REPORTABLE (83)

(1) ZIMBABWE HOMELESS PEOPLE'S FEDERATION (2) PESIWE GONYE (3) THOMAS KAHOMA (4) INNOCENT KAHOMA (5) VICTOR KAHOMA (6) NOREEN KATSANDE (7) TRISH KATUMWA KATSANDE (8) MAKATENDEKA KATSANDE
v
(1) MINISTER OF LOCAL GOVERNMENT AND NATIONAL HOUSING (2) ZVIMBA RURAL DISTRICT COUNCIL (3) LEENGATE (PRIVATE) LIMITED (4) MINISTER OF LANDS, LAND REFORM AND RESETTLEMENT

SUPREME COURT OF ZIMBABWE
PATEL JA, MAVANGIRA JA & MATHONSI JA
HARARE, 19 MARCH & 17 JULY 2020

T. Biti, for the appellants

V. Munyoro, for the 1st & 4th respondents

T. Runganga, for the 2nd respondent

No appearance for the 3rd respondent

PATEL JA: This is an appeal against the judgment of the High Court dismissing an application by the appellants for a declaratory order and consequential relief pertaining to various fundamental rights, in particular, the right of children to shelter. The application was dismissed with no order as to costs.

The first appellant is an association of homeless people with public interest in the right to housing. The second and sixth appellants are members of the first appellant and brought the application *a quo* on behalf of their minor children, *i.e.* the third, fourth, fifth, seventh and eighth appellants. For ease of reference, the association, its members and their minor children will all be collectively referred to as "the appellants".

The first respondent is the Minister of Local Government and National Housing, responsible for housing and the administration of local authorities. The second respondent is Zvimba Rural District Council, the local authority wherein a peri-urban area called Haydon Farm is located. The third respondent is a housing development contractor, which acquired the right to develop the said farm. The fourth respondent is the Ministry of Lands, Land Reform and Rural Resettlement, which was cited as the acquiring authority of the farm.

It is common cause that the appellants settled on Haydon Farm in the year 2000, constructed permanent houses and commenced farming activities on the farm. In 2005 the fourth respondent acquired the farm and designated it as urban land under the jurisdiction of the first respondent. Part of the land was allocated to the City of Harare and certain other parts to the second and third respondents. A low density suburb is currently sprouting on the farm.

The appellants' residential structures were demolished in 2005. They now live in cabins and shacks and are prohibited from constructing permanent structures. They were

then given notice to vacate the farm so as to enable the third respondent to carry out the construction of houses thereon. It is not in dispute that the appellants have no alternative accommodation and that their children attend a school within the area.

Judgment of the High Court

The court *a quo* found that the right to shelter under s 28 of the Constitution is subject to the availability of State resources and that the State must take reasonable measures within the limits of available resources to enable citizens to have adequate shelter. The State is only obliged to provide for the progressive realisation of the right to shelter. Section 28 does not create any right to shelter but only sets out a national objective which is not enforceable.

As regards s 19 of the Constitution, the court took the view that this provision merely prescribes national aspirations pertaining to the rights of children. This provision is also qualified by the availability of resources. The State must put in place policies and measures to ensure that the interests of children are paramount. However, the primary obligation lies on parents to properly care for their children. This provision does not create any enforceable rights. The State is only responsible for those children who have been removed from their family environment.

Turning to s 81 of the Constitution, the court held that this provision did not create any absolute, independent and justiciable right to shelter for children. There was no primary obligation on the State to provide shelter for children in the care of their parents.

The State was only obliged to take measures within its available resources to ensure the progressive realisation of the right to shelter. It is the parents who have the primary obligation to ensure that their children have adequate shelter. In the instant case, the children in question were not in State care and had not been removed from their parents.

With respect to Haydon Farm, the court observed that the appellants' stay on the land had not been regularised and that the acquiring authority had other plans for the land. Additionally, the appellants could not demand alternative land as a precondition to vacating the farm. The court could not compel the fourth respondent to allocate land to the appellants. This was a function that was purely within the domain of the State. The appellants could not insist on being allocated land within an urban area.

According to the court, the conduct of the respondents was in pursuit of the legitimate aim of urban development and expansion of the City in a planned and orderly fashion. There was a pressing social need for urban housing and development. The forced eviction of the appellants and others in their position was for the general public good and was justified. However, to avoid their arbitrary eviction, the appellants must be given the opportunity for genuine consultation and adequate notice of the scheduled eviction in accordance with the due process of law.

In the event, the court held that the appellants had failed to show the existence of a clear right for the interdictory relief that they sought. The application was accordingly dismissed with no order as to costs.

Grounds of Appeal and Relief Sought

The stated grounds of appeal in this matter are conspicuously repetitive. Shorn of that obvious defect, they relate in essence to the interpretation and application of ss 74 and 81 of the Constitution. Section 74 codifies the freedom from arbitrary eviction, while s 81 enshrines the rights of children.

With respect to s 74, the appellants attack the judgment *a quo* for having failed to protect the appellants from arbitrary eviction without due process and a valid court order. As regards s 81, the appellants asseverate the justiciability and enforceability of the right to shelter in favour of children. The judgment *a quo* is impugned for having failed to properly consider the scope and extent of the State's obligations under s 81 insofar as children in parental care are concerned.

The relief craved by the appellants is threefold. Firstly, they seek an interdict against the respondents from ejecting the minor appellants from the informal settlement on Haydon Farm. Secondly, they seek a declarator to the effect that the right of children to housing is justiciable and enforceable as an independent right not dependent upon the general right to housing or shelter. Thirdly, the appellants seek substantive relief commanding the first and fourth respondents to allocate serviced stands and construct minimum core houses on the informal settlement presently occupied by the appellants. Alternatively, the first respondent is to be ordered to provide alternative land on which it must allocate residential stands conforming to the same specifications.

Right to Shelter under International Law and the Constitution

The right to shelter is generally recognised both under international law and municipal law, as a fundamental socio-economic right. The dearth of adequate housing lies at the heart of the myriad deplorable iniquities that bedevil societies generally, not only in developing countries but also in the developed world. As has been observed in several jurisdictions, the courts play a pivotal role in ensuring the eradication of social inequalities and actualising socio-economic rights, thereby promoting and advancing the attainment of social justice. See *People's Union for Democratic Rights & Ors* v *Union of India & Ors* 1983 (1) SCR 456; *Soobramoney* v *Minister of Health (Kwazulu Natal)* 1998 (1) SA 765 (CC).

In the sphere of international law, there are two key instruments that enshrine the rights of children and the concept of their best interests. The first is the United Nations Convention on the Rights of the Child (1989). The second is the African Charter on the Rights and Welfare of the Child (1990).

Article 3(1) of the United Nations Convention stipulates that "the best interests of the child shall be a primary consideration" in all actions concerning children. By virtue of Article 3(2), "State Parties undertake to ensure the child such protection and care as is necessary for his or her wellbeing", taking into account the rights and duties of parents and legal guardians, "and, to this end, shall take appropriate legislative and administrative measures". These provisions are mirrored and reaffirmed in Article 4 of the African Charter.

With respect to the role of parents, Article 27(2) of the United Nations Convention recognises that parents "have the primary responsibility to secure, within their abilities and financial capabilities, the conditions of living necessary for the child's development". Nevertheless, in terms of Article 27(3), States Parties are also enjoined "in accordance with national conditions and within their means" to "take appropriate measures to assist parents" and "in case of need provide material assistance and support programmes, particularly with regard to nutrition, clothing and housing". To similar effect, Article 20 of the African Charter places the primary obligation to implement children's rights on parents, but also obligates the State to assist parents in that endeavour, with particular reference to nutrition and housing.

Both the United Nations Convention and the African Charter have been ratified by Zimbabwe, the former on 11 September 1990 and the latter on 19 January 1995. Consequently, by dint of s 46(1)(c) of the Constitution, it is incumbent upon our courts to take them into account in interpreting the Declaration of Rights entrenched in Chapter 4 of the Constitution. This is reinforced by s 327(6) of the Constitution which dictates the adoption of any reasonable interpretation of domestic legislation that is consistent with any treaty or convention which is binding on Zimbabwe, in preference to any alternative interpretation that is inconsistent with that treaty or convention.

The next question concerns the justiciability and enforceability of the relevant rights dealt with by the court *a quo* and presently under scrutiny on appeal, *i.e.* ss 19, 28,

74 and 81 of the Constitution. Sections 19 and 28, which set out national objectives *vis-à-vis* children and shelter respectively, are located in Chapter 2 of the Constitution. Section 19(2)(b) enjoins the State to "adopt reasonable policies and measures, within the limits of the resources available to it, to ensure that children …….. have shelter and basic nutrition, health care and social services". Section 28 calls upon the State and the government to "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".

In my view, these provisions are essentially hortatory in nature, given that they are qualified by the condition that they are to be realised "within the limits of the resources available" to the State and the government. In this sense, they cannot be said to be strictly justiciable and enforceable in themselves. Nevertheless, they are not to be regarded as being entirely superfluous and otiose and therefore devoid of any legal significance whatsoever. They remain interpretively relevant for the purpose of informing and shaping the specific contours of the substantive rights enshrined elsewhere in the Constitution. I shall revert to this aspect at a later stage.

Chapter 4 of the Constitution sets out the Declaration of Rights, divided into several Parts. Part 1 deals with the application and interpretation of Chapter 4. Part 2 enumerates those rights that are considered to be fundamental rights and freedoms. Part 3 elaborates certain rights and freedoms in relation to their application to particular classes of people. Part 4 provides for the enforcement of fundamental human rights and freedoms, while Part 5 delineates the limitation of those rights and freedoms. The specific provisions

that are germane for the purposes of this appeal are ss 74 and 81. Section 74 guarantees the freedom from arbitrary eviction and appears in Part 2 under the rubric of fundamental human rights and freedoms. Section 81 spells out the rights of children and appears in Part 3 relative to the elaboration of certain rights.

Mr *Biti*, for the appellants, submits that the rights accorded by ss 74 and 81 are justiciable and enforceable. He relies in this respect on s 44 of the Constitution which sets out the duty of the State, every person and the government at every level to "respect, protect, promote and fulfil the rights and freedoms set out in [Chapter 4]".

Ms *Munyoro*, for the first and fourth respondents, adopts a curiously contentious position grounded in the particular location of the provisions under consideration. Sections 19 and 28, dealing with children and adequate shelter, are to be found not in Chapter 4 but in Chapter 2 of the Constitution. Chapter 2 relates to national objectives and aspirations to be progressively attained according to available resources. Additionally, s 81 is located in Part 3 rather than Part 2 of Chapter 4. Consequently, so it is argued, ss 19, 28 and 81, taken together, cannot be interpreted to confer any justiciable or enforceable right to shelter in favour of children.

Mr *Runganga*, for the second respondent, takes a similar stance premised on the argument that first generation civil and political rights are absolute and fully enforceable. However, second generation social and economic rights, so he contends, are not absolute, justiciable or enforceable.

I am unable to find any merit whatsoever in the arguments propounded by counsel for the respondents. Both ss 74 and 81 are located in Chapter 4 of the Constitution, the former under Part 2 and the latter under Part 3 of that Chapter. Clearly, there can be no argument about the justiciability and enforceability of s 74. As regards s 81, the correct position relative to the application of Part 3 is amply clarified by s 79 which provides as follows:

> "(1) This Part elaborates certain rights and freedoms to ensure greater certainty as to the application of those rights and freedoms to particular classes of people.
> (2) This Part must not be construed as limiting any right or freedom set out in Part 2."

The objective underlying Part 3 of Chapter 4 is unequivocally clear. It is to elaborate certain rights and freedoms so as to ensure greater certainty in their application to particular classes, namely, women, children, the elderly, the disabled and war veterans. The objective is certainly not to dilute, diminish or devalue the rights that are particularised in Part 3, but rather to fortify those rights by elaborating and imbuing them with a greater measure of certitude. It follows, in my view, that the rights accorded to children under ss 74 and 81 of the Constitution are not only justiciable but also constitutionally enforceable.

Access to Adequate Shelter or Housing

Section 28 of the Constitution, which appears in Chapter 2 under the broad rubric of National Objectives, provides that:

> "The State and all institutions and agencies of government 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." (My emphasis)

It is immediately apparent that the obligation imposed upon the State and other governmental institutions and agencies to avail access to adequate shelter is one that is to be fulfilled within the limits of the resources available to them. This qualification is significant but does not absolve the State of its administrative obligation to take reasonable legislative and other measures to enable the populace as a whole to have access to adequate shelter.

The equivalent provision under the South African Constitution is contained in s 26(1) which provides for a "right of access to adequate housing". The obvious distinction between this provision and our s 28 is that, in addition to the obligation imposed upon the State, it also confers a corresponding right to housing. In the leading case of *Government of the Republic of South Africa* v *Grootboom* 2001 (1) SA 46 (CC), it was observed that access to land, services and a dwelling is also included in the right to access to adequate housing. Additionally, the State, through legislative and other measures, must create the conditions for access to adequate housing for people at all economic levels of society (at para. 35). The obligation upon the State is to achieve "the progressive realisation of this right" by examining and lowering legal, administrative, operational and financial hurdles over time. However, this does not deprive the obligation of all meaningful content. The State remains bound to move as expeditiously and effectively as possible towards the goal of full realisation of the right, with full use of the maximum resources available (at para. 45).

In any event, as I have already intimated, the obligation imposed upon the State in terms of our s 28 to adopt reasonable measures is significantly qualified by the limits of available resources. As was explained in *Grootboom, supra*, at para. 46:

> "…….. the obligation to take the requisite measures is that the obligation does not require the state to do more than its available resources permit. This means that both the content of the obligation in relation to the rate at which it is achieved as well as the reasonableness of the measures employed to achieve the result are governed by the availability of resources. Section 26 does not expect more of the state than is achievable within its available resources. …….. .
>
> There is a balance between goal and means. The measures must be calculated to attain the goal expeditiously and effectively but the availability of resources is an important factor in determining what is reasonable."

I shall revert to the question of reasonableness later in this judgment in the context of the right to shelter in the particular circumstances of this case.

Protection against Arbitrary Eviction

Section 74 of the Constitution guarantees the freedom from arbitrary eviction and stipulates that:

> "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."

Commenting on the South African equivalent, *i.e.* s 26(3), which is *ad idem* with our s 74, Currie & De Waal: *The Bill of Rights Handbook* (6th ed. 2013), at p. 586, summarise this provision as follows:

> "The general right of access to housing can be negatively enforced against improper invasion in the form of arbitrary evictions. Section 26(3) puts the matter beyond doubt by expressly entrenching a conventional negative right, unqualified by considerations relating to the state's available resources, against arbitrary evictions and demolitions."

Within the broader context of housing rights generally, the learned authors, at p. 586, observe that:

> "…….. mass eviction is a retrogressive step on the road to the promotion of the right of access to adequate housing and needs to be justified, not just on its own terms as an eviction, but also within the bigger picture of progressive housing delivery."

The meaning of the word "home", as used in s 74, is to be very broadly construed. The word embraces both permanent and temporary places of abode as well as shacks and informal dwellings. It has also been conceptually defined to mean a shelter against the elements providing some of the comforts of life with some degree of permanence. See *Ross* v *South Peninsula Municipality* 2001 (1) SA 589 (C); *Port Elizabeth Municipality* v *Various Occupiers* 2005 (1) SA 217 (CC), at 228; Currie & De Waal, *op. cit.* at p. 587; *City of Harare* v *Mukunguretsi & Ors* SC 46-18, at p. 6; *Zuze* v *Trustees of Mlambo & Anor* SC 69-19, at p. 14.

In *Zuze's* case, *supra*, at pp. 14-15, this Court elaborated the essential elements of the freedom from arbitrary eviction and demolition under s 74:

> "The essential elements of the protection afforded by s 74 are twofold. The first is that no person may be evicted from his home or have his home demolished 'without an order of court'. This is a basic procedural requirement to ensure that the law is followed in conformity with due process. This was underscored in the *City of Harare* case (*supra*), at paras. 12 & 15, as a prerequisite to the lawful demolition of the respondents' homes. …….. .
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> The second element relates to the possible arbitrariness of an eviction and necessitates that the court seized with the matter must consider 'all the relevant circumstances' before it grants an order of eviction or demolition. With respect to the South African equivalent of our s 74, *i.e.* s 26, the provision has been construed to confer not only a procedural right but also a substantive benefit to include the issue of whether or not the prospective evictee has access to alternative housing."

As regards what constitutes "all the relevant circumstances" for the purposes of s 74, the Court took the view that the legality or otherwise of occupation by the potential evictee was immaterial and did not detract from the scope and extent of the protection afforded by the section. It was held, at p. 16:

> "In the final analysis, what is required in considering all the relevant circumstances is a balancing exercise between the rights and interests of all the parties involved in or affected by the eviction dispute. In the instant case, the relevant circumstances are relatively clear. The appellant was a *bona fide* occupier who was not aware that the subdivision that he occupied was illegal. He had been residing on the land in question for almost nine years. What is not apparent from the record is whether he had suitable alternative accommodation or land to occupy consequent upon his eviction from the property.
>
> What emerges from the foregoing factual conspectus is that the appellant had a direct and substantial interest in the matter notwithstanding that his occupation of the property might have been illegal. In terms of s 74 of the Constitution, he had a procedural right to be heard *apropos* all the relevant circumstances pertaining to his occupation of the property."

The relative immateriality of the applicant's illegal occupation was further underscored, at pp. 18-19:

> "There is no doubt that the appellant has no substantive real rights in the property in question. Nevertheless, although s 74 of the Constitution does not confer any substantive real rights, it operates to guarantee the procedural rights that I have elaborated above on any person who stands to be evicted from his home. Moreover, the ambit of the protection accorded by s 74 is not confined to strictly legal occupants of land or property. Having regard to the plain and ordinary connotation of a 'home', that protection extends as well to unlawful occupiers of any property that can be characterised as constituting a home."

In my view, the privacy and sanctity of one's domestic space, and the potential trauma of being forcibly or involuntarily ejected from one's home, cannot in any situation be overemphasised. As was recognised in the *Port Elizabeth Municipality* case, *supra*, at para. 17:

> "Section 26(3) evinces special constitutional regard for a person's place of abode. It acknowledges that a home is more than just a shelter from the elements. It is a zone of personal intimacy and family security. Often it will be the only relatively secure space of privacy and tranquillity in what (for poor people in particular) is a turbulent and hostile world. Forced removal is a shock for any family, the more so for one that has established itself on a site that has become its familiar habitat. As the United Nations Housing Rights Programme report points out:
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> 'To live in a place, and to have established one's own personal habitat with peace, security and dignity, should be considered neither a luxury, a privilege nor purely the good fortune of those who can afford a decent home. Rather, the requisite imperative of housing for personal security, privacy, health, safety, protection from the elements and many other attributes of a shared humanity, has led the international community to recognize adequate housing as a basic and fundamental human right.'."

In any event, it is salutary to point out that s 74 does not preclude eviction generally and clearly acknowledges the possibility of informal settlers being evicted under due process, even if this results in the loss of their home. However, this does not mean that homelessness should invariably and immediately eventuate in all cases. The private landowner of property that is occupied by illegal settlers may have to be patient in the course of eviction. By the same token, the State or relevant local authority may have to take the requisite measures, within their available resources, to avert or mitigate the spectre of homelessness. Such limitations upon the rights of private landowners and the imposition of correlative obligations upon the State and local authorities may be warranted in the interests of justice and equity and dictated by the prevailing circumstances.

The aforegoing considerations were aptly highlighted in *City of Johannesburg Metropolitan Municipality* v *Blue Moonlight Properties 39 (Pty) Ltd* 2012 (2) SA 104 (CC), at paras. 40 & 100:

"It could reasonably be expected that when land is purchased for commercial purposes the owner, who is aware of the presence of occupiers over a long time, must consider the possibility of having to endure the occupation for some time. Of course a property owner cannot be expected to provide free housing for the homeless on its property for an indefinite period. But in certain circumstances an owner may have to be somewhat patient, and accept that the right to occupation may be temporarily restricted, as Blue Moonlight's situation in this case has already illustrated. An owner's right to use and enjoy property at common law can be limited in the process of the justice and equity enquiry …….." [para. 40]

"The relief sought in the Occupiers' cross-appeal must therefore be considered in order not to render them homeless. The date of eviction must be linked to a date on which the City has to provide accommodation. Requiring the City to provide accommodation 14 days before the date of eviction will allow the Occupiers some time and space to be assured that the order to provide them with accommodation was complied with and to make suitable arrangements for their relocation. Although Blue Moonlight cannot be expected to be burdened with providing accommodation to the Occupiers indefinitely, a degree of patience should be reasonably expected of it and the City must be given a reasonable time to comply. The date should not follow too soon after the date of the judgment." [para. 100]

The same considerations were further elaborated in *City of Johannesburg* v *Changing Tides 74 (Pty) Ltd* 2012 (6) SA 294 (SCA), at para. 25:

"Reverting then to the relationship between ss 4(7) and (8), the position can be summarised as follows. A court hearing an application for eviction at the instance of a private person or body, owing no obligations to provide housing or achieve the gradual realisation of the right of access to housing in terms of s 26(1) of the Constitution, is faced with two separate enquiries. First it must decide whether it is just and equitable to grant an eviction order having regard to all relevant factors. Under s 4(7) those factors include the availability of alternative land or accommodation. The weight to be attached to that factor must be assessed in the light of the property owner's protected rights under s 25 of the Constitution, and on the footing that a limitation of those rights in favour of the occupiers will ordinarily be limited in duration. Once the court decides that there is no defence to the claim for eviction and that it would be just and equitable to grant an eviction order it is obliged to grant that order. Before doing so, however, it must consider what justice and equity demands in relation to the date of implementation of that order and it must consider what conditions must be attached to that order. In that second enquiry it must consider the impact of an eviction order on the occupiers and whether they may be rendered homeless thereby or need emergency assistance to relocate elsewhere. The order that it grants as a result of these two discrete enquiries is a single order. Accordingly it cannot be granted until both enquiries have been

> undertaken and the conclusion reached that the grant of an eviction order, effective from a specified date, is just and equitable. Nor can the enquiry be concluded until the court is satisfied that it is in possession of all the information necessary to make both findings based on justice and equity."

Ejection without Due Process or Court Order

Reverting to the situation *in casu*, the essence of the appellants' complaint in the first ground of appeal is that the court *a quo* failed to find that the respondents could not eject the appellants without due process and without a valid court order. This ground was not specifically motivated in argument before this Court but was not abandoned and therefore remains to be dealt with and determined.

In its judgment, the court *a quo* was evidently alive to the need to prevent the arbitrary eviction of the appellants. The learned judge opined that "the applicants and their children must be given an opportunity for genuine consultation. Adequate notice to all those affected of the scheduled eviction, information on the proposed evictions and the alternative purpose for which the land is required must be given". He proceeded to find that "notice of the proposed eviction must be given within a reasonable time. The evictions must be supervised and should not be done in the terror of night. The respondents may not evict the applicants without due process of law". In any event, the court declined to grant the interdictory relief sought barring the respondents from ejecting the appellants from the informal settlement situated on Haydon Farm.

It should be borne in mind that the application before the court *a quo* was for a declarator and consequential relief having regard to the particular circumstances of the

appellants' occupation of Haydon Farm. They had been given some unspecified form of notice to vacate the farm and were required to move out to enable the third respondent to carry out the construction of houses on the land. However, what was before the court was not an actual application for eviction or a counter-application to resist any claim for eviction. Thus, the court was not called upon to consider all the relevant circumstances or whether or not the requirements of due process had been complied with, for the specific purpose of granting or declining an eviction order. The criteria and considerations that I have delineated above *vis-à-vis* s 74 of the Constitution would only have been relevant in evaluating the right to shelter that was claimed by the appellants in terms of s 81(1)(f) of the Constitution. This is a somewhat different inquiry and one that I shall address in that larger context later in this judgment.

In any event, it is indisputably clear that there was no application for eviction before the court *a quo*. The court was not called upon to evict the appellants at the behest of the respondents or anyone else. What it did was to deal with the specific application before it and to decline the declaratory and interdictory relief that was sought by the appellants. Nevertheless, in so doing, it explicitly found that the appellants must be given adequate notice of the proposed eviction and that any such eviction must be duly supervised. More emphatically, it also found in unequivocal terms that the respondents could not evict the appellants "without due process of law" and therefore, by necessary implication, without a valid court order. It follows that the first ground of appeal *in casu* is entirely misconceived and misplaced. It must accordingly be dismissed.

Right of Children to Shelter

Section 81 elaborates the particular rights of children. In the portions that are relevant for present purposes, it declares that:

> "(1) Every child, that is to say every boy and girl under the age of eighteen years, has the right—
>
> (*a*) ……..;
> (*b*) ……..;
> (*c*) ……..;
> (*d*) to family or parental care, or to appropriate care when removed from the family environment;
> (*e*) ……..;
> (*f*) to education, health care services, nutrition and shelter;
> (*g*) ……..;
> (*h*) ……..; and
> (*i*) …….. .
>
> (2) A child's best interests are paramount in every matter concerning the child.
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> (3) Children are entitled to adequate protection by the courts, in particular by the High Court as their upper guardian."

Mr *Biti* submits that s 81 of the Constitution is distinguishable from certain other rights incorporated in the Declaration of Rights. In particular, environmental rights (s 73), the right to education (s 75), the right to health care (s 76) and the right to food and water (s 77) are all qualified by the injunction to achieve their progressive realisation within the limits of the resources available to the State. In contrast, the rights of children entrenched in s 81 are not so qualified. They are only subject to the limitations codified in s 86 of the Constitution. They must therefore be regarded as standing on their own. Furthermore, so he submits, s 81(1)(f) applies to every child irrespective of the primary parental obligation. The State is obligated to provide for the child, especially where the parents concerned are indigent.

Ms *Munyoro* does not take any issue with these submissions. She also accepts that s 81 applies whether the child in question is under parental care or is institutionalised under State care. However, she contends that there is no obligation on the State to provide for any child under parental care. Consequently, so she submits, the primary obligation to provide shelter lies on the parents of the child concerned. She further relies upon the *Grootboom* case, *supra*, for the proposition that there is no primary obligation on the State to provide shelter. The equivalent provision in the South African Constitution, *i.e.* s 28(1)(c), is identical to our s 81(1)(f) and, therefore, the decision in *Grootboom* should not be distinguished or departed from. Mr *Runganga* agrees with these submissions and adds that s 81(1)(f) only obliges the State to step in where children have not been provided for by the parents and have been institutionalised.

In the South African context, Currie & De Waal, *op. cit.*, at p. 610, opine that the textual differences between s 28(1)(c) and ss 26 and 27 (relating to the provision of housing, health care, food, water and social security for everyone) would support the interpretation that s 28(1)(c) was intended:

> "to impose a direct duty on the state to ensure that children must have their socio-economic rights met immediately, and that budgetary arguments cannot account for failure on the part of government."

This interpretation is bolstered by the decision in *Governing Body of the Juma Masjid Primary School* v *Essay N.O.* 2011 (8) BCLR 761 (CC). In that case, the court highlighted the distinctive features of the right to a basic education from the right to further education under s 29 of the South African Constitution, at para. 37, as follows:

> "It is important, for the purpose of this judgment, to understand the nature of the right to 'a basic education' under section 29(1)(a). Unlike some of the other socio-economic rights, this right is immediately realisable. There is no internal limitation requiring that the right be 'progressively realised' within 'available resources' subject to 'reasonable legislative measures'. The right to a basic education in section 29(1)(a) may be limited only in terms of a law of general application which is 'reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom'. This right is therefore distinct from the right to 'further education' provided for in section 29(1)(b). The state is, in terms of that right, obliged, through reasonable measures, to make further education 'progressively available and accessible'."

As regards the decision in the *Grootboom* case, *supra*, Currie & De Waal, *op. cit.*, at p. 611, observe that the effect of that decision *vis-à-vis* children's socio-economic rights, such as the right to housing, "underwent a positive adjustment in the *TAC* case". In that case, *Minister of Health* v *Treatment Action Campaign* 2002 (5) SA 721 (CC), the court dealt with access to treatment to avoid mother-to-child transmission of HIV/AIDS in the context of children born in public hospitals to indigent mothers. The court was called upon to interpret ss 28(1)(b) and 28(1)(c) of the South African Constitution, the equivalent of our ss 81(1)(d) and 81(1)(f), *apropos* the provision of basic health care services by the State and/or by parents and the family. The court recalled its earlier judgment in *Grootboom*, where it was held that paras. (b) and (c) of s 28(1) must be read together so that "a child has the right to family or parental care in the first place, and the right to alternative appropriate care only where that is lacking". The court then proceeded to qualify its earlier decision insofar as concerns the position of children born to indigent mothers who could not afford to pay for basic health care services. The obligations of the State in that particular situation were underscored and articulated, at paras. 76-79, as follows:

> "Counsel for the government, relying on these passages in the *Grootboom* judgment, submitted that section 28(1)(c) imposes an obligation on the parents of

the newborn child, and not the state, to provide the child with the required basic health care services.

While the primary obligation to provide basic health care services no doubt rests on those parents who can afford to pay for such services, it was made clear in *Grootboom* that

> '[t]his does not mean . . . that the State incurs no obligation in relation to children who are being cared for by their parents or families.'

The provision of a single dose of nevirapine to mother and child for the purpose of protecting the child against the transmission of HIV is, as far as the children are concerned, essential. Their needs are 'most urgent' and their inability to have access to nevirapine profoundly affects their ability to enjoy all rights to which they are entitled. Their rights are 'most in peril' as a result of the policy that has been adopted and are most affected by a rigid and inflexible policy that excludes them from having access to nevirapine.

The state is obliged to ensure that children are accorded the protection contemplated by section 28 that arises when the implementation of the right to parental or family care is lacking. Here we are concerned with children born in public hospitals and clinics to mothers who are for the most part indigent and unable to gain access to private medical treatment which is beyond their means. They and their children are in the main dependent upon the state to make health care services available to them."

It is axiomatic that the Constitution must be interpreted in an holistic and seamless fashion. Each provision is to be interpreted, without doing violence to the actual language used, in a manner that is consistent and accords with every other relevant provision, so as to achieve the underlying purpose of those provisions. They must be construed as being mutually complementary rather than as being contradictory to one another. In short, the Constitution must be construed as a unified whole.

Reverting to s 81(1) of our Constitution, I am persuaded to adopt the more purposive approach to the interrelationship between paras. (d) and (f) of s 81(1). I do not think that those paragraphs must necessarily be read so that para. (f) is construed as being

subordinated to or diminished by para. (d). In other words, the obligation of the State to provide shelter to children in need in terms of s 81(1)(f) is not contingent upon the absence of parental care or other appropriate care under s 81(1)(d). The obligation of the State in this respect is not negated or diluted by the primary duty of care ordinarily imposed upon parents. In most situations where socio-economic normalcy is possible, where children are living with their parents, the parental duty of care must predominate so as to proportionately reduce the State's correlative obligations. However, where the parents themselves are financially or otherwise incapacitated from fulfilling their parental obligations, it then becomes incumbent upon the State to intervene and carry out its own obligation to ensure that the children's welfare is adequately addressed and safeguarded. In my view, this interpretation is entirely concordant with the ultimate objective of s 81, *viz.* to secure the best interests of the child. To conclude on this aspect, the primary duty of care reposed with parents in respect of their own children does not operate to absolutely absolve the State of its underlying obligation of care towards those children.

Best Interests of the Child

By virtue of s 81(2) of the Constitution, the best interests of the child are paramount in every matter concerning the child. With reference to the equivalent s 28(2) in the South African Constitution, Currie and De Waal, *op. cit.*, at p. 620, make the point that this provision constitutes "a right, and not merely a guiding principle" and "in addition to being a self-standing right it also strengthens other rights". In this connection, the learned authors cite the case of *Minister of Welfare and Population Development* v *Fitzpatrick* 2000 (3) SA 422 (CC), at paras. 17 & 18:

> "Section 28(1) is not exhaustive of children's rights. Section 28(2) requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1). …….. .
>
> …….. . However, the "best interests" standard appropriately has never been given exhaustive content in either South African law or in comparative international or foreign law. It is necessary that the standard should be flexible as individual circumstances will determine which factors secure the best interests of a particular child."

While the best interests of the child must be treated as being paramount, they do not necessarily override other rights entrenched in the Declaration of Rights. This important rider was emphasised in *De Reuk* v *Director of Public Prosecutions (Witswatersrand Local Division)* 2004 (1) SA 406 (CC), at para. 55:

> "In the High Court judgment, the view is expressed that persons who possess materials that create a reasonable risk of harm to children forfeit the protection of the freedom of expression and privacy rights altogether, and that section 28(2) of the Constitution 'trumps' other provisions of the Bill of Rights. I do not agree. This would be alien to the approach adopted by this Court that constitutional rights are mutually interrelated and interdependent and form a single constitutional value system. This Court has held that section 28(2), like the other rights enshrined in the Bill of Rights, is subject to limitations that are reasonable and justifiable in compliance with section 36."

The same qualified approach was adopted in *Centre for Child Law* v *Minister of Justice and Constitutional Development* 2009 (6) SA 632 (CC), at para. 29:

> "…….. . The constitutional injunction that '[a] child's best interests are of paramount importance in every matter concerning the child' does not preclude sending child offenders to jail. It means that the child's interests are 'more important than anything else', but not that everything else is unimportant: the entire spectrum of considerations relating to the child offender, the offence and the interests of society may require incarceration as the last resort of punishment."

It is also necessary to bear in mind that the paramountcy principle itself is not self-defining but generally indeterminate. It must perforce take colour from and be informed by the particular circumstances of each case, having regard to those factors that will effectively secure the best interests of the child. The intrinsic flexibility of the "best interests" provision was ably articulated in the case of *State* v *M* 2008 (3) SA 232 (CC), at paras. 23 & 24:

> "Once more one notes that the very expansiveness of the paramountcy principle creates the risk of appearing to promise everything in general while actually delivering little in particular. Thus, the concept of 'the best interests' has been attacked as inherently indeterminate, providing little guidance to those given the task of applying it. …….. .
>
> These problems cannot be denied. Yet this Court has recognised that it is precisely the contextual nature and inherent flexibility of section 28 that constitutes the source of its strength. …….. . Viewed in this light, indeterminacy of outcome is not a weakness. A truly principled child-centred approach requires a close and individualised examination of the precise real-life situation of the particular child involved. To apply a pre-determined formula for the sake of certainty, irrespective of the circumstances, would in fact be contrary to the best interests of the child concerned."

The decision in *State* v *M* also highlights the point that the paramountcy principle, although seemingly emphatic and unfettered, is not absolute but subject to reasonable limitation. As was appositely observed, at paras. 25 & 26:

> "A more difficult problem is to establish an appropriate operational thrust for the paramountcy principle. The word 'paramount' is emphatic. Coupled with the far-reaching phrase 'in every matter concerning the child', and taken literally, it would cover virtually all laws and all forms of public action, since very few measures would not have a direct or indirect impact on children, and thereby concern them. Similarly, a vast range of private actions will have some consequences for children. This cannot mean that the direct or indirect impact of a measure or action on children must in all cases oust or override all other considerations. If the paramountcy principle is spread too thin it risks being transformed from an effective instrument of child protection into an empty rhetorical phrase of weak application, thereby defeating rather than promoting the objective of section 28(2).

> The problem, then, is how to apply the paramountcy principle in a meaningful way without unduly obliterating other valuable and constitutionally-protected interests.
>
> This Court, far from holding that section 28 acts as an overbearing and unrealistic trump of other rights, has declared that the best interests injunction is capable of limitation. …….. . Accordingly, the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited."

Reasonable Limitations and Reasonable Measures

Section 86 of our Constitution prescribes the manner in and extent to which fundamental human rights and freedoms may be subjected to limitation or derogated from. Section 86(1) stipulates that rights and freedoms "must be exercised reasonably and with due regard for the rights and freedoms of other persons". Section 86(2) states that rights and freedoms "may be limited only in terms of a law of general application and to the extent that the limitation is fair, reasonable, necessary and justifiable in a democratic society". Section 86(2) also delineates the relevant factors that are to be taken into account in determining the fairness, reasonableness, necessity and justifiability of any such limitation. The list of these relevant factors is not exhaustive. Additionally, s 86(3) enumerates those rights enshrined in Chapter 4 that may not be limited by any law or violated by any person. The right of access to housing or shelter is not specifically included in the rights so enumerated.

Mr *Biti*, relying on the *Grootboom* case, *supra*, submits that socio-economic rights generally are justiciable and that the State must formulate and implement reasonable policies and programmes to achieve those rights in accordance with s 19 of the Constitution. The response of the State *in casu* is to deny its obligations and its attitude is

cavalier and unacceptable. It has simply asked the appellants "to join the queue for land" even though they have been settled on Haydon Farm since 2000 in tandem with the Land Reform Programme. The draft order prayed for by the appellants is designed to achieve the progressive realisation of the appellants' right to shelter.

Ms *Munyoro* contends that the appellants are not entitled to the relief that they seek. They are illegal settlers and their actions cannot be sanitised. They should, like any other citizen seeking shelter, apply to the relevant authorities to be allotted other land for their settlement. She further argues that, if the appellants are poor and cannot provide shelter for themselves, the children will be institutionalised and the State will take over and provide for their welfare.

When questioned by the Court, Ms *Munyoro* reluctantly conceded that it would be preferable to leave children with their parents as this option would be more practicable and less costly for the State. Mr *Biti*, in his replying submissions, also agreed that children should not be taken away from their family and parents and that it would clearly be more expensive for the State to institutionalise children. Furthermore, to remove children from their family would be socially damaging and give rise to their proclivity towards crime and violence.

Section 25 of the Constitution enjoins the State and its institutions and agencies, *inter alia*, "to protect and foster the institution of the family". The National Objectives pertaining to children are captured in s 19 of the Constitution. In particular,

s 19(1) calls upon the State to "adopt policies and measures to ensure that, in matters relating to children, the best interests of the children are paramount". More specifically, s 19(2)(b) requires the State to "adopt reasonable policies and measures, within the limits of the resources available to it, to ensure that children …….. have shelter and basic nutrition, health care and social services".

The obligation of the State to adopt reasonable policies and measures subject to the limitation of available resources, was extensively canvassed in the *Grootboom* case, *supra*, in considering the right of access to adequate housing. It is instructive to highlight the principal observations of the court in that case, at paras. 41-44:

> "The measures must establish a coherent public housing programme directed towards the progressive realisation of the right of access to adequate housing within the state's available means. The programme must be capable of facilitating the realisation of the right. The precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive. They must, however, ensure that the measures they adopt are reasonable. …….. . It is necessary to recognise that a wide range of possible measures could be adopted by the state to meet its obligations. Many of these would meet the requirement of reasonableness. Once it is shown that the measures do so, this requirement is met.
>
> The state is required to take reasonable legislative and other measures. Legislative measures by themselves are not likely to constitute constitutional compliance. Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. …….. . An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state's obligations.
>
> In determining whether a set of measures is reasonable, it will be necessary to consider housing problems in their social, economic and historical context and to consider the capacity of institutions responsible for implementing the programme. The programme must be balanced and flexible and make appropriate provision for attention to housing crises and to short, medium and long term needs. A programme that excludes a significant segment of society cannot be said

> to be reasonable. Conditions do not remain static and therefore the programme will require continuous review.
>
> …….. . To be reasonable, measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realise. Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right. It may not be sufficient to meet the test of reasonableness to show that the measures are capable of achieving a statistical advance in the realisation of the right. Furthermore, the Constitution requires that everyone must be treated with care and concern. If the measures, though statistically successful, fail to respond to the needs of those most desperate, they may not pass the test."

The court proceeded to examine the reasonableness of the measures adopted by the State. It noted that the housing programme in question was not haphazard but represented a systematic response to a pressing social need by seeking to build a large number of houses for those in need of better housing. Furthermore, appropriate legislative measures had been undertaken at both the national and provincial levels, through the Housing Act, so as to produce a workable legislative framework for the delivery of houses nationally [paras. 54 & 55]. Nevertheless, the court questioned and found lacking the adequacy of the national housing programme in relation to those in desperate need of shelter. The sentiments of the court, at paras. 56-69, are particularly germane to the circumstances *in casu*:

> "This Court must decide whether the nationwide housing programme is sufficiently flexible to respond to those in desperate need in our society and to cater appropriately for immediate and short-term requirements. This must be done in the context of the scope of the housing problem that must be addressed. …….. ." [para. 56]
>
> "Section 26 requires that the legislative and other measures adopted by the state are reasonable. To determine whether the nationwide housing programme as applied in the Cape Metro is reasonable within the meaning of the section, one must consider whether the absence of a component catering for those in desperate need is reasonable in the circumstances. …….. ." [para. 63]

> "…….. . The housing development policy as set out in the Act is in itself laudable. It has medium and long term objectives that cannot be criticised. But the question is whether a housing programme that leaves out of account the immediate amelioration of the circumstances of those in crisis can meet the test of reasonableness established by the section." [para. 64]

> "…….. . The desperate will be consigned to their fate for the foreseeable future unless some temporary measures exist as an integral part of the nationwide housing programme. Housing authorities are understandably unable to say when housing will become available to these desperate people. The result is that people in desperate need are left without any form of assistance with no end in sight. ….. ." [para. 65]

> "…….. . The nationwide housing programme falls short of obligations imposed upon national government to the extent that it fails to recognise that the state must provide for relief for those in desperate need. They are not to be ignored in the interests of an overall programme focused on medium and long-term objectives. …….. ." [para. 66]

> "In conclusion it has been established in this case that as of the date of the launch of this application, the state was not meeting the obligation imposed upon it by section 26(2) of the Constitution in the area of the Cape Metro. In particular, the programmes adopted by the state fell short of the requirements of section 26(2) in that no provision was made for relief to the categories of people in desperate need identified earlier. …….. ." [para. 69]

The related question that arises in the context of the broader realisation of the right to housing is whether it is always unreasonable to order the eviction and relocation of persons, even if this would entail their temporary or short-term homelessness. Approximately nine years after *Grootboom*, in the case of *Residents of Joe Slovo Community, Western Cape* v *Thubelisha Homes* 2010 (3) SA 454 (CC), this question was answered in the negative. It was held, at paras. 115 & 116:

> "The applicants are being evicted and relocated in order to facilitate housing development. In the circumstances their eviction constitutes a measure to ensure the progressive realisation of the right to housing within the meaning of section 26(2) of the Constitution. …….. .
>
> Eviction is a reasonable measure to facilitate the housing development programme. In addition, all the factors discussed in relation to the question

> whether it is just and equitable to grant the eviction order also justify a conclusion that the eviction is, in the circumstances, reasonable."

This decision brings to the fore the perennial tension between the rights of the community at large and those of its less privileged segments. While it is always desirable to reconcile and accommodate the interests of all sections of the community, this may not always be realistic or practicable. Each unique situation must be considered on its own peculiarities and subjected to the governing test of reasonableness, regarded as between groups or individuals and as between the State and its citizens. Ultimately, the criterion of flexibility in balancing competing interests comes into play so as to determine whether or not it is just and equitable to order the eviction of the persons concerned in all the relevant circumstances of the case.

Appropriate Relief

In the particular context of eviction, I have already observed that the eviction of people living in informal settlements may take place, even if this results in the loss of their homes. See the *Port Elizabeth Municipality* case, *supra*, at para. 21. Nevertheless, it remains imperative in that situation that eviction and relocation should take place in conformity with justice and equity. This was emphasised in the *Joe Slovo Community* case, *supra*, at para. 114:

> "I have come to the conclusion that, provided that the order for the eviction and relocation of the applicants makes appropriate provision for the safe, dignified and humane relocation of all the people involved, the eviction and relocation of the applicants will be in accordance with justice and equity. I would propose an order that would, as far as possible, achieve this."

Section 175 (6) (b) of our Constitution empowers every court, "when deciding a constitutional matter within its jurisdiction", to "make any order that is just and equitable". In framing an appropriate order that is just and equitable, the courts are at large to take into account all the relevant circumstances of the case, including the nature of the right infringed and the nature of the infringement. Moreover, whilst being attuned and sensitive to the doctrine of separation of powers, they should be astute not to be unduly constrained or intimidated by considerations of governmental policy. This was emphatically spelt out in the *Treatment Action Campaign* case, *supra*, at paras. 98-112:

> "This Court has made it clear on more than one occasion that although there are no bright lines that separate the roles of the legislature, the executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation. This does not mean, however, that courts cannot or should not make orders that have an impact on policy." [para. 98]
>
> "…….. . Where state policy is challenged as inconsistent with the Constitution, courts have to consider whether in formulating and implementing such policy the state has given effect to its constitutional obligations. If it should hold in any given case that the state has failed to do so, it is obliged by the Constitution to say so. In so far as that constitutes an intrusion into the domain of the executive, that is an intrusion mandated by the Constitution itself. …….. . Even simple declaratory orders against government or organs of state can affect their policy and may well have budgetary implications. Government is constitutionally bound to give effect to such orders whether or not they affect its policy and has to find the resources to do so. …….. ." [para. 99]
>
> "…….. . Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of section 172(1)(a) a court may also 'make any order that is just and equitable'." [para. 101]
>
> "We thus reject the argument that the only power that this Court has in the present case is to issue a declaratory order. Where a breach of any right has taken place, including a socio-economic right, a court is under a duty to ensure that effective relief is granted. The nature of the right infringed and the nature of the infringement will provide guidance as to the appropriate relief in a particular case.

> Where necessary this may include both the issuing of a mandamus and the exercise of supervisory jurisdiction." [para.106]
>
> "What this brief survey makes clear is that in none of the jurisdictions surveyed is there any suggestion that the granting of injunctive relief breaches the separation of powers. The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies – particularly when the state's obligations are not performed diligently and without delay." [para. 112]

Analysis of Judgment *A Quo*

It is necessary to set out the approach adopted by the court *a quo* in its interpretation of s 81(1)(f) of the Constitution and its application to the circumstances before the court. The learned judge held as follows:

> "Section 81(1)(f) creates the right to shelter but does not create an absolute, independent and separate justiciable right to shelter for children. Section 81(1)(f) does not place a primary obligation on the State and its agents to provide shelter to children who are in the care of their parents on demand. ……..
> The State is obliged to take reasonable legislative and other measures within the resources available to it to ensure progressive realisation of the right and ensure that children enjoy parental care. …….. . The parents have a primary obligation to ensure that their children have shelter. The children are not in the care of the State nor have they been removed from their parents. These children are different from those who are in the care of State institutions who are the primary responsibility of the State and hence there is no primary obligation on the State to provide them with shelter. All the State is required to do is to create an enabling environment by putting in place a legislative framework and other measures for parents to ensure that they are able to provide their children with shelter. Section 81(1)(f) does not create an absolute right to shelter for children."

The gravamen of these findings is twofold. The first is the proposition that s 81(1)(f) of the Constitution does create a right of shelter for children but not one that is absolute, independent and justiciable and, by implication, not one that is legally enforceable. The second is the conclusion that s 81(1)f) does not place any primary obligation on the State to provide shelter for children who are in the care of their parents.

In that situation, the State is enjoined to take reasonable legislative and other measures which are to be progressively realised, so as to enable parents to provide their children with shelter. I take the view, with great respect, that the first proposition is contradictory and questionable, albeit not in its entirety, and that the second cannot be sustained on a proper purposive construction of s 81, taken as a whole and as read with other relevant provisions of the Constitution.

As I have endeavoured to demonstrate earlier, the paramountcy principle enunciated in s 81(2) of the Constitution is conceived to secure the best interests of the child. It is a self-standing independent right and operates to fortify the rights entrenched in s 81(1). However, the best interests of the child do not necessarily override or trump other rights and interests. The concept of "best interests" is an indeterminate and flexible one that must take its shape and content from the particular circumstances of each given case. To this extent, it is correct to take the view that the paramountcy principle embodied in s 81(2) as well as the right to shelter guaranteed by s 81(1)(f) are not unfettered or absolute but are subject to reasonable qualification and limitation where this is necessary and justified.

Nevertheless, although the parameters of the rights set out in s 81(1)(f) may not necessarily be unlimited, I have no doubt in my mind that they are justiciable. Section 81 appears in Part 3 of the Declaration of Rights. That part is designed to elaborate the rights particularised in their application to certain classes, including children, so as to configure them with greater certitude. In addition, the right to shelter conferred upon

children by s 81(1)(f) is further enhanced by s 19(2)(b) of the Constitution. The latter provision enjoins the State to adopt reasonable policies and measures, within the limits of available resources, to ensure that children have shelter. As I have already concluded earlier, it is incontrovertibly clear that the right to shelter for children, as entrenched in s 81(1)(f) and as bolstered by s 19(2)(b), is eminently justiciable and legally enforceable.

The more problematic area of concern relates to the respective roles of the State and parents *vis-à-vis* children who are under parental or familial care. In this situation, there can be no doubt that the primary duty to afford shelter to children reposes in their parents. The obligation of the State in this context is probably best described as being essentially secondary and supportive in nature, to wit, to assist parents in the provision of shelter and nutrition to their children. However, as was acknowledged even in the *Grootboom* case, *supra*, this does not mean that the State incurs no obligation in relation to children under the care of their parents or families. In my view, in certain circumstances, s 81(1)(f) may be invoked to impose a direct duty on the State, despite budgetary or other material constraints. This duty was unreservedly recognised in the *Treatment Action Campaign* case, *supra*, as regards the provision of urgent and essential health care for children born in public hospitals and clinics to mothers who are mostly indigent. I fully endorse the rationale of that decision and would cautiously extend it beyond incapacity due to penury to that arising from any other insuperable disability.

The direct duty of the State towards children under parental care is also affirmed in the two international instruments that I have adverted to earlier, *viz.* the United

Nations Convention on the Rights of the Child (1989) and the African Charter on the Rights and Welfare of the Child (1990). Zimbabwe is a party to both of these instruments and, consequently, our courts are constitutionally bound to take them into account in interpreting the Declaration of Rights. Both instruments recognise that the primary responsibility to secure the conditions of living necessary for the development of children lies on their parents. At the same time, however, they also declare that member States are obligated to take appropriate measures to assist parents, and provide material assistance and support programmes in cases of need, as regards nutrition, clothing and housing.

To conclude on this aspect, the obligations of the State in terms of s 81(1)(f) are not contingent upon the absence of parental or familial care. Those obligations are not counterposed but complementary to the primary duty of parental care envisaged in s 81(1)(d). In particular, the State must fulfil its own obligation to provide shelter to children whose parents are financially or otherwise incapacitated from fulfilling their parental obligations. In short, the primary duty of parental care does not absolve the State of its direct obligation to secure and provide for the best interests of the child.

In arriving at its decision to dismiss the application before it, the court *a quo* reasoned as follows. Firstly, the appellants had no legal right to be on the land, having settled there illegally without any lease, permit or offer of the land concerned. In short, their stay on the land had not been regularised. Secondly, the respondents had other plans for the land and the appellants could not demand alternative land as a condition to vacate Haydon Farm. The court could not compel the respondents to allocate land to the appellants

as that was a function that was purely in the domain of the State. Thirdly, the appellants could not insist on being allocated land in an urban setting. Section 81(1)(f) of the Constitution did not impose on the State an obligation to provide housing, land or shelter to anyone on demand. Finally, the court found that the respondents were pursuing a legitimate aim. The development of the area was necessary for urban development and expansion in a properly planned and orderly fashion. There was a pressing social need for housing and urban development. The interference with the appellants' occupation of the land was in the general public interest and was for a good cause. In the event, the court concluded that the forced eviction of the appellants was justified.

I fully appreciate that in making the above findings the court *a quo* was engaged in the process of exercising its discretion in the matter. It is also trite that an appellate court will not interfere with the exercise of judicial discretion by a lower court unless that court is found to have proceeded on some material misappreciation or misapplication of the law and/or the facts or where it has relied on some extraneous or irrelevant consideration or has failed to take into account some particularly relevant matter. *In casu*, I am of the considered view that the learned judge *a quo* critically misdirected herself in the following respects.

First and foremost, any proper analysis of a matter involving the possible eviction of persons necessitates, apart from the purely procedural requirement of a court order, a detailed and substantive consideration of all the relevant circumstances. As was elaborated in *Zuze*'s case, *supra*, at p. 16, this entails a balancing exercise between the

rights and interests of all the parties involved in or affected by the eviction dispute. This would include not only the prospective evictees and the landowner but also the State and its agents and institutions. Secondly, and in any event, as was emphasised in *Zuze*'s case, at pp. 18-19, the ambit of the protection accorded against arbitrary eviction is not confined to strictly legal occupants of the land or property concerned. Additionally, the rights of the landowner, whether public or private, may have to be temporarily circumscribed so as to obviate the possibility of homelessness. And if that is found to be impracticable, the State or relevant local authority may have to be imposed upon in order to temporarily accommodate the evictees.

In casu, the court *a quo* appears to have concentrated on the rights and interests of the respondents and the fact that they were pursuing the legitimate aim of urban development to address the pressing social need for housing and urban development. While these considerations are very laudable, there is very little on record, apart from bald and sketchy assertions, to substantiate the supposed housing development programme and the pressing social need therefor. More significantly, the court paid minimal regard to the rights and interests of the appellants themselves. It focused instead, quite erroneously, on the illegality of their occupation and their failure to regularise the same. It pointedly failed to take into account the facts that the appellants did not have the luxury of any alternative accommodation and that the minor appellants have been attending school in the informal settlement. It also disregarded the significant and critical reality that the appellants had been in occupation of their permanent homes on the farm since the year 2000, until those homes were demolished in 2005, and have since occupied their impermanent homes

thereafter. Lastly, but equally importantly, the court did not consider possible alternative measures that could have been taken by the respondents to accommodate the appellants elsewhere, either temporarily or permanently. It simply chose to distance itself from the appellants' predicament and consigned them to the ravages of impending homelessness.

Disposition

To conclude, I take the view that the court *a quo* erred in failing to correctly evaluate and apply the considerations calling for determination under s 74 of the Constitution *apropos* the potential eviction of any person from his or her home. The court further erred in its interpretation of s 81(1)(f) of the Constitution and consequently failed to appreciate the proper scope and extent of the right to shelter conferred upon children in terms of that provision.

It follows that the appeal must succeed, in the main, in respect of the second, third and fifth grounds of appeal. The first ground of appeal, as I have already concluded, is unmeritorious and is therefore dismissed. The fourth ground of appeal invokes s 81(5) of the Constitution, a manifestly non-existent provision, and is obviously quite superfluous. It is accordingly struck out.

What remains is to formulate the appropriate relief that should be granted in favour of the appellants. In that regard, it seems useful to restate the principles that should guide this Court in framing an order that is just and equitable in the circumstances of this case.

As is expressly enjoined by the Constitution, fundamental rights and freedoms must be exercised reasonably and with due regard for the rights and freedoms of others. In this respect, it is imperative not to lose sight of the rights and interests of the respondents. Consequently, they cannot be called upon to adopt much more than reasonable policies and measures, within the limits of the resources available to them, to secure the rights and interests of the appellants. In any event, it must be borne in mind that the appellants are relatively destitute and in desperate need of shelter. Moreover, in furtherance of the institution of the family, in conformity with s 25 of the Constitution, it would be more practicable and preferable for the minor appellants to stay with their parents instead of being institutionalised under State care. Ultimately, as I have stated earlier, it is necessary to apply the pivotal criteria of reasonableness and flexibility in balancing competing interests so as to arrive at an appropriate order that is just and equitable having regard to all the relevant circumstances of this case.

The draft order prayed for *in casu* has three distinct components. The first is an interdict against eviction from the informal settlement on Haydon Farm. The second is a *dectaratur*, relative to the right of children to shelter. Both of these prayers, with appropriate modifications, are quite compatible with the *rationes decidendi* expounded in this judgment. The more problematic component is the substantive relief that is sought by the appellants. The principal prayer in this respect is that the first and fourth respondents be ordered to set up a joint committee, inclusive of the appellants, to allocate serviced residential stands to the appellants on the informal settlement presently occupied by them and thereafter, within a period of 12 months, to construct minimum core houses on such

stands for and on behalf of the appellants. In the alternative, the first respondent is to be ordered to provide alternative land on which it must allocate residential stands in compliance with the abovementioned undertakings and specifications.

Apart from the logistical *minutiae* involved in the delivery of what the appellants seek, there is a glaring paucity of factual *data* on record as to the larger elements of the relief prayed for. This relates, *inter alia*, to the relevant development plans, cost implications and scope of coverage of the works envisaged. One assumes that there might be in existence specific development plans, possibly incorporating some form of housing programme, not only for Haydon Farm but also in respect of the Zvimba Rural District Council area as a whole. The second element is equally critical in assessing the budgetary and financial capacities of the first, second and fourth respondents, *qua* institutions of the State, to provide the requisite land, infrastructure and building material. Lastly, one cannot discount the probability that there are other destitute families and children in need of shelter, both on Haydon Farm and within the District area. It would be highly remiss and unreasonable to selectively focus on the appellants' needs without having regard to the housing needs of other persons in the area who are similarly situated. All of these larger elements are issues that should have been properly raised and thereafter thoroughly canvassed and ventilated in the proceedings *a quo*.

In my considered opinion, without this larger picture, this Court is not in any informed position to command the first, second and fourth respondents to comply with their underlying constitutional obligations in terms of ss 19(2)(b) and 28 of the

Constitution, *viz.* to adopt and take reasonable measures, within the limits of the resources available to them, to ensure that the appellants have access to adequate shelter. In short, the Court is critically hamstrung in its ability to afford the particular substantive relief that is craved by the appellants. On the other hand, as I have already stated, they remain entitled to the more specific declaratory and interdictory relief that they seek. As regards the latter, it may be necessary to add a further injunction to secure their stay on Haydon Farm against any interference with their homes and agricultural activities for the duration of their stay on the farm.

The grant of the aforestated relief affords to the appellants the requisite respite in the short term against the possibility of being rendered homeless in the immediate future. However, it does not address their housing situation thereafter. Equally importantly, it does not concretise the precise scope and nature of the respondents' obligations *in casu*, nor does it take into account or resolve their long term developmental concerns in respect of Haydon Farm. These are matters which, as I have already stated, should have been thoroughly and meaningfully addressed *a quo* but remain unresolved at this stage. In the event, it seems to me that the most judicious way forward is to remit this matter to the court *a quo* to enable it to fully adjudicate and definitively determine these outstanding issues. In this respect, it will be necessary for all the parties to present the requisite additional evidence in such form and manner as the court *a quo* may direct as being best suited to achieve that purpose.

Without attempting in any way to be exhaustive, I consider that the principal issues that should be canvassed and determined in the proceedings *a quo* would be the following:

(i) the specific housing requirements to adequately accommodate the appellants;

(ii) the material and financial resources available to the appellants themselves;

(iii) the possibility of voluntary or assisted relocation of the appellants to a different locality;

(iv) the availability of temporary accommodation elsewhere pending the provision of permanent housing;

(v) the requisite material and financial resources allocated for housing development purposes that may have been budgeted for and are available to the first, second and fourth respondents;

(vi) the technical and financial implications for the third respondent of modifying or delaying the housing development project in question.

As for costs, I see no compelling reason to deviate from the usual path that costs should follow the cause. The appellants, having succeeded in the main, are entitled to their costs on the ordinary scale.

It is accordingly ordered that:

1. The appeal is partially allowed with costs.
2. The judgment of the court *a quo* is set aside.

3. It is declared that the right of children to shelter, enshrined in s 81(1)(f) of the Constitution, is justiciable and enforceable as an independent right of all children, including children under parental care, subject to reasonable qualification and limitation where necessary and justified.
4. The matter is remitted to the court *a quo* to determine, following the adduction of further evidence by the parties and having regard to the principles and guidelines set out in this judgment, the respective obligations of the respondents as regards the rights and interests of the appellants, subject to such reasonable qualifications and limitations as may be necessary and justified in the circumstances of this case.
5. Pending the final determination of the court *a quo* pursuant to paragraph 4 above, the respondents and all those claiming authority through them be and are hereby interdicted from ejecting the appellants from the New Park Farm informal settlement situated on Haydon Farm, Old Mazowe Road, Mt. Hampden, Harare, or from interfering in any way with the homes and agricultural activities of the applicants within that informal settlement.

MAVANGIRA JA : I agree

MATHONSI JA : I agree

Tendai Biti Law, appellants' legal practitioners

Civil Division of the A-G's Office, 1st & 4th respondents' legal practitioners

Mbano & Partners, 2nd respondent's legal practitioners

Bherebhende Law Chambers, 3rd respondent's legal practitioners