REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No. (P) I 1852/2007

In the matter between:

DIRK JOHANNES VON WEIDTS **APPLICANT**

And

MINISTER OF LANDS AND RESETTLEMENT **1ST RESPONDENT**

GIDEON THEODORUS GOUSSARD **2ND RESPONDENT**

Neutral citation: *Dirk Johannes Von Weidts & Another v Minister of Land and Resettlement (I 1852/2007) [2016] NAHCMD 92 (4 April 2016)*

CORAM: MASUKU J

Heard: 17 March 2016

Delivered: 4 April 2016

Flynote: HIGH COURT ACT – Section 18 (3) considered. RULES OF THE HIGH COURT – Rule 121. CIVIL PROCEDURE – Collateral constitutional challenge considered.

Summary: The applicant applied for leave to appeal a judgment of this court to the Supreme Court on the basis that this court erred in refusing to consider a collateral challenge in relation to a constitutional issue. *Held* – the constitutional collateral challenge was raised after litigation between the parties had ceased and was therefore no longer open to be raised by the applicant for the court's determination at that stage. *Held* – that the applicant should have raised the constitutional issue at the inception of the proceedings and not, as was the case, in response to an application for leave to execute the High Court's order after litigation between the parties had come to an end. *Held further* – that parties should avoid the proliferation of proceedings by suing once and for in proceedings relating to the same subject matter between the parties. *Held* – that the applicant should have cited the Government as a party in the proceedings and that the 'invitation' allegedly extended to the Attorney-General, as an interested party does not suffice. *Held further* – that the act complained of, namely the applicant's eviction cannot be described as 'coercive action' within the meaning of the case law, as the eviction was in pursuance of an order of court and not the exercise of administrative power by a public authority. The application for leave to appeal was dismissed with costs.

ORDER

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1. The application for leave to appeal to the Supreme Court is dismissed.
2. The applicant is ordered to pay the costs of one instructing and one instructed counsel.

JUDGMENT

MASUKU J:

[1] Serving for this court's determination is an application by the above-named applicant for leave to appeal a judgment granting leave to the 1st respondent above, to execute this court's judgment, pending an appeal by the applicant herein, to the Supreme Court. The application under consideration is brought in terms of the provisions of s. 18 (3) of the High Court Act.[1]

[2] The present application is a sequel to an application that had been moved by the 1st respondent in which the latter had applied for an order in terms of rule 121 (2) of this court's rules of court, for leave to execute a judgment of this court notwithstanding that the applicant had noted an appeal to the Supreme Court. This court granted the application for leave to execute *vide* a judgment dated 22 January 2016. Dissatisfied with that judgment, the applicant has filed the present application seeking leave from this court to appeal to the Supreme Court against the said order.

[3] I shall not indulge in much detail regarding the facts giving rise to the present application for the reason that the history of the dispute is fully captured in the judgment dated 22 January 2016. There are two main issues raised by the applicant and on the basis of which this court is alleged to have erred in coming to the conclusion that it did, thus forming the bases for the instant application for leave to appeal.

[4] In his address, Mr. Heathcote started on a confessional note. He confessed that he could not, in good conscience, argue with the court's finding that a constitutional case, has first to serve before the court of first instance, namely this court in our jurisdiction. This finding, he pointed out, is eminently correct. I point out that it is supported by a recent authority, fresh from the oven, so to speak, in the Republic of South Africa. This is the judgment of *The Minister of Justice and Constitutional*

[1] Act No. 16 of 1990.

Development v The Southern African Litigation Centre,[2] delivered on 15 March 2016 by that country's Supreme Court of Appeal.

[5] In that case, Wallis J.A., writing for the majority of the court stated as follows at para [24]:

'Furthermore, where the purpose of the appeal is to raise fresh arguments that have not been canvassed before the High Court, consideration must be given to whether the interests of justice favour the grant of leave to appeal. It has frequently been said that it is undesirable for it as the highest court of appeal in South Africa to be asked to decide legal issues as a court of both first and last instance. That is equally true of this court. But there is another consideration. It is that if a point of law emerges from the undisputed facts before the court it is undesirable that the case be determined without considering that point of law. The reason is that it may lead to the case being decided on the basis of a legal error on the part of one of the parties in failing to identify and raise the point at an earlier stage. But the court must be satisfied that on the papers, the point truly emerges on the papers, that the facts relevant to the legal point have been fully canvassed and that no prejudice will be occasioned to the other parties by permitting the point to be raised and argued.'

[6] It is clear that the instant case does fall within the prohibition stated in the excerpt above. Equally true, is that properly considered, the present case also does not fall within the exception also provided therein. It becomes clear that the cases cited in the previous judgment of this court dated 22 January, 2016, including *Prince v President of the Cape Law Society and Others* and *S v Paolo,* and referred to later in this judgment, were on point. For that reason, Mr. Heathcote's concession was not only comely but properly and ethically made. He had in his quiver other arrows which he put up his string however.

[7] The first live issue raised by the applicant is in respect of the security *de restituendo.* In this regard, it was contended that the Minister had not made a tender for security when he had an obligation to have done so, as required by the rules of court. It

[2] (867/15) ZASCA 17 (15 March 2016).

was also contended that the court erred in not determining the amount of security. I however, understood Mr. Heathcote to no longer pursue this issue, particularly in view of the unanswerable argument raised by Mr. Hinda in his heads of argument, namely that in terms of the provisions of rule 8 (4) of this court's rules, the Government of the Republic of Namibia is not required to put up any security. This provision, nipped the applicant's argument in the bud so to speak and I need not, for that reason, address this issue at all more than I already have.

[8] The second issue raised was that the court erred in dealing with the constitutional challenge on the basis that the issue would have had to be raised for the first time on appeal before the Supreme Court and therefor dismissed same. It was argued that this court should have proceeded in the last hearing, to determine the constitutional issue and because it did not, it erred in not doing so. In this regard, it was argued that in view of the binding authority of *S v Paolo,*[3] this court should itself have determined the constitutional collateral challenge in the last hearing. Is Mr. Heathcote correct in his submissions to that effect?

[9] Mr. Hinda, for the Minister, argued briefly but very strongly that Mr. Heathcote's argument was incorrect for the reason that in the *Paolo* case, the court took the view that a collateral challenge must be raised during litigation. Mr. Hinda was of the view that in the instant case, the collateral challenge was raised for the first time at the post-trial stage, he argued therefor that this court was correct in not entertaining the same. It appears to me that it is, for that reason, necessary to consider the relevant aspects of the *Paolo* judgment in order to determine which of the protagonists is correct in the heavy reliance necessarily placed on the said judgment.

[10] Mr. Heathcote referred, in support of his argument, to para [15] of the *Paolo* judgment. The relevant portion of the judgment, which I am of the view is potentially dispositive of this issue is the following:

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[3] 2013 (3) NR 366.

'In this regard Mr. *Obbes* had argued, correctly in my opinion, that a litigant is entitled to invoke any provisions of the Constitution during litigation, at any time during litigation. But this of course is subject to the safeguards mentioned in the Namibian High Court decision of *Vaatz v Law Society of Namibia* 1990 NR 332 (HC) at 336 (1991 (3) SA 563 (Nm) at 576E-F (SA).
In that decision Levy J, in his judgment, concurred in by Strydom AJP, said:

"A litigant can invoke any provision of his country's constitution at any time during litigation. Should the other party be taken by surprise, the Court will decide whether or not such party is entitled to a postponement and whether there should be a special order as to costs."' (Emphasis added).

[11] In my view, what should be closely considered, and which is key to the issue for determination, is what is meant and to be understood by the words 'during litigation', as employed in the *Paolo* judgment. Mr. Hinda, for his part, as foreshadowed above, argued that in the instant case, the constitutional issue was not raised during litigation but at the post-trial stage when the litigation between the parties had already come to an end and when post-trial proceedings had commenced. Is he correct in his contention?

[12] The Oxford Advanced Learner's Dictionary defines 'litigation' as 'the process of making or defending a claim in court'. In this regard, it would seem to me inexorably the position that where a case has, after a full hearing, been determined and a final judgment thereon has been issued, that the litigation proper is thereby finalized. This is the case in my view as the claim or defence, as the case may be, and which are the subject of the litigation, would have been finally determined by the said court. In the instant case, it is clear that the proceedings were commenced by way of action. Evidence was led for and on behalf of all the parties, including the claim in reconvention by the Minister. At the end, the court, in its judgment dismissed the applicant's claim and granted the Minister's counterclaim and thereby brought litigation between the parties to an end.

[13] It was only after this court's judgment on the trial had been issued and when the Minister wished to execute on the said judgment that the constitutional issue was for the very first time raised by the applicant. Can that constitutional issue raised at such a juncture, be properly said to have been raised 'during litigation'?

[14] I think not. I say so, as is apparent from what I have said above, that the trial had ended. Judgment had been rendered and only enforcement procedures at the post-trial stage had been commenced by the Minister. One pauses to consider whether the applicant would have moved the constitutional application if the Minister had not applied for leave to execute. Although the answer may be the subject of surmise or conjecture, it appears most unlikely as from present indications what persuaded the applicant to raise the constitutional issue was the Minister's unequivocal intention to have the judgment executed notwithstanding the applicant's appeal.

[15] It was in opposing the application for leave to execute this court's judgment that the constitutional issue was for the first time raised and this was plainly done after the final determination of the case. For that reason, it cannot, with the greatest benevolence, be said that the application was raised during the litigation. This was, in my view, after the cessation of litigation hostilities as it were and this was after one party had been finally determined by the court to have been vanquished in battle of litigation.

[16] In my view, the stage reached when the constitutional issue was raised is in legal parlance referred to as *lis finite,* which is described as follows by Claassen:[4]

'Suit concluded. This signifies not only that the action has been brought to an end, but also that the matter at issue between the parties has been finally determined, so that if a fresh action is raised with regard to the same subject-matter, it will be effectually met by a *exceptio litis finitae vel rei judicatae'.*

[17] In this regard, the question to be asked as stated in the quotation above, in order to determine whether or not the litigation between the parties has been finalized, is the

[4] Claassen's Dictionary of Legal Words and Phrases, Vol. 3, at p. L-45, Butterworths, 1997.

following: if another action was to be instituted between or among the parties on the same cause of action, would it on present indications be successfully met with the plea of *res judicata?* If the answer is in the affirmative, then it would mean that the stage of *lis finite* has unquestionably been reached. In my view, the answer to that question is in the affirmative and it is the only conclusion that can be reached in the present circumstances.

[18] In the *Paolo* case, for instance, the Supreme Court, at para [15] held that it would have been 'absurd' to raise a constitutional challenge at the sentencing stage. I am of the view that sentencing, in criminal trials is even before the stage which had been reached in this matter when the constitutional challenge was raised. I say so for the reason that the sentence in criminal trials ordinarily marks the end of the trial, after judgment on conviction has been delivered. In this case, the present application was moved after the final sentence and word had already been spoken by this court in the entire matter.

[19] I am constrained in the circumstances to agree with Mr. Hinda. This court was not at liberty to have entertained the constitutional challenge as it was raised after litigation and at the stage where enforcement procedures of the judgment had been initiated and were in progress. I am of the view that the *Paolo* case does not support the applicant's case in the present circumstances.

[20] I am of the view that the application by the applicant should be refused for other reasons as well. During argument, Mr. Heathcote told the court that the applicant has always been aware of his right to raise the constitutional challenge but did not raise it earlier supposedly because of financial challenges. The question is whether the decision to raise the issue now, when the applicant has always been aware of his rights in that regard does not transgress the rule against piecemeal litigation? This is because it is not as if the constitutional issue is a new one that has not previously existed so that the applicant would have not have been expected, with reasonable foresight, to have known about it before the time he raised it and so late in the day, if I may add.

[21] In *Okorusu Fluorspar (Pty) Ltd v Tanaka Trading CC and Another*[5], this court referred to *Evins v Shield Insurance Co. Ltd*[6] where the court dealt with the principle of *res judicata a*nd the once and for all principle in litigation. The court in the *Evins* case said the following:

'The object of this principle (*res judicata*) is to prevent repetition of law suits, the harassment of a defendant by a multiplicity of actions and the possibility of conflicting decisions. . . The principle *res judicata*, taken together with the "once and for all" means that a claimant for Aquilian damages who has litigated finally is precluded from subsequently claiming from the same defendant upon the same cause of action additional damages in respect of further loss suffered by him (i.e. loss not taken into account in the award of damages in respect of the original action), even though such further loss manifests itself or becomes capable of assessment only after the conclusion of the original action. . . <u>The claimant must sue for all his damages, accrued and prospective, arising from one cause of action, in one action and, once that action has been pursued to final judgment, that is the end of the matter.'</u> (Emphasis added).

[22] It will be clear that the above excerpt relates mostly to the principle of *res judicata* but what is important to mention is that implicit therein is the need to litigate on all issues at once and not litigate in a piecemeal or truncated fashion which resultantly calls on the other party to be dragged to court time and again on the same matter. This, in my view is what the applicant is seeking to do, considering as I have pointed out earlier, that the constitutional issue is not new to him. On his own word, stated by his legal representative, the applicant has always been aware of his right but did not exercise same at the appropriate time. He has at all times known about the existence and justiciability of the constitutional issue and appears to have had the same legal team which appears from all accounts to have known about the existence of the constitutional challenge. He should not be allowed to raise same at this stage after litigation, when the litigation arsenal has been retired or possibly being serviced and calibrated for future legal battles with other litigants.

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[5] (I 2055/2013) [2016] NAHCMD 16 (05 February 2016).
[6] 1980 (2) SA 814.

[23] In *Socratus v Grindstone*[7] Navsa J.A., writing for the majority of the Supreme Court of Appeal stated the following about proliferation of proceedings and its deleterious consequences on the use of court time at page 3 para [16] of the judgment:

'Courts are public institutions under severe pressure. The last thing that already congested rolls require is further congestion by unwarranted proliferation of litigation.'

I endorse these remarks as apposite in the instant case and hereby encourage litigants to avoid duplication of proceedings by raising legal matters in their respective cases in instalments and once the one they had decided to raise first has hit the concrete wall of dismissal as it were. If such a situation prevails, the court is compelled in some cases to expend double the time and resources, both human and financial in respect of what is essentially the same cause of action between the same parties than it might otherwise have. This amounts to at best to inefficient or at worst, wasteful use of the court's time and resources, thus denying or postponing the exercise of other litigants' right and opportunity to access the court and for which they may have waited for a very long time.

[24] In the case of *Prince v President of the Cape Law Society*[8] the South African Constitutional Court made the following lapidary remarks:

'Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provision sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the Court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the Court information relevant to the issue of justification. I would emphasise that all the information must be placed before the Court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as to allow the opportunity to present factual material and legal

[7] 2011 (6) SA 325 (SCA)
[8] 2001 (2) SA 388 (CC) at para [22].

argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such challenge in the papers or pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement their case on appeal.'

[25] It will be seen that in the instant case, the applicant did not bring a constitutional challenge in a proper application, seeking specific relief. The case of constitutionality of the provisions of s. 17 of the Agricultural (Commercial) Land Reform Act[9] in question was raised in glib terms in the answering affidavit filed by the applicant in response to the Minister's application for leave to execute this court's judgment aforesaid. *In casu*, the constitutional issue was raised in reverse, so to speak and not on the basis of the applicant initiating proceedings questioning the constitutionality of the specified provisions of the relevant Act. In other words, the constitutionality was not raised as an issue in its own right and as a sword so to speak. It was rather raised as shield to the proceedings launched by the Minister seeking to leave to execute the court's judgment as earlier stated. Neither did the applicant, as he properly could, file a cross-application, I may add.

[26] As a consequence of how the applicant chose to raise the matter, it would seem that he has in the process breached the proper procedure to be followed by litigants in matters where the constitutionality of a statute is raised. In *Kavendjaa v Kaunozondunge* ***N.O.*** *And Others,*[10]Damaseb J.P. emphasised the importance of citing the Attorney-General and the government in such proceedings in the following language:

'In *casu* the Attorney-General has not been cited nor has any minister of the government. The government has no*t* chosen to remain silent: it was consciously excluded by the applicant from these proceedings. That is fatal. It is an unwholesome practice, to be discouraged, for people to seek to challenge the constitutionality of a law without citing the government which carries the political responsibility for the continued existence of the law.'

[9] Act No. 13 of 2002
[10] 2005 NR 450 at p 465.

[27] The learned Judge President was in respectful agreement with and cited with approval the statement of the law by the Constitutional Court of South Africa in *Moise v Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as* ***Amicus Curiae)***[11]. In particular, the following statement is instructive, namely:

> 'It is for this reason that the government functionary responsible for legislation that is being challenged on constitutional grounds must be cited as a party. If the government wishes to defend the particular enactment, it then has an opportunity – indeed an obligation – to do so. The obligation includes not only the submission of legal argument but the placing before court of the requisite factual material and policy considerations.'

[28] The unconventional reverse and defensive manner in which the applicant has chosen to challenge the constitutionality of the said provisions has resulted in the breach of the principles stated in the above cases. The applicant stated that the 'Attorney-General will be invited to join these proceedings.'[12] It will be seen from the contents of the immediately preceding paragraphs that the Attorney-General must not be 'invited' as if to a party or picnic as it were but should in terms of the legal precedent be cited as a party as the said office clearly has a material interest in the challenge indirectly made by the applicant.

[29] It must be stressed that constitutional litigation is a very serious matter and in which all the necessary parties should be cited in order to enable them to play a meaningful role in unravelling the constitutional conundrum and render much needed assistance to the court. An invitation extended to that office, even in the most polite terms will not do and will not be countenanced. Short cuts in this regard must be avoided.

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[11] 2001 (4) SA 491 (CC) at 498 D-G.
[12] Para 7 of the applicant's answering affidavit.

[30] Finally, I also find it necessary to say a few words about the collateral challenge and its appropriateness in the present matter. This is a subject that was undertaken with finality by the Supreme Court in *Black Range Mining (Pty) Ltd*.[13] At page 12, para [19] the Supreme Court dealt with the issue of the collateral challenge by stating the following applicable principles:

> '(a) A collateral challenge may only be used if the right remedy is sought by the right person in the right proceedings;
>
> (b) Generally speaking and in an instance where an individual is required by an administrative authority to do or to refrain from doing a particular thing, if he or she doubts the lawfulness of the administrative act in question, the individual may choose to treat it as void and await developments. Enforcement proceedings will have to be brought by the administrative authority involved, and the individual will be able to raise the voidness of the administrative act in question as a defence.
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> (c) It will generally avail a person to mount a collateral challenge to the validity of an administrative act where he or she is threatened by a public authority with coercive action, precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question.
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> (d) Collateral challenges may not be allowed where evidence is needed to substantiate the claim, or where the decision maker is not party to the proceedings, or where the claimant has not suffered any direct prejudice as a result of the alleged invalidity.
>
> (e) A collateral challenge bears on a procedural decision.'

[31] In dealing with the collateral challenge in this matter, Mr. Heathcote, as I understood him, contended that there was coercive action on the part of the government in the instant case, namely the eviction of the defendant from the farm in question, thus entitling the applicant to mount a collateral challenge. In dealing with the meaning of coercive action, the Supreme Court stated the following in the *Blackstone* case:[14]

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[13] Case No. SA 09/2011.
[14] At para 21.

'The term 'coercion' includes both direct and indirect coercion. A form of compulsion exists to prevent a person from exercising their free will to do or to refrain from doing something. This court in *Namibian Broadcasting Corporation v Kruger and Others* 2009 (1) NR 196 (SC) at para 25 accepted the definition in *The Collin's Dictionary Complete and Unabridged* 8 ed where the word "coercion" was used along with terms such as "compulsion by the use of force or threat" and "constraint". The *Concise Oxford English Dictionary* 10 ed defines "coerce" as: "to persuade (an unwilling person) to do something by using force or threats'.

[32] The question that needs to be investigated is whether the contention that the eviction (which I am made to understand has since been undertaken) qualifies to be regarded as 'coercive' action within the meaning described above. In this regard, it would appear that the said coercive action must be in relation to an exercise of administrative power by a public authority.

[33] In the first place, I am of the view that the order for eviction is not, in the peculiar circumstances of this case, one that can properly be described as the exercise of administrative power by a public authority. What is abundantly clear in this case is that the eviction was the result of the finding of this court, after a fully-fledged trial and in which the applicant was legally represented. It is now history that this court held and found that applicant had no right to continue occupying the land in question.

[35] For that reason, it is clear that the eviction was carried out in execution of an order of court, which cannot be regarded as the exercise of power by a public authority. It is a step that is sanctioned and authorized by the court in giving effect to its own judgments and may not be regarded in any shape or form as coercive use of administrative power by a public authority in the sense described above. The applicant is in fact challenging the validity, not of an unlawful administrative act but a court order. For that reason I am of the considered view that this is not a proper case in which a collateral challenge should be allowed. It is simply not in the right proceedings or circumstances to raise same.

[36] In view of the foregoing, I am of the view that the application for leave to appeal has no merit whatsoever and I am of the considered view that another court may not, in the circumstances of this case, properly construed, be predisposed to find differently on the issue of the constitutional challenge.

[37] As a result, I issue the following order:

1. The application for leave to appeal to the Supreme Court is refused.
2. The applicant is ordered to pay the costs of one instructing and instructed counsel.

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TS Masuku

Judge

APPEARANCES:

APPLICANT:	R. Heathcote SC Instructed by MB De Klerk & Associates
1st RESPONDENT:	G. Hinda SC Instructed by Government Attorney