDYAUSIKU CJ: I agree

GWAUNZA CCJ: I agree

GOWORA CCJ: I agree

HLATSHWAYO CCJ: I agree

GUAVA CCJ: I agree

MAVANGIRA ACJ: I agree

CHIWESHE ACJ: I agree

MAKONI ACJ: I agree

Saratoga, Makausi Law Chambers, I agree

National Prosecuting Authority, respondent's legal practitioners