COMMISSIONER OF POLICE v COMMERCIAL FARMERS' UNION 2000 (1) ZLR 503 (HC)

2000 (1) ZLR p503

Citation 2000 (1) ZLR 503 (HC)

Case No Judgment No. HH-84-00

Court High Court, Harare

Judge Chinhengo J

Heard April 10, 2000

Judgment April 13, 2000

Annotations None

Civil application B

[zFNz]Flynote

Constitutional law - Constitution of Zimbabwe 1980 - Declaration of Rights - s 18(1) - protection of law - duty of police to C afford such protection - separation of powers - relationship to rule of law - relevance to failure of police to take action where normally action would be taken

Police - duties - duty to enforce law and protect constitutional right to protection of the law - duty to disregard ministerial or D other orders to the contrary

Practice and procedure - order - by consent - must be complied with - timeous application in which explanation offered for non-compliance - effect of

[zHNz]Headnote

Following the invasion and occupation of numerous white-owned commercial farms by groups calling E themselves "war veterans", the respondent obtained a court order, issued by consent, which, among other things, declared the invasions to be unlawful and required the police, within seventy two hours of the issue of the order, to inform the invaders that the invasions were unlawful and to remove them if they did not leave the farms. The order also required the police to disregard any executive instructions to the contrary. Six days after the order was issued, the applicant applied to the court to delete the paragraphs of the court order requiring the police to F disregard contrary instructions from the executive and requiring the police to evict the invaders. The application did not address the other parts of the order directed at the police, requiring the police to inform the invaders that the invasion was unlawful. These other parts of the order were not complied with.

Although the application was not made on an urgent basis, the respondent applied for the matter to be treated as urgent.

The main ground for the application was that, after the order was issued, the police realised that they has G insufficient resources to effect the evictions. The applicant cited the size of the police force, the number of the invaders, the ongoing fuel shortage in the country, and transport and budgetary constraints. It was also argued for the police that to intervene in a situation that was charged with political and racial overtones would be ill advised and would ignite a powder keg. The land distribution and ownership pattern in Zimbabwe was iniquitous and should be rectified in the shortest possible time. The applicant applied, at the hearing, for the deletion of the order to instruct the invaders that the invasion was H

unlawful. The applicant argued, with regard to the concept of the rule of law, that enforcement of an unjust and A inequitable ethnically based ownership structure, through the application of brutal state power, such as demanded by the respondent, would not promote the rule of law.

It was argued for the respondent that the applicant should not be heard because, having failed to carry out the court's orders within seventy-two hours, he was in contempt. The application to delete the order to inform the invaders of the illegality of the invasion was opposed. The respondent argued that, in any case, the principle of B finality of litigation meant that the application could not be entertained. The respondent also asked that the applicant be ordered to pay the costs personally.

Held, that a court order must be obeyed until it is set aside. The wilful refusal to obey a court order amounts to contempt of court. It cannot be said, however, that there is wilful disobedience to a court order where the person against whom it is made timeously goes back to court to explain why he considers that he is unable to comply with the order. In the present case, it could not be said the police had not wilfully disobeyed the order to evict the C farm invaders as they had returned to court timeously to explain why they felt unable to comply with the order. As Saturdays and Sundays do not form part of the period within which a court order must be carried out, the application had been made timeously. It was different, however, in respect of the order against the police that they must inform the invaders of the illegality of their actions. This order remained in force and had to be complied with.

Held, further, that the application was concerned with the enforcement of the court's order, not with the question of land distribution. D

Held, further, that although the police might be stretched, the fact was that they had not even attempted to enforce the court order. If some attempt has been made to enforce the order, the court's attitude might have been different.

Held, further, that police intervention was unlikely to ignite an already explosive situation. Where the executive had acted on the previous farm invasions, the invasions had ended.

Held, further, that the protection of the law and the police's duty in the that regard provided under s 18(1) of the Constitution extended to protection in respect of a person's civil rights. In the present case the civil rights of E members of the respondent were violated. An order was issued by the court to the applicant to protect the civil rights of the petitioners. The consent order could be equated to and was in effect an order of mandamus, for it required the applicant to act to prevent the violation of the civil rights of respondent's members. The police have a duty to enforce the law and investigate crime and to disregard ministerial orders to the contrary. The applicant clearly had the public duty to enforce the consent order and to afford the members of the respondent the protection of the law enshrined in s 18(1) of the Constitution. If the court were to accede to a variation, F amendment or other detraction from the order, it would not be upholding its sworn duty - to uphold the law of Zimbabwe. The applicant could not be allowed to adopt stratagems to obviate the absolute necessity of implementing an order of the court, more so where such order has been issued with his informed consent.

Held, further, that where a written constitution, amenable to amendment by the people is in existence, and statute laws, old and new exist, and which the people's representatives can amend or repeal, an argument such G as the one advanced by the applicant with regard to the rule of law was spurious. The rule of law meant that everyone must be subject to a shared set of rules that are applied universally and which deal on an even-handed basis with people and which treat like cases alike. It meant that those who are affected by official inaction should be able to bring actions on the basis of official rules - i.e. the law - to protect their interests.

Held, further, that the applicant had not only failed to lay the basis for the relief he sought under H

the common law but has also failed to satisfy the court that this would be an appropriate case to grant such A relief. Under r 449 of the High Court Rules, the applicant had to give a reasonable explanation of the circumstances in which the consent order was entered and there must be a bona fide defence on the merits of the case which prima facie carries some prospect of success. As the applicant's legal representatives were involved in the formulation of the consent order and in amending it to suit the applicant's position, there was no basis on which the court could revisit the order.

Held, further, that in view of the lack of support for the applicant from the executive, he should not be penalised B personally with regard to costs.

[zCIz]Cases Considered

Cases cited:

Bheka v Disablement Benefits Bd 1994 (1) ZLR 353 (S)

Binza v Acting Dir of Works & Anor 1998 (2) ZLR 364 (H)

Chavhunduka & Anor v Commissioner of Police & Anor 2000 (1) ZLR 418 (S)

Culverwell v Beira 1992 (4) SA 490 (W) C

Deweras Farm (Pvt) Ltd & Ors v Zimbank 1997 (2) ZLR 47 (H)

Firestone SA (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A)

Forum Party of Zimbabwe & Ors v Min of Local Govt & Ors 1996 (1) ZLR 461 (H)

Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd 1998 (2) ZLR 488 (S)

Kandy Farm (Pvt) Ltd & Anor v Eastwood 1996 (2) ZLR 729 (S)

Kassim v Kassim 1989 (3) ZLR 234 (H)

Ndebele v Ncube 1992 (1) ZLR 288 (S) D

R v Metropolitan Police Commissioner, ex p Blackburn [1968] 1 All ER 763 (CA)

RAG (Pvt) Ltd v Huizenga NO 1986 (2) ZLR 203 (S)

Stumbles & Rowe v Mattinson 1989 (1) ZLR 172 (H)

[zCIz]Case Information

P A Chinamasa, Attorney-General, for the applicant

A P de Bourbon SC, for the respondent E

[zJDz]Judgment

Chinhengo J: On 16 February 2000, Zimbabwe's Liberation War Veterans embarked on a campaign to occupy commercial farms and ranches owned or occupied by white people in Zimbabwe. The War Veterans were joined in this campaign by other land hungry black Zimbabweans or by other Zimbabweans who were aggrieved by the pattern of land distribution and ownership in Zimbabwe. This campaign commenced in Masvingo Province and it soon spread to other parts of the country. The campaign has now earned itself the epithet "farm invasion". I F shall for convenience use this epithet also. When many more farms and ranches throughout Zimbabwe were thus invaded, the respondent applied to this court in Case No. HC-3544-2000 for an order that would, but for subsequent events, have brought about a cessation of the campaign. The order was sought against Border G Gezi, the Governor for Mashonaland West, Dr Chenjerai Hunzvi, the Zimbabwe National Liberation War Veterans Association and the Commissioner of Police as first, second, third and fourth respondents respectively. In that application, an order was granted by consent by my brother Garwe J on 17 March 2000 ("the Consent Order"). H

The order reads: A

"It is ordered that -

1. Every occupation of any property listed in the Schedule hereto or any other commercial farm or ranch in Zimbabwe that has been occupied since 16 February 2000 in pursuit of any claim to

a right to occupy that property as part of the demonstrations instigated, promoted or encouraged by any person, is hereby declared unlawful. B

2. All persons who have taken up occupation of any commercial farm or ranch in Zimbabwe since 16 February 2000 in pursuit of any claim to a right to occupy that property as part of the recent demonstrations instigated, promoted or encouraged by any person shall vacate such land within 24 hours of the making of this Order.

3. The first three respondents be and are hereby ordered not to encourage allow or otherwise participate in any demonstration in protest against the holding of commercial farming or ranching land in Zimbabwe according to the race of the present owners or occupiers thereof in so far as such demonstration: C

3.1 comprises the entry upon any farm or ranch by five or more persons; and/or

3.2 persists for more than two hours; and/or

3.3 extends at any time to the presence of any of those persons at a point closer than 100 metres from any point of any residence on the property or into the area included in any security fence; or

3.4 purports in any way to be designed to acquire control of the farm, ranch or any part thereof otherwise than in accordance D with the laws of Zimbabwe;

3.5 This order shall not prevent the 2nd Respondent from addressing any such occupants in order to achieve the peaceful removal or ejectment of such occupants.

4. The applicant shall forthwith announce:

4.1 on radio and television over periods of not less than 20 seconds each, four times a day in each of Shona, Ndebele and E English for three successive days; and

4.2 through the medium of two major newspapers circulating within Zimbabwe where the announcements shall appear in respect of advertisements covering not less than two columns by 15cm on three successive days.

The precise terms of the first four paragraphs of this Order and those media reports shall be deemed to be adequate notice for purposes of r 37, Order 5 of the High Court Rules 1971, to persons subject to the Order set out in para 2 hereof of their obligation to vacate those farms. F

5. The fourth respondent is ordered to direct all officers and members of the Zimbabwe Republic Police that:

5.1 the uninvited presence on any ranch or farm of any persons for more than two hours can constitute the offence of contravening paragraph (b) or para (c) of subs (1) of s 5 of the Miscellaneous Offences Act [Chapter 19:05];

5.2 any report of any such presence shall be investigated immediately and unless the persons present have good and G sufficient reason to remain on the farm, they shall be removed from the farm;

5.3 any claim that the persons' presence on the farm is justified by virtue of a desire to occupy the land because of a wish to protest against racial distribution of commercial farming land in Zimbabwe or the State's obligation to provide him or herself or others with land on which to settle is not a good enough and sufficient reason; H

5.4 all persons who have taken part in the recent demonstrations instigated, promoted or encouraged by any person shall A be ordered to vacate the land that they occupy forthwith and all those who remain in occupation 24 hours after the making of this Order or who resume occupation or re-enter the land are to be arrested and charged with such offences as they may have committed.

6. The fourth respondent is ordered to disregard any executive instruction that he may receive, from any person holding Executive Power in Zimbabwe, to the effect that the Zimbabwe Republic Police or any member thereof is not to assist any Deputy Sheriff B or Messenger of Court in the service and enforcement of any order of eviction made by the civil courts of Zimbabwe and he is ordered to direct all members of the Zimbabwe Republic Police to disregard any such instruction.

7. The fourth Respondent is also ordered to disregard any such executive instruction to disregard any offence other than a First Schedule Offence, as defined in the Criminal Procedure and Evidence Act [Chapter 9:07] that may be committed in the course of demonstrations in favour of the redistribution of land in Zimbabwe and he is ordered to direct all members of the Zimbabwe C Republic Police to disregard any such instruction.

8. In so far as any person who gained occupation of any property listed in the Schedule on or after 16 February 2000 in association with the aforementioned demonstrations may remain on the land more than 72 hours after the making of this Order, the fourth respondent is ordered forthwith to deploy such manpower, having regard to available resources, as is reasonably necessary to evict all such persons from any land with their families and their belongings and to this end the Fourth Respondent shall: D

8.1 ensure that all persons so evicted are correctly identified and that their names and addresses are recorded; and

8.2 ensure that all offences that are reported to have occurred on each such farm are fully and properly investigated. E

9. The costs of this application shall be reserved for determination at a future date."

The order by consent was granted by Garwe J after the parties, all represented by their legal practitioners, had haggled over the wording of the order for some time outside the judge's chambers. It is evident that certain amendments were made to the respondent's original draft order as a result of the haggling that took place. For instance: F

(a) the reference by name to "Cde Border Gezi the first respondent, Dr Chenjerai Hunzvi the second respondent, or the Zimbabwe National Liberation War Veterans Association, the third

respondent or by any one or more of them" as being the persons who had instigated, promoted or encouraged the farm invasions was deleted from para 1 of the order and the phrase "any person" substituted; G

(b) a similar reference in para 2 was also deleted;

(c) in para 3 the words "interdicted from encouraging allowing or otherwise participating", which was the substance of the relief sought against the first three respondents, were deleted and substituted with the words "ordered not to encourage, allow or otherwise participate"; H

(d) a new subpara 3.5 was inserted and reads as it appears in the consent order; A

(e) para 8 was amended by the insertion of the words "having regard to available resources" to qualify the requirement that applicant was to deploy manpower necessary to effect the evictions. Subparagraph 8.1 was also amended in respect of the identification by name and address of the farm invaders by inserting the B phrase "as far as is possible";

(f) a whole paragraph was deleted from subpara 8.2 which read:

"and the fourth respondent is ordered to report to the registrar of this Honourable Court what the police have done in this regard (in respect of full and proper investigation of offences reported to have occurred on each farm) in every Province by 31 March 2000, such report to be filed by 7 April 2000. A copy of such report shall also be served on Messrs Coghlan Welsh and Guest the C legal practitioners for the applicant";

(g) Paragraph 9 was amended from requiring that the costs of the application be paid by the first three respondents jointly and severally to that the costs "be reserved for determination at a future date".

Paragraphs 6 and 7 of the original draft order were not amended at all. The evidence placed before me is that the D amendment to para 8 was insisted upon by the applicant's legal practitioners, who wished to make it clear that the applicant was to be required to deploy such manpower as was reasonably required to effect the evictions having regard to the available resources.

It is necessary for me to analyse the import of the order by consent in order to provide the background necessary for a better appreciation of the arguments advanced in this application. E

The salient features of the order by consent were the following:

(a) the invasion of the farms were declared to be unlawful (para 1);

(b) all the farm invaders were to vacate the land within 24 hours of the making of the Order (para 2); F

(c) the first three respondents in that application were ordered not to encourage, allow or otherwise participate in the farm invasions. "Farm invasion" was defined by reference to number of

person involved, the duration of their sojourn on the farm, proximity to residential premises on the farm, and the purpose of the invasion (para 3);

(d) the second respondent in that application was allowed to address the farm invaders to achieve their G peaceful removal from the farms (para 3.5);

(f) the respondent was required to place advertisements through the electronic and print media for a period of three days as notice to the farm invaders of the obligation to vacate the farms (para 4);

(g) the applicant was ordered to advise members of the police force that the farm invasions constituted a criminal offence under the Miscellaneous H

Offences Act; that the police force was going to investigate the presence of uninvited occupants on the A farms and that such uninvited occupants would be removed from the farms; that any claim that the occupation of the farms by the invaders was justified as a protest against racial distribution of land in Zimbabwe was not a good and sufficient reason to remain in occupation of the farms and that the farm invaders were required to vacate the farms within 24 hours of the making of the Order and those who B remained in occupation, or re-entered the land would be arrested and charged with any offences which they may have committed (para 5);

(h) the fourth respondent was ordered to disregard any instruction from the executive arm of Government, or any member thereof, which may have required the police not to assist any deputy sheriff or messenger of C court in carrying out the evictions or any instruction to disregard any offence committed during the farm invasions (paras 6 and 7);

(i) the fourth respondent was ordered to deploy such manpower "having regard to available resources" as was reasonably necessary to evict the farm invaders (para 8). D

It must be noted that the applicant did not file any opposing papers to the respondent's application. The applicant had four days within which to file any such opposing papers if he had wished to do so. He was content to negotiate with the other parties and, in particular, the respondent for an order by consent to be issued by the court. From the papers before me, it is clear that the applicant through his legal representatives actively participated in drawing up the order by consent. They must have, over a period of four days, actively considered E the ramifications of the order which the applicant in that matter was seeking.

After the order by consent was issued and after the 72 hours had expired from which moment the applicant was required to carry out the evictions, the applicant, instead of enforcing the court order, filed, on 23 March 2000 an F application in which he sought an order to delete paragraph 6, 7 and 8 of the Consent Order. This application was made as an ordinary court application which in the nature of things, would have been heard after at least two months from the date of filing it. The application was not made on an urgent basis which would have meant that the matter could be heard as a matter of priority. The effect of this application was to render the enforcement of G certain parts of

the order by consent sub judice with the result that the applicant was not to act in terms of paragraphs 6, 7 and 8 of the consent order. If this was the effect of the application, the remaining portions of the consent order would be given effect to. This meant that in terms of para 1 of the consent order, the farm invasions would remain H

2000 (1) ZLR p510

CHINHENGO J

illegal; in terms of para 2 the farm invaders were to vacate the farms within 24 hours; in terms of para 3 the A words "farm invasion" were to be understood as defined and Dr Chenjerai Hunzvi could address the invaders with a view to have them move off the farms; in terms of para 4 the respondent would advertise the order as notice to the farm invaders to vacate the farms and in terms of para 5 the applicant would inform members of the B police force about the criminal nature of the farm invasions, the requirement that the invaders should move off the farms or be moved by the police, that their reasons for remaining on the farms were not good and sufficient reasons to do so, and that if they remained on the farms they would be charged with offences that they would have committed in addition to being forcibly evicted. C

The respondent filed its opposition to the application for the order to delete paragraphs 6, 7, and 8 of the Consent Order. The respondent warned that it would also apply to court for the application to be heard on an urgent basis. The respondent then filed an interlocutory application in which it sought an order that the applicant was, if it so wished, to file its answering affidavit in the main application by 1.00 p.m. on Wednesday 5 April 2000 and that the D main application should be set down for hearing on Thursday 6 April 2000 at 10.00 a.m. Another order by consent was issued by Garwe J on 6 April 2000. The main application was set down for argument for 10.00 a.m. on 10 April 2000. The applicant was to file his answering affidavit and heads of argument by 2.00 p.m. of Friday 7 E April 2000, and the respondent was to file its heads of argument by not later than 8.30 a.m. on Monday 10 April 2000. The application was to be heard in open court.

As a result of this, the second consent order, the matter was set down before me on 10 April 2000 as directed by Garwe J. The applicant's heads were filed out of time on Monday, just before the hearing commenced. A F satisfactory explanation was proffered by the Attorney-General for this non-compliance with the terms of the second consent order. Argument was heard over a period of some three hours from about 10.00 a.m. to about 1.00 p.m.

The applicant's case was that soon after the order by consent of 17 March 2000 was issued by Garwe J, it became apparent to the applicant that the order was not possible of enforcement by the applicant. The applicant G averred that it did not have adequate resources to enforce the order and that even if the resources were available the enforcement of the order was ill advised as it would worsen the security situation in the country. I will examine these grounds in detail. H

2000 (1) ZLR p511

CHINHENGO J

LACK OF RESOURCES A

The applicant acknowledges that the farm invasions constitute a contravention of the Miscellaneous Offences Act. The intensity and pattern of the offences has, in the applicant's words, "turned the problem into a monumental one". He says that as, at the date of the hearing, over 1 000 farms had been invaded by more than 58 000 people. The applicant avers that the "scatteredness" of the farm invasions pits the task of enforcement B against the meagre resources available to the police force. He explained that the police operate through police stations dotted all over the country with a majority of these stations concentrated in the urban areas because of higher population concentrations. An average rural police station has a complement of sixty officers and covers a C radius of 100 km or more. The police establishment is about 20 000 men and women. The force had, as at the time that the affidavit was filed, 2 100 serviceable vehicles, including 894 vehicles acquired from the British Government in terms of a bilateral agreement which prohibited the use of the vehicles in riotous situations. The farm invasions would be viewed as a riotous situation in terms of the agreement, he said. D

In respect of other resources, the applicant avers there is an acute fuel shortage in the country that has hampered the work of the police force. The force has not been spared from the fuel shortages. The police force has already exhausted its budget for rations and so it would not be able to feed its members on active duty on the farms and ranches. The operation itself requires additional resources in the form of troop carriers, ammunition and tear smoke which the force does not presently have. It would require an additional allocation of E funds. Some parts of Zimbabwe have become inaccessible because of the havoc wreaked by the recent cyclone, Eline, and if deployments were made to these areas it would be extremely difficult to provide back-up service and reinforcements. The Zimbabwe National Army caused a public outcry when it was involved in the F food riots in Harare in 1998 and it is reluctant to get involved this time around.

The respondent submits that the averment that the police force has no resources to handle the farm invasions does not hold water. It is grossly exaggerated, unfounded and contrived. The suggestion that the police establishment of 20 000 would not be able to contend with about 58 000 is untrue. The pattern of the farm G invasions has been that the numbers of farm invaders constantly fluctuates. There are desertions. Individual groups move from farm to farm, or ranches, over a couple of days. The pattern has been to create "hot spots of terror" in various districts which are designed to constitute threats and examples for other farms which were or are invaded on a less offensive, but nonetheless illegal, basis in the areas surrounding each H

"hot spot". The numbers of invaders is therefore much less than that given by the police. A

The respondent avers that the greater number of farm invaders are not war veterans. The majority of them are unemployed youths from urban and rural township areas and some of them have been paid to participate in the campaign. The respondent estimated that the number of war veterans involved was below 1 000. The B respondent relied on situation reports submitted to it from farmers throughout the country whose farms have been invaded. Such farmers, in my view, would have no interest in minimizing the scale of the invasions so far as the numbers of the invaders were concerned. On the contrary, they would be expected to inflate the numbers of the invaders so as to

create a greater image of crisis. Although I cannot, on the evidence, make a definitive C finding on the numbers of farm invaders, I think that they are large enough to cause concern on the part of the invaded, which is common cause, and large enough to stretch to the limit the resources available to the police in handling the evictions.

The respondent does not accept the claim that the police force does not have enough manpower to handle the situation. The respondent say that the police force has a well trained and equipped Support Unit set up to deal D with situations such as the situation prevailing in the country at the moment. In the respondent's view there is no need to deal with all situations simultaneously because the level of aggression on different farms varies and it is relatively limited on each day. The respondent believes that the real reason for failing to commit manpower to the E termination of farm invasions is to be found in applicant's own views of the farm invasions which views are sympathetic, and not antagonistic, to the farm invasions.

I incline towards the views expressed by the respondent in respect of the adequacy of manpower resources without at all minimizing the assessment of the applicant. The police force is the most visible and deterrent expression of State power in the daily lives of the citizenry. Its mere presence and involvement is a sufficient F deterrence on its own against disobedience of the law. It represents an organisation that has the ability to overwhelm any person with physical force if that person resists its demands. It can call on that force any time to enforce the decisions of the courts. It can ask political leaders to deploy more resources, manpower and material, if that is necessary to resist a challenge to its authority. Its potential power is enormous, for in the last G resort it can call upon all the organised force of the State. It is an immensely powerful organisation.

The respondent further avers that the police force could, in its effort to suppress the invasion, have enough vehicles available to it. Vehicles could be taken from other Ministries or borrowed from the Zimbabwe National H

Army. The farming community itself is more than willing to make vehicles available to the police. The fuel A situation, though extant, is not an insurmountable obstacle and therefore it is not acceptable as a reason for the police not to act. The State regulates the distribution of fuel and it can prioritise fuel supplies to the police force for the exercise. The respondent notes that in any case the fuel supply situation has much improved to about 80% of normal supplies. B

The excuse that the police does not have the money to provide rations to its members is for the same reasons also unacceptable. Equally, so the excuse that it has still to acquire and stock up additional resources such as troop carries, ammunition and tear smoke. The financial year began in January 2000 and it is hardly possible that the police force would have exhausted its budget for rations. The effect of Cyclone Eline has no real impact on C the exercise as very few properties fall within the areas affected by the cyclone and in any case the national army would be able to assist.

The applicant denies in its answering affidavit that the numbers of people involved in the farm invasions is exaggerated. He avers that the police establishment of 20 000 includes non-operational staff such as nurses, D doctors, technicians and administrators. The number of farms invaded

continues to grow and the numbers of people involved to swell as more and more people are joining in. The police is not aware of fluctuations in number and of desertions. In its answering affidavit the applicant does not sufficiently dispute the allegation that persons other than war veterans constitute the larger majority of farm invaders. It states that it is not aware of the exact composition of persons involved nor the diversity of their reasons for their involvement. The support unit E comprises some 1 645 members as a part of the whole force strength of 20 000 members. That unit is over-stretched because of other national commitments and as such it is inadequate to deal with the situation. The police stations country-wide are equally over-stretched even to deal with ordinary issues of policing and for F this reason it is intended to increase the police strength by about 6 000 members. The applicant avers further that the shortage of resources is a real predicament that the police force finds itself in. In respect of motor vehicles, the applicant states that it is general knowledge in the country and therefore common cause that police stations do not have adequate vehicles for the normal policing duties. He further states that it is beyond his G authority to take vehicles from other ministries or State agencies. So far as the money for rations and additional resources is concerned, the applicant avers that the police did not budget for a situation of the magnitude such as is concerned in this application.

One must express some sympathy for the applicant in respect of the availability of resources. Certain averments he makes tell of what is generally H

known by many in this country. The police do not have enough vehicles for their normal policing work. They A would therefore be severely constrained in the present situation. Fuel supplies have, over the past few months, been insufficient to meet the ordinary requirements of the motoring public. Even if priority was given to the police the shortage of fuel would still be a factor to reckon with. That the police has no money to ration its members, whilst possible, is an assertion which is subject to some doubt. No figures were placed before the court to prove B the absence of funds for rations. It is hardly four months into the financial year and one would think that funds for this purpose are still available. It would be assumed that in its planning and financial estimates the police force would provide for contingencies.

Greater sympathy must, I think, be expressed for the applicant in respect of receiving additional resources from C the executive arm of Government in the form of either obtaining vehicles from other Government ministries or agencies or in the form of directing the national army to render any assistance. It is true that resource or additional resources can only be made available by the Executive. The Executive is not a party to this application, so it has not put its position across and should therefore not be condemned without a hearing. What, however, is D clear from the papers before me and what has not been strongly challenged is that the Executive appears sympathetic to the cause of the present campaign by the war veterans. That that sympathy exists founds or is the basis of the formulation of paras 6 and 7 of the consent order. And that being the case, the Executive would not be willing to provide further assistance to the police force. I do not intend to make a finding on the attitude of E the Executive but suffice it to state that the applicant may not, as he urges the court to accept, be able to access additional resources without the Executive providing such additional resources.

The sympathy which I have expressed for the applicant should not blind anyone from seeing the more fundamental aspects of this case in their proper context. The factor of resources is what the parties recognised F when they agreed to the formulation of para 8 of the consent order. The underlying perception must have been that the police force would, to the best of its ability and with the resources available to it, act to terminate the farm invasions. It must have been naturally hoped that the Executive would provide whatever additional resources, within its means, as were required by the police force. What is, however, glaringly apparent is that the applicant G has not acted at all. His explanation is that after the order was issued a fresh assessment of the situation revealed that the police could simply not embark on such a mammoth task on the resources available to it. And for that reason it did not act. It must be apparent that I do not find this reason to be convincing enough. I shall revert to this explanation for the omission to act later in the judgment. H

2000 (1) ZLR p515

CHINHENGO J

THE IGNITION OF THE POWDER KEG ARGUMENT A

It was urged upon the court by the Attorney-General that the lack of resources should not be viewed in isolation from another and perhaps more important consideration. If the consent order was enforced, a powder keg would be ignited, he said, basing his submissions on the applicant's averments. The situation was charged with B political and racial overtones, and any intervention by the police would be ill-advised. The farm invasions had not only been politicised and racialised but internationalised as well. The British Government had jumped into the fray. South African white opposition parties had jumped into the fray. The land question in Zimbabwe had been portrayed as a black on white confrontation. Those who had jumped into the fray did so on the side of the white C commercial farmers against the aspirations of the black people of this country. Land redistribution on its own is always an emotional issue but when it is coloured by factors of race, colonial history and international interference it becomes a more intractable problem. The farm invaders had threatened to resist any police action to evict them and the police were not taking this threat lightly. Some of the invaders may in fact be armed. In his D own words, the applicant described his assessment in these words:

"9. Those people who have invaded the farms have threatened resistance and as Police we cannot take this lightly. However, of greater concern to the police is the fact that even taking a single intervention on a specified farm, such intervention cannot and should not be taken naively as a once off intervention. In the event of resistance, and in this regard police should anticipate that resistance can take many forms from the peaceful to the not-so-peaceful and to violence. Police may be required to provide E back-up services such as reinforcements. Worse if resistance is violent and takes the form of armed resistance. More back-up services become an imperative in the planning and implementation process.

10. Also to be anticipated is what the reaction might be countrywide when news of Police intervention in one place reaches the other invaded farms not enjoying Police protection. In their assessment, Police intervention in one place will apocalyptically provide F the match stick that will ignite this beautiful country of ours into a bloody conflagration. In their painstaking consideration of the question of enforcement of the order the police have looked over the edge of the cliff, over the

brink and they see nothing but an abyss if police intervene. Police feel enforcement of the order will render the law and order situation worse than it is at the present moment and this probably ranks the understatement of the century. The purpose of this application is to bring, figuratively G speaking, this Honourable Court to the edge of the cliff and invite your Lordship to peep over the edge and be persuaded to agree that an enforcement of the order is tantamount to falling over the cliff, not for the court of course, but for the entire country. Committing hara-kiri for the people of this country is a decision that should not be taken lightly. It is strongly contended that from a security point of view given that the country is racially and polically polarised and is sitting on a powder keg, police enforcement H

of the Order will provide the match stick to light up the powder keg. This Honourable Court should weigh heavily and decide A whether by ordering enforcement of the order it is not going down in history as providing the match stick to torch the country. Such eventuality is calamitous for the country.

11. ... Police contention is that the land question is a complex, involved, divisive problem which is better resolved in the political arena. The countrywide trespasses are but a tip of the land question iceberg. A spirited police attack against a single farm invasion will not solve the problem but instead serve to trigger violent reactions which in its view might risk some of the members of the B respondent being killed. It will not take on its shoulders that awesome responsibility. Equally the courts are not the forum where the land problem can be solved. It required an armed struggle to begin to attempt a solution to the problem. Even in circumstances characterised by goodwill and co-operation, which unhappily are non-existent in our present situation, land reform and distribution problems take years to resolve. This Honourable Court should be mindful of that." C

These are lofty words indeed.

The applicant filed a supplementary affidavit in further support of the powder keg submission. In that supplementary affidavit, he drew the court's attention to an incident that took place in Marondera on 4 April 2000 in which a farm owner, a Mr Ian Kay was assaulted and a policeman was shot and killed. In my view, that D incident is as much supportive of the respondent's argument as it is of the applicant's argument.

The applicant gives a historical and current conspectus of the land question. He says that the land question in Zimbabwe seems to have evaded a solution over the years. The landless have hungered for land without much E palliation. The armed liberation struggle was waged principally over the question of land ownership as between whites and blacks. He laments that twenty years after independence about 4 000 white commercial farmers continue to own about 13.3 million hectares of the best land in the country whilst the majority of the black people of this country remain divorced from such land and the numbers of them who have no role to play in the agricultural economy of the country except one of dependency continues to grow. He describes the land F distribution and ownership pattern in Zimbabwe as iniquitous and opines that it should be rectified in the shortest possible time. Unfortunately, for the applicant, this application is not, as I shall show

later, essentially concerned with the question of land ownership and distribution in Zimbabwe. It is singularly concerned with the question of the enforcement of an order of this Honourable Court. I shall, therefore, not be sidetracked from the essential G issues before me in this application.

The respondent does not subscribe to this "powder keg" submission and submits that in any event there are dozens of smaller powder kegs that are being created by the failure of the police to take action. The situation that moved the respondent to seek the relief in the Consent Order is H

graphically described in the papers before the court and in particular in the founding affidavit in Case No. A HC-3544-2000. That description appears in paras 24-31 of the affidavit. It is to the following effect.

Some invasions are relatively peaceful and the invaders merely get onto the land and make themselves shelters. They cut down trees and mark their claims for land. There are other instances where farmers are told to vacate B their farms, farm occupants are abused and called derogatory names, drum beating to the accompaniment of songs outside the occupants' residence goes on for long periods or several days and nights. Senior farm workers are singled out for abuse. Farm occupiers' schedules and working practices are flouted or interfered with and attempts are made to provoke a reaction. The more aggressive invasions are characterised by persons carrying large sticks, old spears and assorted makeshift weapons. Farm tractors and equipment are C commandeered. Farm buildings are broken into and tools looted. Electricity supplies are cut off. Farm houses and workers residences are invaded. Tobacco reaping and curing is interrupted. In general, the civil rights of farmers and their workers are invaded.

Against this background the respondent submits that intervention by the police will not be the cause for igniting D the explosive situation and further, that even if it was, it would not be the sole cause for such an eventuality. The intensity of the "hot spot demonstration" that continue to be used as intimidatory displays poses a constant danger. Excesses are increasing arising from perceived political differences between the farm invaders and E some farm workers. The failure of the police to act provides encouragement to the farm invaders, with the result that they take more liberties. The respondent argues that the longer the police stand by, the bolder and less restrained will the farm invaders be and the more likely are there to be really serious incidents. The respondent contends that the flash point could also just as easily come from amongst the invaded because of persistent provocation, disruption of their farming activities, losses in production, the threat of escalation of violence and the F total inactivity of the police force. They may start some form of open resistance which could also spread throughout the country.

It is evident that the respondent views the situation quite differently to the applicant. It argues that the nature and extent of the invasions are not as subject to a national explosion as the applicant would have the court believe. G The respondent argues that the land invasion has the backing of the Executive and if only the Executive wished to do so it could, as it were, "turn off the tap" and bring an end to the invasions. The respondent refers to statements made to the electronic and print

media by some members of the Executive in apparent support of the invasions as indicia that, if they made similar H

statements against the farm invasions, the invasions would come to an end. The respondent does not therefore A share the applicant's view as to the extremely explosive nature of the situation and its apparent irreversibility.

From the evidence placed before me, I an inclined to agree with the respondent's view that police intervention is not likely to ignite an already explosive situation. Farm invasions are not a new phenomenon in Zimbabwe. They B have occurred in the past and when the police, with the support of the Executive have acted, the invasions have been brought to an end. It is accepted, though, that previous invasions were not spearheaded by war veterans who, it must be accepted, have a more credible ability and disposition to resist force and even to resist force with force, but their numbers are not perhaps as significant as they were, for instance, during the armed liberation struggle and their resolve not as strong. It must be held to their credit that they now must be C entertaining the hope, and not a forlorn one at that, that the Executive will address the land question once and for all, thereby dampening their ardour somewhat. This is a factor in my view which would seem to render the conflagration assessment untenable. D

THE ESSENCE OF THE PRESENT APPLICATION

The present application is not essentially concerned with whether the land distribution and ownership in Zimbabwe is fair. That may have been a line of defence possible to be taken up by the applicant in the application that resulted in the consent order. E

It is acknowledged by all and sundry that the land ownership and distribution pattern is not fair. In para 5.1 of its opposing affidavit, the respondent states:

"The Union accepts that the imbalance in the distribution of land between the black people and the white people of the country does present a source of friction between the community that must be eliminated." F

It speaks of its efforts at redressing the land question and lays the blame for lack of progress on the Government. I do not think, however, that the blame can be laid squarely on the Government alone. Both the white commercial farmers and the Government must bear the blame, if blame should be allocated. But this is not the point to deal with in this application, nor should my own views be regarded as the truth. The point in this application is whether G the failure of the respondent to enforce the consent order at all or in part is excusable on the grounds proffered and whether paras 6, 7 and 8 should be deleted as incapable of enforcement. The application raises issues relating to how consent orders should be dealt with, the role of the applicant in the face of a court order directing him to take certain action, the rule of law and perhaps obliquely, the question of disobedience. I will deal with all these H

CHINHENGO J

issues, having in mind the need to hand down this judgment within the shortest possible time. I undertook to do A so within at most three days from the date of the hearing. I shall not examine or consider all these issues in any great detail because of time constraints.

Mr de Bourbon raised two points in limine. The first was that the applicant should not be given audience by the court because he was in contempt of court in failing to obey the consent order. The second was that the B applicant had not laid a basis for this court to exercise its jurisdiction in this matter. He submitted that there were only two grounds on which the court's jurisdiction could be exercised - the first under r 449 of the High Court Rules and the second under the common law. I will deal with these points at once. C

CONTEMPT OF COURT

The consent order was issued on Friday 17 March 2000. At the expiration of the period of 72 hours from the making of the consent order, the police were required to deploy its members and evict all land invaders from the farms. The 72 hours expired at the latest by end of day on Wednesday 22 March 2000. Rule 4A of the Rules of this court provides that: D

"Unless a contrary intention appears, where anything is required by these rules or in any order of the court to be done within a particular number of days or hours, a Saturday, Sunday or public holiday shall not be reckoned as part of such period."

The police would therefore have been expected to commence to evict the land invaders on the morning of E Thursday 23 March 2000. Instead of doing so, the applicant filed, on the same date, the present application in which he is seeking the variation of the consent order. It must be observed that the applicant did not by his application challenge the validity of the consent order. He came to court, so to speak, to anticipate the charges of contempt and explain why, in his opinion, part of the order could not be enforced. F

It is indeed true that "all orders of this court, whether correctly or incorrectly granted, have to be obeyed until they are properly set aside" (Culverwell v Beira 1992 (4) SA 490 (W) at 494), but the same cannot be said where the person affected by an order of court goes back to that court, timeously in the circumstances, to explain himself and his perceived inability to comply with the order issued against him. He is in a sense purging his contempt, as G it were. This I find to be the situation in casu in respect of the applicant's conduct relative to paras 6, 7 and 8 of the consent order. The application filed by the applicant cannot in my view be construed as a wilful intention to disregard the order of the court. I would not find that the applicant is in contempt of the consent order in respect to his inaction relative to paras 6, 7 and 8 of the order. H

I cannot, however, say the same thing in relation to para 5 of the consent order. This paragraph ordered the A applicant to advise all members of the Zimbabwe Republic Police that the uninvited presence of persons for more than two hours on any of the farms constituted an offence under the

Miscellaneous Offences Act; that members of the Zimbabwe Republic Police should investigate their presence immediately with a view to removing such persons from the farms; that any claim to remain on the farms as a protest against the racial B distribution and ownership of land in Zimbabwe was not a sufficient reason to remain thereat; and that all persons who invaded the farms were being required to vacate the land, with those who remained there for more than 24 hours after the making of the order having to be arrested and charged with such offences as they may have committed. C

There was not placed before me any evidence that the applicant had complied with this paragraph. During the hearing, Mr Chinamasa said that the applicant had complied with this paragraph. Later, in his response to the respondent's submissions and after being asked by the court what the applicant's explanation was on his apparent non-compliance with para 5, Mr Chinamasa made an oral application to include para 5 among those D paragraphs which should be deleted. Needless to mention that Mr de Bourbon opposed this last minute amendment. The opposition was merited. The applicant had not sought, on his affidavits or in his earlier submissions to court, to have para 5 deleted along with paras 6, 7 and 8. The respondent had, in its papers, taken up the issue of applicant's non-compliance with para 5, but the applicant had not chosen to contest that E point or to amend its papers so as to seek the deletion of that paragraph. Quite obviously, the respondent's opposition to Mr Chinamasa's very belated application was justified. The respondent would have been severely prejudiced by such amendment.

If Mr Chinamasa's approach was that the inclusion of para 5 as one of the paragraphs to be deleted was to cure any failure by the applicant to comply with that paragraph and to avoid any allegation of contempt of court which F may arise therefrom, that approach should be, justifiably, sneered at. If Mr Chinamasa's application were to be granted then it would buttress the argument that the applicant deliberately refrained from giving effect to the consent order as a whole, including giving effect to paras 6, 7 and 8. I am not called upon to determine the question whether the applicant was in contempt of the court in respect of para 5. That is a separate question G which I do not have to answer in this judgment. The absence of any evidence to show compliance with para 5, which would seem to be the reason for Mr Chinamasa's application to have that paragraph deleted, would suggest however, that the applicant may have committed a contempt. This fact is relevant to my decision whether I should grant the application to include H

para 5 for deletion along with paras 6, 7 and 8. For the reasons I have given that application cannot be granted. A Regardless of the decision I will come to on paras 6, 7 and 8, para 5 remains a part of the order which the applicant is required to comply with. And for the reasons I have given I cannot find that the applicant was in contempt of court in respect of paras 6, 7 and 8 so as not to hear him. In any case, there is some concession that these paragraphs require to be explained by the court for their better understanding by everyone concerned. B

THE JURISDICTIONAL ISSUE

Mr de Bourbon submitted that the only bases upon which the applicant could approach this court for a "variation" C or alteration of its order are the provisions of r 449 of the Rules of this court and the common law. He submitted, further, that even if such bases existed the court should have regard to the principle of finality of litigation. He referred to Firestone South Africa (Pty) Ltd v Genticuro AG 1977 (4) SA 298 (A) at 306 where the judge said: D

"The general principle, now well established in our law, is that once a court has duly pronounced a final judgment or order, it has itself no authority to correct, alter or supplement it. The reason is that it thereupon becomes functus officio, its jurisdiction in the case having been fully and finally exercised, its authority over the subject matter has ceased."

He referred me to numerous other cases in this jurisdiction where this principle was accepted as correct, among E them Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corporation Ltd 1997 (2) ZLR 47 (H) at 61-62; Kandy Farm (Pvt) Ltd & Anor v Eastwood 1996 (2) ZLR 729 (S) at 734; Stumbles & Rowe v Mattinson; Mattinson v Stephenes & Ors 1989 (1) ZLR 172 (H) at 174; Kassim v Kassim 1989 (3) ZLR 234 (H) at 242; Bheka v F Disablement Benefits Board 1994 (1) ZLR 353 (S) at 357G and Ndebele v Ncube 1992 (1) ZLR 288 (S) at 290C-E.

I agree that the principle of finality of litigation must be upheld in every case where no other factor permissible at law exist to warrant a departure from that principle. If this were not to be so, these courts would be flooded with repeat litigation and the administration of justice would come to a halt. Litigants would themselves become G disenchanted by the litigation process and the existence of the courts and their purpose would be justifiably open to question. In this regard, I have had the benefit of the decision by MALABA J in City of Mutare v Mawoyo 1995 (1) ZLR 258 (H) where he deals almost exhaustively with the jurisdictional basis of alterations to judgments. Under common law, the position with regard to judgments by consent is even H

more circumscribed with respect to whether such judgments can be revoked or withdrawn. The applicant has A not only failed to lay the basis for the relief he seeks under the common law, but has also failed to satisfy me that this would be an appropriate case to grant such relief.

It was submitted on the applicant's behalf that this application was concerned with the manner in which the eviction is to be carried out and that that manner is a procedural matter. Consequently, the court can alter the B manner in which the eviction is to be carried out if sufficient cause is shown. Reliance was placed on Stumbles & Rowe v Mattinson 1989 (1) ZLR 172 (H). I must respectfully disagree with this submission. I hope I have shown quite clearly elsewhere in this judgment that this application is not in my view concerned with the manner of carrying out the evictions. It is, on the contrary, concerned with whether the applicant will carry out the evictions C at all. I therefore would reject this submission. Although the applicant refers to the relief he seeks as a variation of the consent order, it is in effect not such relief at all. It is, as I have already stated, an application to have a part of the consent order rescinded because the applicant thinks that it cannot be enforced. He wishes to be absolved from his obligations under the order for the reasons which he has given. D

Under r 449, it is my finding that not only is the application not for the variation of the consent order, but also that, even if it was, it does not satisfy the requirements of the rule, in particular the requirement that a reasonable explanation must be given on the circumstances in which the consent order was entered and that there must be E a bona fide defence on the merits of the case which prima facie carries some prospect of success (see Georgias & Anor v Standard Chartered Finance Zimbabwe Ltd 1998 (2) ZLR 488 (S) at 493). The circumstances in which the consent judgment was entered can be gleaned from the papers. I have already shown how the applicant's legal representative was involved in the formulation of the consent order and in amending it to suit his F position. I would, for those reasons and more which appear in this judgment, find that the applicant has not laid the basis on which this court can revisit its order of 17 March 2000. Finality of litigation is paramount and it must be upheld in this case. Rescission under the common law or under r 449 is not merited at all. The application could therefore be dismissed on this basis alone. G

I must however do justice to the spirited submissions made by the parties' legal practitioners which exercise, as I shall show, leads me to no different a conclusion.

2000 (1) ZLR p523

CHINHENGO J

THE ESSENCE OF APPLICANT'S ARGUMENT A

The applicant concedes that the farm invasions are unlawful and in fact they constitute offences at criminal law. This is recognised in paras 1 and 5 of the consent order. He would concede, as did the Attorney-General, that the remedy lies both under the criminal law (prosecution for contravening the Miscellaneous Offences Act) and B under the civil law (eviction pursuant to an order such as the consent order). The applicant has, however, stated that he cannot enforce the order because he has no resources with which to do so and he fears that the situation may further deteriorate.

The applicant did not allude to a complete lack of resources when he agreed that the consent order should be issued. No new facts which were unknown to him on 17 March when the order was issued had emerged by 23 C March when he filed the present application. As it is argued on the papers, he had the historical experience that farm invasions have the potential to grow in terms of intensity and spatial occurrence. He accepted that he would act with the resources available to him. I do not find merit at all in his submissions on the lack of resources. If any attempt had been made at evicting the farm invaders, I would probably have viewed the submission differently. I D have already dealt with the "powder keg" submission and concluded that in my view it does not hold water.

There are the other fundamental questions which arise from this application which I should address at this point. I do so because submissions were made in regard to them. E

THE ROLE OF THE POLICE COMMISSIONER AND RIGHT OF EVERYONE TO PROTECTION UNDER THE LAW

In a very recent judgment of the Supreme Court in Chavunduka & Anor v Commissioner of Police & Anor 2000 (1) ZLR 418 (S), the full bench of the Supreme F Court stated at p 421 in fine- 422B that:

"The entitlement of every person to the protection of the law, which is proclaimed in s 18(1) of the Constitution, embraces the right to require the police to perform their public duty in respect of law enforcement. This includes the investigation of an alleged crime, the arrest of the perpetrator provided the investigation so warrants and the bringing him or her for trial before a court of competent jurisdiction. As underscored in Commissioner of Police v Rensford & Anor 1984 (1) ZLR 202 (S) at 202H, members of the police G force may not refuse to perform a duty imposed on them by the law of the land."

The Chief Justice then expressed regret that the Police Commissioner in that case had failed to afford the applicants the protection of the law which they are entitled to expect from him. At p 422F he said: H

2000 (1) ZLR p524

CHINHENGO J

"What then is the appropriate remedy where it has been shown that the police have not done something which obviously it is their A duty to do so - where there has been a dereliction of duty owed to the public? The answer is that in such a clear case the court will grant an order of mandamus."

The protection of the law and the police's duty in that regard provided under s 18(1) of the Constitution extends to protection in respect of a person's civil rights. In the present case the civil rights of members of the respondent B were violated. An order was issued by this court to the applicant to protect the civil rights of the petitioners. The consent order can be equated to, and in my view, it was in effect an order of mandamus, for it required the applicant to act to prevent the violation of the civil rights of respondent's members. The duty of the applicant in respect of the criminal aspect of the farm invasions is no different to that which was advised to him by the C Supreme Court in Chavunduka's case supra. Perhaps for purposes of emphasis I must also refer to the words of Lord Denning MR in R v Metropolitan Police Commissioner, Ex p Blackburn (1968) 1 All ER 763 (CA) ("Blackburn No. 1") which were quoted with approval in Chavunduka's case supra at p 423: D

"I hold it to be the duty of the Commissioner of Police, as it is of every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or not suspected persons are to be prosecuted; and if need be, bring the prosecution or see that it is brought; but in all these things he is not a servant of anyone, save the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation at his place or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The E responsibility for law enforcement lies on him. He is answerable to the law and the law alone."

The words of SALMON LJ are also quoted with approval:

"... the police owe the public a clear duty to enforce the law - a duty which I have no doubt they recognise and which they perform most conscientiously and efficiently. In the extremely unlikely event, however, of the police failing or refusing to carry out their duty, the F court would not be powerless to intervene. For example, if, as is quite unthinkable, the chief police officer in any district

were to issue an instruction that as a matter of policy the police would take no steps to prosecute any housebreaker, I have little doubt but that any householder in that district would be able to obtain an order of mandamus for the instruction to be withdrawn."

The farm invasions are illegal and of a riotous nature. The applicant clearly has the public duty to enforce the G consent order and to afford the members of the respondent the protection of the law enshrined in s 18(1) of the Constitution. If this court were to accede to a variation, amendment or other detraction from the order issued by Garwe J it would not be upholding its sworn duty - to uphold the law of Zimbabwe. In independent Zimbabwe, the law should no longer be viewed as being made for us; rather it must be H

viewed as our law. We have the sovereign right to enact new laws and repeal old laws which we find to be A incompatible with the national interest. The applicant cannot be allowed to adopt stratagems to obviate the absolute necessity of implementing an order of this court more so where such order has been issued with his informed consent.

THE RULE OF LAW B

In his answering affidavit the applicant stated in paragraph 4 as follows:

"These are not disputed but suffice to point out that the Rule of Law which is divorced from justice and just laws becomes a hollow concept. Enforcement of unjust and an iniquitous ethnically (sic) land ownership structure, through the application of brutal state power, such as demanded by the respondent, is not promotive of the Rule of Law." C

These same sentiments were expressed by the Attorney-General in his oral submissions to the court. I would shudder to think that this perception of the rule of law could have been one of the reasons why the respondent thought that he may not enforce the order. It is unlikely and unthinkable that it could be so. I acknowledge that at the philosophical level there are different schools of thought as to what the rule of law encompasses. At the D practical level, however, where a written constitution, amenable to amendment by the people is in existence, and statute laws, old and new exist, and which the people's representatives can amend or repeal, an argument such as the one advanced by the applicant in the passage I have just quoted is but spurious. There is, in my opinion, a middle view of the rule of law between the two extremes - that the law or the rule of law is partisan on the one E hand and that it is neutral on the other hand. That middle view is that the rule of law represents a norm, a standard which ensures that any person may bring up a claim and have it determined within the framework of a body of principles which are applied to all persons equally. Viewed from this perspective, the role of the State is F to maintain law and order and mitigate conflict within the community and the instrumentality for the maintenance of law and order is the police. The rule of law must, in my opinion, be viewed as a national or societal ideal. Talking of a society where the rule of law is viewed as a societal ideal, Jeremy Waldon in The Law: Theory and Practice in British Politics says: G

"What is this image? It is the image of a land where everyone is subject to the same rules, where they are applied scrupulously and impartially by the officials who take that as their vocation and where people can look one another in the eye and know that they are co-operating openly in a framework on terms that apply to them all."

The rule of law to me means that everyone must be subject to a shared set of rules that are applied universally and which deal even handedly with H

people and which treat like cases alike. It means that those who are affected by official inaction should be able to A bring actions, as did the respondent in casu, on the basis of the official rules - i.e. the law, to protect their interests.

THE SEPARATION OF POWERS B

Under a constitutional democracy such as Zimbabwe there is a recognition that society's power is dangerous to its members if it is exercised by one group of individuals. It is recognised therefore that there must be a separation of powers to perform the three jobs which have to be done - that of making the law (by Parliament) that of applying the law to particular cases (by the judiciary) and that of enforcing the laws and decisions of the C courts (by the Executive).

These pillars of the State act together. They are not isolated from each. They however act as brakes on each other. It is in performing its function of applying the law to particular cases that the consent order was issued. In the face of an admitted illegality, this court is duty bound to pronounce itself in favour of the application of the law, D our law, and to uphold the rule of law.

On the basis that the applicant has a public duty to afford protection of the law to everyone in Zimbabwe; that the rule of law must be upheld and that this court has and is conscientiously performing its constitutional function of applying the law to particular facts of cases that are brought before it and on the finding that the applicant has E failed to show good cause for this court to alter its order entered by consent, there does not appear to me to be any basis for granting the order sought by the applicant.

Paragraphs 6, 7 and 8 of the consent order are capable of enforcement by the applicant "having regard to available resources". The applicant must accordingly act in terms of the consent order. These paragraphs as formulated in the consent order are clear and should not lead to any confusion. They in fact recognise a positive F duty, couched in the negative, of the Executive to facilitate the enforcement of the consent order. These paragraphs were so framed because of the refusal of the police at Masvingo to assist the messenger of court evict persons ordered by the court to be evicted and because of press reports to the effect that certain members of the Executive were urging that the evictions should not be carried out. The same applies to para 7 in respect G of the investigation and prosecution of offences committed during the farm invasions. Any other reading or construction of paras 6 and 7 of the consent order can only be mischievous and calculated to mislead the reader about the true import of those paragraphs and the bona fides underlying their formulation. H

CHINHENGO J

COSTS A

Mr de Bourbon urged it upon this court that it should order Mr Augustine Chihuri, the Police Commissioner, to pay the costs of this matter personally. He argued that if he is guilty of dereliction of his public duty to enforce the orders of this court then taxpayers should not have to pay the costs. He cited authority for his submissions - B Forum Party of Zimbabwe & Ors v Minister of Local Government & Ors 1996 (1) ZLR 461 (H), Binza v Acting Director of Works & Anor 1998 (2) ZLR 364 (H) and RAG (Pvt) Ltd v Huizenga NO 1986 (2) ZLR 203 (S).

I do not agree that the costs in this matter should be paid by Mr Chihuri personally. Even though I have rejected his contentions in support of the application to delete paras 6, 7 and 8 from the consent paper, there is enough C indication on the papers filed of record in this matter that the Executive has been unwilling to assist him in the task before him. I would like to urge to the Executive to recognise that the permanent interest of Zimbabwe and the rule of law are served by ensuring that the land invasions are brought to an immediate end. I would urge the Executive to provide the applicant with all the additional resources that the police force may require to carry out D its functions under the law. This will avoid the impression that the applicant is a lonely figure in the midst of the present crisis. In a sense, his application can be viewed sympathetically as a cry for the courts to recognise the predicament that he is in. On one side, the courts have issued an order which he should enforce and, on the E other, the Executive is giving conflicting signals as to what he must do, if it is not showing outrightly that it condones the farm invasions. It is no wonder that Mr Chinamasa, in appreciation of the applicant's predicament described him as the "hapless Commissioner". He will no doubt find comfort in the rule of law as I have articulated it and in the fact that he has a public duty which he must perform for the common good. Although this F application would, gauged against a different set of circumstances, come quite close to an abuse of the court process, I think that considering the totality of the circumstances in which it was made and having regard to my finding on the question of contempt of court, an order of costs against Mr Chihuri personally would not be appropriate or justified or fair.

In the result, the application is dismissed with costs. G

Civil Division of the Attorney-General's Office, applicant's legal practitioners

Coghlan, Welsh & Guest, respondent's legal practitioners H