REPORTABLE

CASE NO.:SA35/2010

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PETRUS SHAANIKA	**First Appellant**
AUGUSTE NARIS	**Second Appellant**
JOSEPH JOSHUA MATSUIB	**Third Appellant**
HADUEESHI BINONIA	**FourthAppellant**
MOSES SHIKONGO	**Fifth Appellant**
JACOBINA NTINDA	**Sixth Appellant**
JAIRUS AMUNYELA	**Seventh Appellant**
TEOFILUS ANDENGE	**Eighth Appellant**
HOSEA IHUHWA	**Ninth Appellant**
JOHANNES IYAMBO	**Tenth Appellant**
JOSHUA SHATILWE	**Eleventh Appellant**

and

THE WINDHOEK CITY POLICE	**First Respondent**
MUNICIPAL COUNCIL OF THE MUNICIPALITY OF WINDHOEK	**Second Respondent**
ATTORNEY-GENERAL	**Third Respondent**
GOVERNMENT OF THE REPUBLIC OF NAMIBIA	**Fourth Respondent**

Coram:	MARITZ JA, MAINGA JA and O'REGAN AJA
Heard:	**8 November 2012**
Delivered:	**15 July 2013**

APPEAL JUDGMENT

O'REGAN AJA(MARITZ JA AND MAINGA JA concurring)

[1] The appellants are all occupiers of a plot of land situated on the corner of Matshishi Street and Monte Christo Rd, Katutura, Windhoek. The plot of land has no formal buildings erected on it and it is referred to colloquially as 'Havana 6'. Its formal description is Erf 1807, Goreangab Township. The appellants and others have erected homes on this piece of land using corrugated iron sheets, wooden poles and plastic material. The average size of each dwelling is 10 square metres. Most of the residents of Havana 6 have lived there since early 2009 and most are unemployed.

[2] The second respondent, the City of Windhoek, owns the land on which Havana 6 has been built. It has not consented to the occupation of the land.

[3] On 20 July 2009, the appellants approached the High Court in Windhoek urgently seeking an order interdicting the first and second respondents and their employees from demolishing the structures situated at Havana 6 as well as declarations that subsections 4(1) and (3) of the Squatters Proclamation, Proclamation 21 of 1985 (the Proclamation) are unconstitutional and therefore invalid and of no force and effect. Damaseb JP granted a rule *nisi* calling upon respondents to show cause why the relief sought by the appellants should not be

granted, but after several extensions of the return day, the rule was discharged and the application dismissed by a full bench of the High Court on 16 September 2010. Theappellants appeal against the order and judgment of the full bench of the High Court.

[4] The High Court based its discharge of the rule on the doctrine of unclean hands. The judges found that the appellants(the applicants before it) who were seeking relief from the High Court had not come to court with clean hands, in that they admitted thatthey were living unlawfully on Havana 6. Section 2(1) of the Proclamation provides that any person,who is on land without the consent of the owner or lawful occupier of that land, is guilty of an offence.[1] In reaching its decision, the High Court relied, amongst other cases, on the Zimbabwean decision of *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for Information and Publicity in the President's Office and Others*[2]in which the court refused to permit an application to bring a constitutional challenge to a legislative provision with which the applicant had not complied.

Relevant legal provisions

[5] Sections 4(1) and (3) of the Proclamation provide 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 –

[1]Section 2(1) of the Proclamation provides as follows: 'Any person other than a person acting on the authority of any law or in the performance of his functions or duties as an employee employed in any department or local authority who –
(a) without lawful cause enters upon or enters any land, building or structure; or
(b) without the consent of the owner or lawful occupier of any land, building or structure is on or in such land, building or structure,
shall be guilty of an offence and liable on conviction to a fine not exceeding five hundred rand or imprisonment for a period not exceeding six months or to both such fine and such imprisonment.'
[2]2004 (2) SA 602 (ZS).

(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 of any officer employed in his department and authorized thereto by him.'

'4(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 a 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,

such first-mentioned person shall not have recourse to any court of law in any civil proceedings founded on the demolition or removal or intended demolition or removal or 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-mentioned person.'

Appellants' submissions

[6] The appellantsraise two arguments before this Court. First, they argue that the High Court erred in relying on the doctrine of unclean hands in this matter. The appellants admit that they are residing on Havana 6 unlawfully, but they state that they are there because of the desperate housing shortage in Windhoek and that, accordingly, they are there out of desperation, and are not in wilful defiance of the law. The appellants accordingly argue that the facts of this case are

distinguishable from the facts in the Zimbabwean case *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for Information and Publicity in the President's Office and Others*[3]on which the High Court relied.

[7] The appellants also urge that the doctrine of unclean hands, properly understood, only bars applicants who have acted dishonestly in relation to the subject matter of the issue they seek to bring before Court. In this argument, they rely on a dictum relating to the doctrine of clean hands in a recent decision of this Court, *Minister of Mine and Energy and Another v Black Range Mining (Pty) Ltd.*[4]According to that dictum, 'the doctrine … would apply in circumstances where there was some or other dishonesty on the part of the person who claimed protection for his rights' (at para 46). The appellants argue that they have not acted dishonestly in residing unlawfully on Havana 6.

[8] The appellants also rely on Article 12(1)(*a*) of the Constitution, which provides that, in the determination of their civil rights, 'all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law'. They argue that to deny them access to court in circumstances where the socio-economic conditions in which they live make it impossible for them to find lawful accommodation in Windhoek would be to violate their constitutional right of access to courts, entrenched in Article 12 of the Constitution.

[9] Finally, in relation to the doctrine of unclean hands, the appellants argue that the implication of the High Court order is to place them in a disadvantaged

[3] Id.
[4]2011 (1) NR 31 (SC).

position compared to applicants in spoliation proceedings. The remedy of the *mandament van spolie*enables occupiers who have been evicted from land without a court order to be restored to that land, regardless of whether their original occupation was lawful or not. The appellants rely on a range of Namibian authority, including the recent decision of this Court in *Kock t/a Ndhovu Safari Lodge v Walter t/a Mahangu Safari Lodge & Others*,[5] for the principle that a court in determining whether to grant relief on the basis of *mandament* will not consider whether the applicant who has been dispossessed was lawfully in occupation of the property in question.

[10] The appellants argue that if they succeed in persuading this Court that the High Court erred in dismissing the application on the basis of the doctrine of unclean hands, then this Court should determine the merits of the application brought to the High Court.Counsel for appellants argued that the case raised a legal point that could and should be dealt with by this Court. They arguethat subsections 4(1) and (3) of the Proclamation are unconstitutional because they are in breach of Article 12(1) of the Constitution.

[11] In making this argument, they rely on Article 14(1) of the International Covenant on Civil and Political Rights, as well as on Article 1 of the Constitution. The appellants also point South African jurisprudence under section 34 of the South African Constitution, which entrenches the right of access to court.[6]

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[5]2011(1) NR 10 (SC).

[6]*Chief Lesapo v North West Agricultural Bank and Another* 2000 (1) SA 409 (CC) (holding unconstitutional a legislative provision permitting a creditor to seize defaulting debtors' property without first obtaining a court order); and *Zondi v MEC for Traditional and Local Government Affairs* 2005 (3) SA 589 (CC) (holding unconstitutional legislation which permitted the sale of impounded cattle without an order of court).

[12] In support of their argument that subsections 4(1) and (3) of the Proclamation are in breach of the constitutional principle of the rule of law, the appellants also refer to jurisprudence of the SADC Tribunal which held that the rule of law embraces two fundamental rights, the right of access to courts and the right to a fair hearing before an individual is deprived of a right, interest or legitimate expectation.[7]

First and Second Respondent's submissions

[13] First and second respondents argue that the High Court was correct in concluding that the doctrine of unclean hands prevented the appellants from approaching the High Court while they were in unlawful occupation of Havana 6. They note that the conduct of the appellants meant that they were in violation of section 2 of the Proclamation, which renders it a criminal offence to be in occupation of land without the consent of the owner.

[14] The first and second respondents argue that if this Court finds that the High Court did err in its reliance on the doctrine of unclean hands, and that the appellants were entitled to approach the High Court for relief, then itwould be appropriate for this Court to remit the application to the High Court for it to determine as it would not be appropriate for this Court to decide the question of the constitutionality of sections 4(1) and (2) of the Proclamation as a court of first

[7]See *Tembani v Republic of Zimbabwe* (SADC (T) 07/2008) [2009] SACD T 3, delivered on 14 August 2009, at p. 19 of the .pdf version. Judgment reported at http://www.saflii.org/sa/cases/SADCT/2009/3.html ; and *Campbell and Others v Republic of Zimbabwe* (SADC (T) 02/2008) [2009] SADC 2, dated 13 December 2007 reported at http://www.saflii.org/sa/cases/SADCT/2007/1.html .

and final instance. In this argument, they rely on the decision of this Court in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others (No. 1).*[8]

[15] The first and second Respondents also note that the High Court did not decide a point they raised *in limine* based on section 43C(5) of the Police Act, 19 of 1990. That provision states that legal proceedings contemplated against the first respondent should be instituted against the second respondent.

[16] In the alternative, the first and second respondents argue that if the Court does consider the constitutionality of sections 4(1) and (3) of the Proclamation, it should find that even if the provisions do constitute a limitation on the right of access to courts, as entrenched in Article 12, that limitation is justifiable within the contemplation of Article 22 of the Constitution. Respondents argue that section 4(1) is rationally connected to a legitimate objective, being the achievement of a speedy and cost-effective removal of illegally erected structures and that it contributes accordingly to the prevention of crime, hazards to public health and the environment.

[17] The first and second respondents also argue that any decision to demolish structures that have been illegally erected would be administrative action and that the decision could not be taken without notice to affected parties, such as the appellants. They argue that any action under section 4(1) must therefore comply with Article 18 of the Constitution.

[8] 2010 (2) NR 487 (SC) at 532.

[18] As to section 4(3), the first and second respondents argue that, properly construed, it does not limit the right of access to court. They argue that the doors of the court are not closed to anyone as any applicant may come to court. Once there, the court will determine whether the applicant is unlawfully occupying land. If the court concludes the applicant is in unlawful occupation of land, that applicant will not be afforded relief preventing the destruction of unlawful structures. This, the first and second respondents argue, does not constitute a violation of Article 12.

[19] Finally, the first and second respondents argue that the section is necessary given the difficulty of seeking eviction orders against a large number of 'faceless' individuals who have unlawfully occupied land.

Third and Fourth Respondents' submissions

[20] The third and fourth respondents support the arguments raised by the first and second respondents and raise one additional point in their written argument. They submit that in determining that the appellants had not come to court with unclean hands, the full bench of the High Court had exercised a discretion and there were no grounds for this Court to interfere with the exercise of that discretion.

Issues

[21] The following issues thus arise for decision:

(a) did the High Court err in refusing to consider the Appellants' application on the basis of the doctrine of unclean hands;

(b) if it did, is it appropriate for this Court to consider the merits of the application or should the matter be remitted to the High Court;

(c) was the first respondent correctly cited;

(d) if it is appropriate for this Court to consider the merits of the application, are sections 4(1) and/or 4(3) of the Proclamation inconsistent with the Constitution;

(e) if it is held that sections 4(1) and/or 4(3) is inconsistent with the Constitution, what is the appropriate relief?and

(f) costs.

The doctrine of unclean hands

[22] The High Court held that as the appellants were residing on the land in question without the consent of the owner of that land, their occupation of the land was unlawful and in breach of section 2(1) of the Proclamation. The consequence of this finding, according to the High Court, was that the appellants did not have 'clean hands' and were therefore not entitled to approach the court for relief.

[23] In reaching this conclusion, the High Court relied on a decision of the Zimbabwean Supreme Court, *Associated Newspapers of Zimbabwe (Pvt) Ltd v Minister for Information and Publicity in the President's Office and Others* 2004 (2) SA 602 (ZS) in which Chidyausiku CJ held that the applicant, who was seeking to bring a constitutional challenge to provisions of the Access to Information and Protection of Privacy Act Chap [10:27] was barred from doing so because the

applicant had not complied with the terms of the Act requiring it to register as a 'mass media service'. The applicant argued that it had not registered because it could not do so 'in good conscience' given its view that the provisions of the Act were unconstitutional. As a result of its conclusion that the applicant had not come to court with clean hands, the Zimbabwean Supreme Court did not entertain the constitutional challenge.

[24] In reaching its decision, the Zimbabwean court relied on an English decision, *F Hoffman-La Roche & Co AG and Others v Secretary of State for Trade and Industry*.[9]There, the applicants were pharmaceutical companies who sought to have statutory orders setting the price of pharmaceutical products declared *ultra vires*. The applicants refused to comply with the terms of the statutory orders pending the outcome of the review proceedings. The Secretary of State applied for an interlocutory injunction restraining the company from charging prices in excess of those stipulated in the statutory orders pending the determination of the review. On appeal, the Secretary of State was successful. Lord Denning MR in the Court of Appeal judgment, which was upheld by the House of Lords, in a passage cited by the Zimbabwean Court, ruled that the applicants 'argue that the law is invalid; but unless and until these Courts declare it to be so, they must obey it.'

[25] There is of course a fundamental difference between the English case and the Zimbabwean case. In the English case, the state sought and obtained an interim order requiring compliance with the statutory orders pending the determination of their validity by the Court. There was no question of the

[9][1974] 2 All ER 1128 (HL).

applicants being denied the opportunity to challenge the validity of the impugned statutory orders, even though they had launched the challenge at a time when – they admitted – they were not complying with the orders. In the Zimbabwean case, on the other hand, the State did not seek as interim relief an order requiring compliance with the impugned legislation pending determination of its constitutionality. Instead, the State argued, successfully, that the applicant should be barred from approaching the court and thus prevented from obtaining a determination of the constitutionality of the impugned legislation. In my view, the English case does not support the outcome in the Zimbabwean case: it is authority for the proposition that a litigant may, by order of court, be compelled to comply with a legal provision pending the determination of the provision's validity. It is not authority for the proposition that a litigant may be prevented from obtaining the determination of the validity of a legal provision as a result of non-compliance with the provision.

[26] The Zimbabwean Court also rejected an argument that the doctrine of unclean hands, or dirty hands, as the Zimbabwean court styled the doctrine, only prevented those who had acted dishonestly or fraudulently from approaching a court. (At p 608G). The approach of the Zimbabwean court in this respect is at odds with the way in which the doctrine of unclean hands has been understood in Namibia.

[27] The doctrine of unclean hands appears to have originated as an equitable doctrine in England.[10]As noted in a recent decision of this Court, *Minister of Mine*

[10]See the discussion in the South African cases *Tullen Industries Ltd v A de Sousa Costa (Pty) Ltd* 1976 (4) SA 218 (C) at 220 – 221 and *Mgoqi v City of Cape Town &Another* 2006 (4) SA 355 (C) at

and Energy and Another v Black Range Mining (Pty) Ltd),[11]the doctrine has largely found application in the area of unlawful competition law where its effect is that an applicant is prevented from obtaining relief where he or she has behaveddishonestly.[12]Accordingly, in *Black Range Mining,* this Court refused to uphold a challenge based on the doctrine of unclean hands in the absence of any evidence showing that the appellant had acted dishonestly or fraudulently. Although the Court in *Black Range Mining* did not expressly say so, I have no doubt that in using the words 'dishonestly or fraudulently', it would have considered bad faith or *mala fides* in the conduct of litigation to be included within its formulation.[13]

[28] There are good reasons for this narrower approach to the doctrine. In the area of constitutional rights, in particular, courts should be slow to place barriers before the doors of the court. Fundamental to the functioning of a constitutional democracy is the right of citizens to approach courts to assert their constitutional rights[14] and to have legal disputes determined, a right protected in Namibia by Article 12 of the Constitution. It is not necessary to determine in this case whether the doctrine of unclean hands has no place in the field of constitutional law at all, for here, as in*Black Range Mining*, the doctrine finds no application as there is no evidence of dishonesty, fraudor *mala fides* in the conduct of litigation on the part of

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para 140, where the Court held that an applicant will be denied relief where there has been "fraud, dishonesty or mala fides" (At para 140).

[11]Above n 4.

[12]Id. at para 46. See also Mgoqi, cited above, para 140 and *Cambridge Plan AG and Another v Moore & Others* 1987 (4) SA 821 (D) at 842F–H.

[13] South African courts have on several occasions made plain that bad faith or mala fides in the conduct of litigation will also bring the doctrine of unclean hands into play: see *Mgoqi,* cited above n 10, at para 140; *Socratous v Grindstone Investments* 2011 (60 325 (SCA) at para 16, (where a litigant had failed to inform a court of other litigation on related subject matter);

[14]In this regard, see the similar remarks made by Geier AJ in *Medical Association of Namibia and Another v Minister of Health and Social Services and Others* 2011 (1) NR 272 (HC) at para 53.

the appellants. Although the appellants admit they have been occupying the land in question without the consent of the owners, and therefore unlawfully, they have asserted that they are occupying the land because they have no other place to reside. The conduct of the appellants, while unlawful, cannot be said to be dishonest or fraudulent.

[29] It is correct, as the third and fourth respondents argued, that in deciding whether to bar an applicant from seeking relief on the basis of the doctrine of unclean hands, a court exercises a discretion. To determine the proper approach on appeal to the exercise of discretion, it is ordinarily necessary to determine whether the discretion is a discretion in the strict sense.[15]A discretion is a discretion in the strict sense if a judicial officer may select from a number of permissible options.[16] If the relevant discretion does permit a judicial officer to select from a number of permissible options, then the role of an appellate court is restricted and the decision may only be overturned on the grounds that it 'has not been exercised judicially, or has been exercised on the basis of a wrong appreciation of the facts, or wrong principles of law'.[17]

[30] It is not necessary to decide here whether the discretion at issue is a discretion in the strict sense, for it is clear from what has been set out above that the High Court exercised the discretion on the basis of wrong principles of law.

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[15] See, for example, *Knox D'Arcy and Others v Jamieson and Others* 1996 (4) SA348 (SCA) at 361 H – I; *Giddey NO v Barnard and Partners* 2007 (5) SA 525 (CC) at para 19.

[16] See *Media Workers Association of South Africa v Press Corporation of South Africa Ltd* 1992 (4) SA 791 (A) at 800C–F.

[17] See *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others (Number 2)* (2012] NASC 21, unreported judgment of this court dated 25 October 2012, reported on the web at http://www.saflii.org.za/na/cases/NASC/2012/21.html at para 106; *Giddey NO,* cited above n 15, at para 19.

The High Court erred in concluding that an applicant who has acted unlawfully is barred from seeking relief in the High Court. This proposition is too broadly stated. To bar a litigant from access to court on the basis of the doctrine of unclean hands, as this court has held previously, a litigant must have acted dishonestly or fraudulently, not merely unlawfully. The High Court thus erred in finding that the appellants were barred from seeking relief from the Court given that it was not established that they had acted dishonestly or fraudulently. The High Court decision cannot stand even on the narrow grounds of appeal that arise in relation to the exercise of a discretion in the strict sense.

[31] In this regard, one final observation is appropriate. The High Court also relied on an earlier High Court decision,*Hendrick Christian t/a Hope Financial Services v Chairman of the Namibian Financial Institutions Supervisory Authority and Another.*[18]That case concerned the persistent non-compliance with a court order by a litigant, which had resulted in the High Court issuing an order stating that the litigant may not issue further proceedings until he had paid the costs ordered to be paid by the court. It was in this context that the High Court, in the *Hendrick Christian* case, cited authority emphasising the importance of obedience to court orders. It is clear that these dictahave no direct application in this case, where theappellants are not in breach of any court order and the reasoning in the *Hendrick Christian* case is therefore not directly relevant to these proceedings. In relying upon it here, therefore, the High Court also erred.

Should the merits be remitted to the High Court?

[18]Judgment of the High Court in Case A244/2007,dated 13 February 2009, reported at http://www.saflii.org/na/cases/NAHC/2009/6.pdf.

[32] Having concluded that the High Court erred in dismissing the application on the ground that the appellants had come to court with unclean hands, the next question that arises is whether this Court should consider the merits of the application or whether the Court should refer the matter back to the High Court. The issue before us is a legal question: are the provisions of sections 4(1) and (3) of the Proclamation inconsistent with the Constitution? If they are, then, the relief granted by the High Court cannot stand. If the provisions are consistent with the Constitution, then the Appellants' application must fail.

[33] The Respondents contended that if this Court upheld the appeal in relation to the applicability of the doctrine of clean hands, it should refer the merits back to the High Court for decision. In this contention, they relied on the judgment of this Court in *Rally for Democracy and Progress and Others v Electoral Commission of Namibia and Others*.[19] There this Court held that it would be appropriate to remit the matter to the High Court, particularly because there was a range of contentious preliminary issues that had not yet been determined, and also because the merits of the issue had already been argued before the High Court, though not before the Supreme Court.

[34] In deciding whether to remit a case for consideration by the High Court, relevant considerations will include the prudent employment of scarce judicial resources, which will include considerations such as whether the issues have already been argued before the High Court and/or the Supreme Court, as well as the nature and complexity of the issues still to be determined, and whether the

[19] Above n 8 at para 75.

issues are issues of law or fact. In this case, by contrast to the *Rally for Democracy* case, there is only one minor preliminary issue to be determined before proceeding to the merits. It is of a procedural nature, not highly contentious and turns on a point of law that can be determined by this Court. Moreover, the Supreme Court has already had the benefit of legal argument, both written and oral, on the merits of the application, which turn entirely on questions of law. In these circumstances, it would not be a wise employment of scarce judicial resources to refer the merits back to the High Court for determination and accordingly, this Court will continue to consider the merits of the application.

Preliminary issue: section 43C(5) of the Police Act, 19 of 1990

[35] The preliminary issue that remains for consideration relates to section 43C(5) of the Police Act, 19 of 1990.[20] That provision stipulates that legal proceedings arising out of conduct or omissions of municipal police services shall be instituted against the relevant local authority. The effect of this provision is that claims arising from conduct or omissions of the Windhoek City Police (the first respondent) should be instituted against the Municipal Council of the Municipality of the City of Windhoek, the second respondent.

[36] The appellants argued, on the assumption that the respondents are correct, that given that the second respondent was cited in the application, the error could be cured by excising the first respondent from any order that may be made by the

[20]That subsection provides: 'Legal proceedings in respect of any alleged act performed under or in terms of this Act or any other law, or an alleged failure to do anything which should have been done in terms of this Act or any other law by a member of a municipal police service, shall be instituted against the local authority council.'

Court. In both their written and oral argument, the respondents appeared to accept that the error could be cured in this way.

[37] Accordingly, this Court will proceed on the basis that the first respondent should not have been cited in these proceedings and that any relief granted will bind the second respondent, not the first respondent.

Are sections 4(1) and (3) of the Proclamation inconsistent with the Constitution?

[38] The appellants argue that the effect of section 4(1) is to prevent them, and others similarly situated from obtaining access to court for the determination of their rights prior to their homes being demolished. The consequence of section 4(3) is that if litigants are in unlawful occupation of the property at the time their homes are demolished, they are prevented from launching any civil suit in respect of the demolition thereafter. The appellants contend that these consequences are inconsistent with Article 12(1) of the Namibian Constitution. Article 12 provides that:

> 'In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law'.

[39] The appellantsalso rely on the provisions of Article 14(1) of the International Covenant on Civil and Political Rights[21] which is formulated in similar terms to Article 12 of the Constitution as follows:

[21]Namibia acceded to the International Covenant on Civil and Political Rights on 28 November 1994.

> '… in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.'

[40] Finally, applicants rely on jurisprudence of the Southern African Development Community Tribunal (the SADC Tribunal) to the effect that a legislative provision which permits a creditor to seize a debtor's land and sell it in execution of a debt without first obtaining a court order denies the debtor the right of a hearing before an independent and impartial court or tribunal and permits the creditor to act 'as a judge in its own cause.'[22] Similarly, in *Campbell et al v Republic of Zimbabwe,*[23] in which the Tribunal held that the rule of law has two aspects: the right of access to courts and the right to a fair hearing and legislation which ousted the power of the Zimbabwean courts to review the acquisition of certain agricultural land was in breach of these aspects of the rule of law. In reaching this conclusion, the SADC Tribunal relied on a range of authority, including Article 7 of the African Charter of Human and Peoples' Rights which provides that '[e]very individual has the right to have his cause heard' as well as decisions of the African Commission on Human and Peoples' Rights which hold that ouster clauses are in conflict with the African Charter.[24]

[41] The respondents do not vigorously dispute the assertion that the provisions of section 4 limit appellants' (and those similarly situated) right of access to courts.

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[22] See *Tembani v Republic of Zimbabwe* SADC (T) 07/2008, judgment dated 14 August 2009, at p. 19 of the .pdf version. Cited above n 7.

[23] SADC (T) 02/2007, judgment dated 13 December 2007, cited above n 8.

[24] See, for example, *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria, Comm. No 140/94, 141/94, 145/94 (1999),* at paras 29 and 33, reported at http://www.achpr.org/files/sessions/26th/comunications/140.94-141.94-145.95/achpr26_140.94_141.94_145.95_eng.pdfand *Zimbabwe Human Rights NGO Forum/Zimbabwe, Comm. No 245 (2002)*, paras 171 and 174, reported at http://www.achpr.org/files/sessions/39th/comunications/245.02/achpr39_245_02_eng.pdf
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Instead, they seek to argue that any limitation is justifiable by asserting that the provisions are rationally connected to a legitimate government objective, to achieve speedy and cost-effective removal of illegally erected structures and buildings, and thus to promote the prevention of crime and avoid hazards to public health and the environment.

[42] It will be helpful here to restate the effect of the two impugned provisions. Section 4(1) of the Proclamation has the effect that a landowner may, without a prior order of court, and without notice to any occupants, demolish and remove any structures that have been erected on the land without the consent of the landowner. Section 4(1) also authorizes local authorities, again without a prior order of court and without prior notice, to demolish and remove any structures erected on land without the prior approval of the local authority. The effect of the provision is thus to reverse the ordinary common law rule which stipulates that a possessor may not be deprived of possession without the order of court. This, appellants argue, is in conflict with Article 12 of the Constitution.

[43] Section 4(3) in turn has the effect that those whose structures have been demolished in terms of section 4 shall have no right of recourse to courts unless they can show that they were entitled to occupy the land on which the structure was erected at the time it was demolished.

[44] The right of access to courts is of great importance in a constitutional democracy. The appellants cite the decision of the South African Constitutional Court in *Chief Lesapo v North West Agricultural Bank and Another*, where

Mokgoro J acknowledged the importance of the right of access to court in the following passage:

> 'The right of access to courts is a bulwark against vigilantism, and the chaos and anarchy that it causes. Construed in the context of the rule of law and the principle against self-help in particular, access to court is of cardinal importance. As a result, very powerful considerations would be required for its limitation to be reasonable and justifiable.'[25]

[45] In this case, we are concerned with a proclamation that seeks to empower landowners, without notice and without a court order, to demolish and remove 'any building or structure intended for human habitation or occupied by human beings'. By definition, therefore, the provision empowers the destruction of homes and dwellings without a court order and then prevents those whose homes have been destroyed from recourse to a court of law unless they can establish that their occupation was lawful.

[46] In assessing whether the impugned provisions are in breach of Article 12, it is important to take into account the nature of the disputes that are effectively excluded from judicial oversight. The more potentially harmful the implications of the conduct that is excluded from court oversight, the more likely it will be that the provision will be found to be in breach of Article 12.

[47] Sections 4(1) and (3) relate to the demolition and removal of dwellings or homes, together with their contents. The effect of the sections is thus that people's homes may be destroyed, and their contents removed, without any notice to the people concerned or any consideration by a court. The destruction of a home and

[25] 2000 (1) SA 409 (CC) at para 22.

the removal of its contents has grave implications for the people concerned. Homes are the centre of people's lives. They are shared by close family members and friends. They are the place where people store their precious possessions. Such possessions will often not have great commercial value, but are precious for personal reasons. The intense personal importance that homes have for human beings is reflected in Article 13 of the Constitution, which prohibits 'interference with the privacy of . . . homes' save in specified circumstances. It is hard to imagine therefore a more invasive action than the destruction of homes, and the removal of their contents.

[48] Given the intense importance of homes to human beings, no matter how small or humble the home, the destruction of homes should take place only once it is clear that destruction is a lawful course. One of the important purposes of the rule of law is to ensure that the invasion of the interests and rights of human beings is lawful and the right of access to courts is one aspect of the rule of law, which prevents the unlawful invasion of citizens' rights and interests. It is to protect this aspect of the rule of law that the Constitution entrenches the right of access to courts in Article 12. As the South African Constitutional Court reasoned in another case:

> 'The right of access to courts is an aspect of the rule of law. And the rule of law is one of the foundational values on which our constitutional democracy has been established. In a constitutional democracy founded on the rule of law, disputes between the State and its subjects, and amongst its subjects themselves, should be adjudicated upon in accordance with law. The more potentially divisive the conflict is, the more important that it be adjudicated upon in court.'[26]

[26] See *Zondi v MEC for Traditional and Local Government Affairs* 2005(3) SA 589 (CC) at para 82.

[49] In that case, the Court was concerned with the sale of impounded animals without a court order. Ngcobo J, on behalf of the Court, observed'the problem of cattle trespassing on farmland' is 'one of the sharpest and most divisive conflicts of our society'.[27] He explained this in the following way:

> 'It is not merely the ordinary agrarian irritation it must be in many societies. It is a constant and bitter reminder of the process of colonial dispossession and exclusion. The potential for conflict between landless stockowners, whose forebears were deprived of their land, and farmers must be acknowledged. Moreover, in many cases, landless stockowners, for whom cattle constitute not only a form of material security but also a way of life of tremendously significant social and communal importance, will have scant ability to approach courts for relief when their cattle are impounded. The effect of the impounding scheme as described, therefore is to effectively remove from the arena of courts the sharp conflicts which will often underlie the process of impoundment.[28]

[50] The question whether a home or dwelling should be demolished and removed, thus not only raises a question of intense importance to the people whose home it is, but also may give rise to divisive social conflict, particularly in a city where the shortage of affordable housing and land is acute, as both respondents and appellants acknowledge. The effect of the impugned sections is to empower landowners to decide that a dwelling has been unlawfully erected and to demolish it without the intervention of an independent and impartial arbiter. The exercise of such a power has the potential to give rise to social disturbance and anger, particularly because the exercise of the power may be seen to be unfair or abusive. The rule of law seeks to avoid such consequences by ensuring that an

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[27] Id. at para 76.
[28] Id.

independent, impartial and competent tribunal determines legal disputes, before any action is taken.

[51] The first and second respondents lodged a range of affidavits to show that the City of Windhoek is concerned about the shortage of land and housing, and about land invasions arising as a result of the shortage of available and affordable land. The respondents thus argue that sections 4(1) and (3) constitute justifiable limitations of the rights contained in Article 12 within the meaning of Article 22 of the Constitution. Article 22 provides that:

> 'Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorised, any law providing for such limitation shall:
>
> (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
>
> (b) specify the ascertainable extent of such limitation and identify the Article or Articles hereof on which authority to enact such limitation is claimed to rest.'

[52] Article 12(1)(*a*) does not expressly contemplate limitations on the right it confers, so it is not apparent that Article 22 finds any application in relation to Article 12(1)(*a*). Yet the absence of an express limitation does not necessarily mean that no limitation of the right is contemplated at all. As this Court has recently observed in respect of Article 12(1)(*d*), the use of the words 'according to law' in that subsection should be understood as an implicit limitation permitting the

legislature in certain circumstances to impose a burden of proof upon an accused person and so limit the right contained in Article 12(1)(*d*).[29]

[53] Article 6(1) of the European Convention on Human Rights is formulated in strikingly similar terms[30] to Article 12(1)(*a*),and the European Court of Human Rights has held that the Article includes the right of access to court, but that that right it is not absolute and may be subject to limitations. The reason that limitations may be permissible according to the Court is that the right of access to court'by its very nature calls for regulation by the state, regulation which may vary in time and place according to the needs and resources of the community and of individuals.'[31]In considering what limitations would be permissible, the Court has held that a limitation may not impair the very essence of the right, must pursue a legitimate aim, and comply with the principle of proportionality.[32]

[54] It is not necessary for the purposes of this case to decide whether Article 12(1)(a) contemplates limitations of the right of access to court similar to those that have been found to exist in the similarly formulated Article 6(1) of the European Convention on Human Rights. For even if we were to assume in favour of the

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[29] See *Attorney-General v Minister of Justice and Others* [2013] NASC 3, at para 31, as yet unreported decision of this Court, dated 4 April 2013, published on the web at http://www.saflii.org.za/na/cases/NASC/2013/3.html.

[30] Article 6(1) provides: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.'

[31] See *Golder v United Kingdom* [1976] 1 EHRR 524 at para 38; see also the full discussion in Lester, Pannick&Herberg*Human Rights Law and Practice* 3rded 2009 at 4.6.18.

[32] See *SociétéLevagePrestations v France* (1996) 24 EHRR 351, at paras 40 – 50. See also discussion in Lester, Pannick&Herberg, id., at para 4.6.18.

respondents that such limitations are contemplated, such a limitation would have to be consistent at least with the principle of proportionality as the European Court has reasoned in respect of Article 6(1). In determining whether a limitation is proportionate, account would have to be taken of the importance of citizens having access to courts to have their rights and obligations determined, as discussed at para 28 above. In this case, it cannot be said, assuming that Article 12(1)(*a*) does permit limitations, that the reasons for the limitation proffered by the respondents are indeed proportionate.

[55] The first and second respondents assert that the reliance on sections 4(1) and 4(3) enables them to act decisively against land invasions. There can be no doubt that it is important for a municipality to be able to restrain land invasions and to ensure the orderly development of the municipal area. However, requiring a municipality to obtain a court order before demolishing dwellings, while perhaps causing some delay and cost to the municipality will not preclude the municipality from preventing land invasions. Moreover, permitting landowners and municipalities to demolish homes and remove the contents of homes without a court order, will mean that a process that is potentially intensely harmful to the rights and interests of people will take place before the lawfulness of the demolition and clearance has taken place. The potential harmful effects of sections 4(1) and (3) are therefore very acute. Although it can be accepted, as has been said above, that the purpose of seeking to prevent land invasions is an important and legitimate government purpose, that purpose can be achieved in other ways, less potentially harmful to the rights and interests of citizens. Moreover, in most circumstances, access to court does introduce some delay and cost which might

be troubling to landowners and local government, but the very purpose of access to courts is to ensure that there is impartial and independent determination of the legal question before the harmful process of demolition and eviction takes place.

[56] In these circumstances, it cannot be said that sections 4(1) and (3) are proportionate to the harm that may be caused by the denial of the right of access to court. Accordingly, even assuming in favour of first and second respondents that it may be possible to limit the right conferred by Article 12(1)(*a*), first and second respondents' arguments that the limitation of the Article 12(1)(*a*) right caused by sections 4(1) and 4(3) are justifiable within the meaning of Article 22 cannot succeed.

[57] First and second respondents also argued that the harm occasioned by sections 4(1) and (3) was not that severe because the sections needed to be read in light of Article 18 of the Constitution which requires administrative bodies and officials to 'act fairly and reasonably' and in compliance with the law. The first and second respondents argued that the implication of Article 18 was that a demolition could not take place without any residents' being afforded an opportunity to be heard. The difficulty with this argument is that it overlooks the express wording of section 4(1) which stipulates that demolitions may take place without 'prior notice of whatever nature to any person'.

[58] An alternative route to achieve the result proposed by first and second respondents would be to order severance of the words 'prior notice of whatever nature to any person' from section 4(1). The effect of such a severance would be

that, at least to the extent that local government took steps to demolish dwellings, the obligation to act fairly, entrenched in would diminish the harmful aspects of the clause. This would be a good result as far as it goes, but it would not cure the difficulty that the legal rights of government to demolish homes in terms of section4(1) and (3) would still not be subject to judicial determination before the demolition takes place. Although it is clearly desirable, and probably constitutionally required, that notice be given to affected residents before a demolition of a home takes place, notice is not sufficient to cure the unconstitutionality at the heart of sections 4(1) and (3).

[59] Finally, first and second respondents argued that section 4(3) does not limit the right of access to court because a resident whose home has been demolished may go to court following the demolition of his or her home. However, the clear language of section 4(3) is that a person whose home has been demolished will not be able to obtain any relief ‘in any civil proceedings founded on the demolition or removal or intended demolition or removal of such building’. The purport of the subsection appears remarkably wide, capturing within its ambit any civil suit, which would appear to include civil actions founded on, amongst other things, the law of contract or delict, property law, as well as administrative and constitutional law. Counsel for appellants argued that this might include a delictual claim for wrongful assault during the process of demolition. It is not necessary for us to decide whether that submission is correct. What is clear is that section 4(3) covers a wide range of civil suits. The effect of the clause appears to be that the resident can go to court, but his or her claim will fail, if he or she cannot establish lawful occupation of the land on which the demolished dwelling stood. The ordinary meaning of

section 4(3), therefore, seem to be that although you may approach a court by way of a civil suit for relief, that relief will be denied to you unless you can establish lawful occupation, even if lawful occupation does not otherwise need to be established for the relevant civil claim. Section 4(3) therefore introduces, in effect, an insuperable obstacle to what may otherwise be valid claims in law. As such, it constitutes a material impairment of the right of access to courts in the determination of the litigants' civil rights and obligations for which the respondents have produced no justification.

[60] In the circumstances, the Court concludes that both sections 4(1) and (3) of the Proclamation are inconsistent with Article 12 of the Constitution.

Appropriate relief

[61] Given the conclusion reached that sections 4(1) and (3) are inconsistent with the Constitution, the Court must consider whether a declaration of invalidity in respect of those sections is the appropriate order. Neither party has suggested that a severance, other than the severance relating to notice discussed in para 56 above, would render the sections constitutionally compliant. A consideration of the sections makes plain that once the offending aspects of the section have been removed, there is no apparent legislative purpose still to be served. In the circumstances, it is appropriate for the Court simply to declare the two sections invalid.

[62] The final issue that needs to be considered in this regard is the date from which the declaration of invalidity should take effect. In this case, no steps have

been taken under sections 4(1) and (3) and therefore to provide effective relief to the appellants, it is necessary only to make the declaration of invalidity with prospective effect. No evidence has been set before the Court to indicate whether the impugned sections have been relied upon to effect demolitions since the Constitution came into force. The question of whether any relief might lie for demolitions that have taken place under the provisions before the date of this judgment raises complex questions of law and fact, which it is not necessary to deal with in these proceedings. And, if any such claim should arise, it should be determined on its own facts and pleadings. Accordingly, the declaration of invalidity shall take effect from the date of this judgment.

[63] In the circumstances, the interdict sought by the appellants should be ordered in the following terms:

> 'The second respondent and its employees are interdicted from, without first obtaining an order of court, demolishing and/or removing, together with its contents, any structure or building belonging to the appellants and the other residents of Havana 6 Windhoek, situated at Erf 1807, corner of Matshitshi street and Monte Christo Rd, Katutura, Windhoek.'

Costs

[64] The appellants have been successful in their appeal. There is no reason why the second, third and fourth respondents should not be ordered to pay their costs in this Court and in the High Court, such costs to include the costs of one instructed and one instructing counsel.

Order

[65] The following order is made.

1. The appeal succeeds.

2. The order of the High Court dismissing the application is set aside and replaced with the following order:

‘(a) The second respondent and its employees are interdicted from, without first obtaining an order of court, demolishing and/or removing, together with its contents, any structure or building belonging to the appellants and the other residents of Havana 6 Windhoek, situated at Erf 1807, corner of Matshitshi street and Monte Christo Rd, Katutura, Windhoek.

(b) With effect from 15July 2013, subsections 4(1) and (3) of the Squatters Proclamation, Proclamation No 21 of 1984, are declared to be inconsistent with the Constitution, and invalid and of no force and effect.

(c) The second, third and fourth respondents are ordered to pay the applicants' costs on the basis of one instructed and one instructing counsel.'

3. The second, third and fourth respondents are ordered to pay the appellants' costs on appeal on the basis of one instructed and one instructing counsel.

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O'REGAN AJA

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MARITZ JA

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MAINGA JA

APPEARANCES

APPELLANTS:	N Tjombe Instructed by Tjombe-Elago Law Firm Inc
1ST AND 2ND RESPONDENTS:	G Narib Instructed by Kwala& Co
3RD AND 4TH RESPONDENTS:	A W Boesak Instructed by the Government Attorney