CASE NO.:A249/2009

IN THE HIGH COURT OF NAMIBIA

In the matter between:

PETRUS SHAANIKA	1ST APPLICANT
AUGUSTE NARIS	2ND APPLICANT
JOSEPH JOSHUA MATSUIB	3RD APPLICANT
HADUEESHI BINONIA	4TH APPLICANT
EVELINE MUUND	5TH APPLICANT
JULIA HANGULA	6TH APPLICANT
MOSES SHIKONGO	7TH APPLICANT
JACOBINA NTINDA	8TH APPLICANT
JAIRUS AMUNYELA	9TH APPLICANT
IRENE UIRAS	10TH APPLICANT
TEOFILUS ANDENGE	11TH APPLICANT
HOSEA IHUHWA	12TH APPLICANT
JOHANNES IYAMBO	13TH APPLICANT
JOSUA SHATILWE	14TH APPLICANT

and

THE WINDHOEK CITY POLICE	1ST RESPONDENT
THE MUNICIPAL COUNCIL OF CITY OF WINDHOEK	2nd RESPONDENT
THE ATTORNEY GENERAL	3rd RESPONDENT
THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA	4th RESPONDENT

CORAM: MULLER, J *et* SWANEPOEL, J

Heard on: 16 September 2010

Delivered: 16 September 2010

Reasons on: 28 October 2010

REASONS

SWANEPOEL, J: [1] On 21 July 2009 the Applicants obtained a *rule nisi* in the following terms:

> *"2.1 Interdicting and restraining first and second Respondents and their employees from demolishing and/or removing, together with its contents, any structure or building belonging to the Applicants and other residents of Havana 6, Windhoek, Namibia, situated at plot 1807, corner of Matshitshi Street at Monte Christo Road, Katutura, Windhoek, Namibia.*
>
> *2.2. Declaring section 4(1) of the Squatters Proclamation, Proclamation no. 21 of 1985 to be unconstitutional, invalid and of no force or effect.*
>
> *2.3. Declaring section 4(3) of the Squatters Proclamation, Proclamation no. 21 of 1985 to be unconstitutional, invalid and of no force or effect."*

[2] On 16 September 2010 this Court made the following ruling:

1. That the Applicants could not apply to this Court for the relief contained in the Notice of Motion because they were, as admitted, in unlawful and illegal occupation of the land belonging to the second Respondent on the basis of the doctrine of "dirty hands."

2. Consequently it is ordered that the *Rule Nisi* granted on 21 July 2009 is discharged with costs payable by the Applicants, jointly and severally, including the costs of one instructed and one instructing counsel in respect of the first and second, as well as the third and fourth Respondents.

3. That reasons, if requested within 10(ten) days, will be furnished later.

[3] It is common cause between all the parties that:

3.1. That Applicants are all informal settlers, who have erected shacks or whose shacks have been demolished by the employees of the second respondent on a certain Erf 1807, in the Goreangab Township, the property of the second respondent.

3.2. The shacks were erected unlawfully, and without the consent of the second respondent.

3.3. Section 4(3) of the Squatters Proclamation provides as follows:

> *"(3) Unless a person first satisfies the Court on a preponderance of probabilities -*
>
> (a) *that he is lawfully entitled to occupy the land on which any building or structure has been erected; and*
>
> (b) *in the case of any person whose right of occupation is based on the consent of any person other than the owner of such land, that such other person is lawfully entitled to allow other persons to occupy such land,*
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> *such third-mentioned person shall not have recourse to any court of law in any civil proceedings founded on the demolishing or removal or intended demolishing or removal of such building or structure under this section and it shall not be competent for any court of law to grant any relief in any such proceedings to such last-mentioning person."*

3.4 The Applicants and several other people have erected makeshift houses and moved on to the second respondent's property from November 2008 onwards.

3.5 The residents were informed by the employees of the second respondent that they are all illegal squatters on the property and would be forcibly removed in the event that the then residents do not demolish the shacks and move off the property.

3.6 The second respondent commenced with the demolishing of a number of shacks since February 2009. The demolishing of some of the shacks was done in pursuance of the provisions of section 4(1) of the Proclamation which provides as follows:

> *"4.1 Notwithstanding anything to the contrary in any law contained and without the authority of an Order of Court or prior notice of whatever nature to any person -*
>
> *(a) the owner of land may demolish and remove together with its contents any building or structure intended for human habitation or occupied by*

human beings which has been erected or is occupied without his consent on such land;

(b) any building or structure intended for human habitation or occupied by human beings which has been erected on land within the area of jurisdiction of any local authority, without the prior approval of that or any former local authority of any plan or description of such building or structure required by
law, may at the expense of the owner of the land be demolished and removed together with its contents by the local authority or the Secretary or any officer employed in his department and authorised thereto by him."

[4] This matter was originally placed on the roll for hearing on 6 April 2010 when I raised the question whether the main application could be entertained by this Court in view of the admitted facts by the applicants that they were all unlawful occupiers of certain municipal land belonging to the second respondent to which section 2(1) of the Squatters Proclamation applies.

[5] Mr Tjombe appearing on behalf of the applicants submitted that the present application concerns the important issue of access to Courts, where the applicants' rights to do so are being denied by the provisions of the Squatters Proclamation. Although it is admitted that the applicants are in unlawful occupation of the property of the second respondent and without any consent of the owner, he submitted that the applicants are *"therefore on the piece of property out of desperation, and are not wilfully defying the law (i.e the Squatters Proclamation), and cannot be said to have approached the Court with unclean hands"* He furthermore submitted that the present situation is distinguishable from the facts in the Zimbabwean Supreme Court case of *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for Information and Publicity in the President's Office and Others* 2004(2) SA 602 ZS. I

will revert to this submission when the respondents' submissions are dealt with infra. In conclusion Mr Tjombe relied on the *Minister of Mines and Energy and Another v Black Range Mining (Pty) Ltd* (unreported judgment of the Namibian Supreme Court of 15 July 2010 and followed in the High Court case of the *Medical Association of Namibia Ltd and Another v Minister of Health and Social Services and Others* (unreported judgment delivered on 8 September 2010). Mr Tjombe relied in the first mentioned case inter alia on the following at page 27 paragraph [50]:

> *"Although the remarks made by Van den Heever J, in the Schuster case, supra, was in connection with the enforcement of a contractual right and the present case deals with the protection of a right, the principle applied is the same, namely, that a Court does not deny a person access thereto in respect of the enforcement of his rights, or the protection thereof,* ***if not contaminated by some or other act of dishonesty or other impediment*** *as referred by Van der Heever J,* while he relied on the following dictum in the *Medical Association* case at page 15 paragraph [53]:
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> > ***"Neither can it be said that there is any impediment or that there are any exceptional circumstances, which would entitle the Court to close its doors to the applicants.*** *To so do in the circumstances of this matter and* ***in the absence of any contrary proof of wrong doing*** *would obviously also run counter to Article 12 of our Constitution where these rights of the applicants are guaranteed"* (Emphases is mine).

[6] Mr Narib, appearing on behalf of the first and second respondents submits that the doctrine of dirty hands assumes greater significance since the birth of our constitutional democracy on 21 March 1990 wherein the rule of law took centre stage. (Compare: *Ex parte Attorney General: In re: Corporal Punishment by Organs of State* 1991 NR 178 (SC) 179 E and Article 1 of the Namibian Constitution. He further relied on Article 140(1) of the Namibian Constitution which provides as follows:

> *"(1) Subject to the provisions of this constitution, all laws which were in force immediately before the date of independence shall remain in force until repealed or amended by Act of Parliament or until they are declared unconstitutional by a compenant Court."*

[7] There is no doubt and it is not disputed that the Squatters Proclamation was in force before the date of independence and that it remained as such by virtue of the aforesaid provision. In support of his submissions Mr Narib also relied on the *Associated Newspapers of Zimbabwe (Pty) Ltd* case *supra* as well as on the decision of House of Lords in the case of *F Hoffman - La Roche and Co AG and Others v Secretary of State for Trade and Industry* [1975] AC 295 (HC) B [1974] 2 All ER 11280, in particular the following dictum by Lord Denning MR at 322B:

> *"They argue that the law is invalid; but unless and until these Courts declare it to be so, they must obey it. They cannot stipulate for an undertaking as the price of their obedience. They must obey first and argue afterwards..."*

[8] The Supreme Court of Zimbabwe upheld the abovementioned principle as being founded on sound authority and practical common sense. At 607 A to 608 F at H the Zimbabwean Supreme Court stated the following:

> *"This court is a court of law and as such cannot connive at or condone the applicant's open defiance of the law.* ***Citizens are obliged to obey the law of the land and argue afterwards.*** *It was entirely open to the applicant to challenge the constitutionality of the Act before the deadline for registration and thus avoid compliance with the law it objects to pending a determination by this Court.*
>
> *In the absence of an explanation as to why this course was not followed, the inference of a disdain for the law becomes inescapable. For the avoidance of doubt the applicant is not being barred from approaching this Court. All that the applicant is required to do is to submit itself to the law and approach this court with clean hands on the same papers".* (Emphasis provided)

[9] The principle in the abovementioned matter was also followed in the decision of *Hendrick Christian t/a Hope Financial Services v The Chairman of the Namibian Financial Institution Supervisory Authority (NAMFISA),* case no A244/2007 at paragraph 17 on page 7 of the unreported judgment. In this case Hoff J approved the following dictum of Herbstein J in *Kotze v Kotze* 1953(2) SA 184 (C) at 187 F:

> *'The matter is one of public policy which requires that there shall be obedience to orders of Court and that people should not be allowed to take the law into their own hands.'*

He likewise approved the following in the *Associated Newspapers* - case at 609 B as follows:

> *"In my view, there is no difference in principle between a litigant who is in defiance of a court order and a litigant who is in defiance of the law. The Court will not grant relief to a litigant with dirty hands in the absence of good cause being shown or until such defiance or contempt has been purged."*

> *"It is clear from the aforementioned authorities that a litigant may be barred from approaching a Court until he or she has obeyed an order of such Court which had not since been set aside.*

> *Applicant's reliance on the provisions of Article 25 of the constitution is misplaced since a litigant, in my view, cannot utilize the provisions of Article 25 in order to evade compliance with a court order."*

[10] Mr Boesak appearing on behalf of the 3rd and 4th respondents is in full agreement with the submissions made by Mr Narib pertaining to the authorities cited in his Heads of Argument as well as to the submissions made in Court. He further made the submission that the applicants' claim, based on socio economic factors (as much as it may be factually correct) to have forced them to take the law into their own hands, can never be sufficient justification to defy the law in the circumstances.

[11] I am in respectful agreement with counsel for the respondents that the cases relied upon by the applicants and referred to in paragraph 5 *supra,* are clearly distinguishable from the present matter. In this regard I refer to the *dicta* emphasised in the citations. The applicants in the present matter are clearly contravening the existing Squatters Proclamation and are in defiance of the law.

[12] In conclusion I refer to two paragraphs in the matter of *Jacob Shikumweni Ndashe v Permanent Secretary: Ministry of Home Affairs and Immigration and 4 Others,* case no. A146/2008, an unreported judgment delivered on 22 May 2009, where the following was stated:

> *"[21.] - The clean/dirty hands doctrine is derived from the English law and is similar in effect to the Roman law in pari delicto potior est conditio defendentis.*
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> *Compare: Klokow v Sullivan 2006(1) SCA 259 at 265 F - G;*
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> *[22.] In S v Ebrahim 1991(2) SA 553 AD the court found that a litigant (The State), where it is a party to proceedings, must come to court with "clean hands". It referred with approval to the following dictum of Justice Brandeis in Olmstead v United States 277 US 438, 48 Sct 564, 72 L Ed 944 (1928) and cited in the matter of United States v Toscanino 500 F 2d 267 at 281 where the judge said the following:*
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> > *"The Court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination".*

[13] This view is re-iterated and endorsed. For these reasons the ruling referred to in paragraph 2, *supra* was made on 16 September 2010.

SWANEPOEL, J

I agree

MULLER, J

ON BEHALF OF THE APPLICANTS	Mr N Tjombe
Instructed by:	Norman Tjombe Law Firm
ON BEHALF OF THE 1st and 2nd RESPONDENTS	Adv. G Narib
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