REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No. (P) I 1852/2007

In the matter between:

MINISTER OF LANDS AND RESETTLEMENT **APPLICANT**

And

DIRK JOHANNES WEIDTS **1ST RESPONDENT**

GIDEON THEODORUS GOUSSARD **2ND RESPONDENT**

Neutral citation: *Minister of Land and Resettlement v Dirk Johannes Weidts & Another (I 1852/2007) [2016] NAHCMD 7 (22 January 2016)*

CORAM: MASUKU J.

Heard: 15 September 2015

Delivered: 22 January 2016

Flynote: Rules of Court – rule 121 (2) regarding the application for leave to execute a judgment pending appeal revisited; elements to be satisfied by applicant for leave to

execute restated. - PRACTICE – undesirability of raising constitutional issues for the first time on appeal restated.

Summary: The applicant was a successful party in a trial before this court and was therefor granted leave to evict the 1st respondent from a farm. The 1st respondent appealed against the decision of this court. In the interregnum, the applicant applied for leave to execute the judgment the appeal notwithstanding. The court revisited the elements that an applicant for leave should satisfy. *Held* – that the applicant had satisfied the elements for leave to execute the judgment. *Held further* –that in dealing with such applications, the court must disabuse its mind on the matter and bring an unbiased and impartial reasoning to bear on the application, eschewing its previous judgment from clouding the issues raised on appeal. *Held further* – that it is generally undesirable for a party to raise a constitutional matter on appeal for the first time, compelling the appellate court to sit in the composite capacity of being the court of first and last instance. Application for leave to appeal granted with costs.

ORDER

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1. The application for leave to execute the judgment of this court delivered on 16 March 2015 under Case No. I 1852/2007 notwithstanding the noting of an appeal is granted.
2. The 1st respondent is ordered to pay the costs of the application.

JUDGMENT

MASUKU J.

Introduction and history

[1] The principal issue for determination in this judgment is whether on the facts at hand, the applicant, the Minister for Lands and Resettlement (the Minister), is entitled to an order to execute a judgment of this court in his favour, notwithstanding that an appeal against the said judgment has already been lodged with the Supreme Court for final determination.

[2] In order to place the issue in proper perspective determination necessary, I find it prudent to first chronicle the history of the dispute and the main findings of this court. I will, in the process of dealing with the issue at hand, consider the relevant authorities governing an application for leave to execute judgment and then pronounce my judgment on the facts, whether the applicant has met the threshold and whether he is therefor entitled to the relief sought.

[3] By combined summons dated 4 June 2008, the 1st respondent sued the applicant, together with the 2nd respondent for an order calling upon the Minister to take steps within 5 days, failing which the Deputy Sheriff be authorised to transfer property to the 1st respondent; that the 2nd respondent repays all the payments made to the 1st respondent as compensation for occupation of the property from the date that the 2nd respondent was *in mora,* interest at the rate of 20% per annum from date of payment and costs of the suit.

[4] From a reading of the pleadings, it would seem that the 1st respondent and the 2nd respondent had entered into a written agreement of sale in terms of which the former purchased a farm in Karibib described as Farm Korabib No. 327, measuring

19789, 1821 hectares, together with improvements thereon. The 1st respondent claims that he complied with all his obligations in terms of the agreement by tendering to pay the purchase price. He further averred that the provisions of s. 17 of the Agricultural (Commercial) Land Reform Act[1] (the Act) had been complied with in that a certificate of waiver had been obtained indicating that the State did not have interest in the aforesaid property.

[5] The Minister, for his part filed a special plea in which he averred that the provisions s. 17 A of the Act had not been complied with and that the certificate referred to was never lodged with the Registrar of Deeds as required. He further averred that the property in question was purchased by the Government and the said property was on 12 July 2007 transferred and registered in the name of the Government of the Republic of Namibia and as such the Government is the lawful owner of the property in question. It is worth noting that in his plea filed subsequently, the Minister by and large incorporated the averments made in the special plea referred to herein.

[6] That was not all. The Minister further filed a claim in reconvention in which he sought an order terminating a lease agreement between him and the 1st respondent. He further sought an order evicting the 1st respondent from the property and costs of suit as well. The claim was based on the following averrals; namely that the 2nd respondent sold the property in question to the Minister and an agreement was entered into transferring the said property to the Minister and that upon registration of same, the property shall be handed over to the Minister as the rightful owner.

[7] It is further averred that the Minister and the 1st respondent entered into an oral agreement on 12 July 2007 in terms of which the Minister leased the property in question to the 1st respondent up to 12 August 2007 at the rate of N$ 15 039. 97 per month. It is further averred that upon expiry of the period set out in the agreement, the 1st respondent refused to vacate the property despite demand by the Minister to do so. The Minister claimed that the property was required by the Government in order to

[1] Act 13 of 2002.

settle previously disadvantaged Namibian citizens on it, hence the order for the eviction of the 1st respondent.

[8] In his plea in reconvention, the 1st respondent admitted the sale of the property to the Minister but denied that he remained thereon unlawfully. It was his case that the rights that may have accrued to the Minister in terms of the transfer of the property were subject to his claim in convention referred to earlier. In the alternative, the 1st respondent claimed that he was a *bona fide* possessor of the land in question and that during his occupation thereof, he caused certain improvements to be made to the property amounting to N$800,000. He therefore claimed that he should only be evicted against payment of the amount of the improvements by the Minister.

[9] After a few legal skirmishes, the 1st respondent again amended his plea in reconvention, largely based on the same allegations. Significantly, in his prayer, he applied for the Minister to repay all payments he had made to the Minister as compensation for occupation of the property to the time when he was in *mora;* interest thereon at 20% and that the 2nd respondent be ordered to repay the purchase price of the farm to the Minister and costs of suit. Needless to say this action remained vigorously defended.

[10] The trial eventually served before Damaseb J.P. The learned Judge President delivered his judgment on 16 March 2015 in which he dismissed the 1st respondent's claim against Minister and the 2nd respondent. The court further granted the Minister's counterclaim and accordingly ordered the 1st respondent to vacate the farm in question, failing which the deputy sheriff for the district of Windhoek, duly assisted by the Namibian Police, if necessary, take steps on the Minister's behalf. The Minister was awarded costs for the counterclaim against the 1st respondent.

[11] Dissatisfied with the judgment of this court, the 1st respondent, as he is entitled to, noted an appeal against the entire judgment of the court to the Supreme Court. In the interregnum, the applicant has launched the present application, which, as earlier

indicated, seeks this court's leave to execute the judgment in the applicant's favour and this is, as earlier pointed out, done notwithstanding the fact that an appeal against this court's judgment still awaits determination by the Supreme Court. I must pertinently point out that it was specifically recorded that the 2nd respondent has opted to abide by the decision of this court.

Applications for leave to execute judgments

[12] Applications for leave to execute judgments of this court pending appeal, are governed by the provisions of rule 121 (2). For the sake of completeness, I quote hereunder the full rendering of the applicable portion of the said subrule:

'Where an appeal to the Supreme Court has been noted the operation and execution of the order in question is suspended pending the decision of such appeal, unless the court which gave the order on the application of a party directs otherwise.' (Emphasis added).

[13] To my understanding, the following can be gleaned from the nomenclature employed in the subrule in question. First, if this court has, in a civil matter granted an order and an appeal has been noted against the said order to the Supreme Court, the noting of the appeal ordinarily stays the operation and execution of the order in question. This, in my view makes sense for the reason that if it were otherwise, by the time an order is made by the Supreme Court in favour of the appellant, it may in some cases be difficult and at times impossible to give effect to the Supreme Court's judgment or order as the case may be. This may serve to hamper the logical and orderly conduct of litigation through all the rungs of the court structure to the apex court. In a sense therefore, the noting of an appeal freezes or maintains the status *quo* until the Supreme Court, being the court with the last word, has determined the matter in a final fashion in favour of one or the other party.

[14] It would also appear to me that the general rule is to have the noting of an appeal stay execution of the judgment automatically. For that reason, it is my view that the filing

of an application for leave to execute must therefore be regarded as the exception to the general rule and one, it would further seem to me, that the court should not grant lightly or merely for the asking as it may have the potential to interfere, as pointed out above, with the dissatisfied party's ordinary constitutional and legal right of recourse to a higher court and in this case, for final for redress.

[15] Second, if a party to the case wishes to have this court's order or the judgment rendered operational and executable immediately without waiting for the final word from the Supreme Court, then the onus is upon that party, being the successful one, to approach this court to direct otherwise, namely, that the judgment be executed notwithstanding a pending appeal.[2] Significantly, it would appear to me that this court may not *mero motu* make or initiate such a process. One of the parties to the *lis* can only do so. In this regard, it must be further pointed out, the mode for setting this machinery into operation is set in motion by an application. In this regard, it must be pointed out that the application initiating the operation and execution of the judgment must comply with the provisions of rule 65 to be found in Part 8 of this court' rules.

[16] In this regard, rule 65 points out that 'Every application must be brought on notice of motion supported by affidavit as to the facts on which the applicant relies for relief. . .' There is no denying that the applicant in this case has followed the mandatory provisions of this rule to the letter. I did not understand the respondents or either of them to hold a different position in this regard.

[17] In his notice of motion dated 29 May 2015, the applicant moves this court to grant the following prayers:

(1) 'That the operation of the order of the above Honourable Court dated 16 March 2015 under Case Number I 1852/2007 be given effect to and not be stayed despite the respondent's noting of an appeal to the Supreme Court of Namibia;
(2) That the respondent pays the costs of this application only in the event he opposes the application.'

[2] *Cf Southern Cape Corporation(Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (AD) at 546 C-H.

The affidavit in support of the application, whose contents may be visited later in this judgment, is deposed to by Mr. Utoni Nujoma, the Minister responsible for land acquisitions and expropriations in terms of the provisions of the Act.

[18] In order to determine the nature of the allegations to be made for a party to succeed in such applications, the rules of court offer no *praescriptum*, clue or guidance. It is therefore necessary to resort to case law and other authorities in order to determine whether the applicant in this matter has made out a case for the relief sought.

[19] In *Medical Association of Namibia Ltd and Another v The Minister of Health and Social Services and Others*[3] this court cited with approval the law set out in the South African *locus classicus* case of *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd*.[4] It has been held that the law adumbrated in the *South Cape Corporation* case is accurately reflective of the law of Namibia as well.[5] In the *South Cape Corporation,* the following lapidary remarks were made by Corbett J.A (as he then was), on the applicable principles:

'Whatever the true position may have been in the Dutch courts, and more particularly the Court of Holland (as to which see *Ruby's Cash Store (Pty) Ltd v Estate Marks and Another* 1961 (2) SA 118 at 120-3), it is today the accepted common law rule of our practice in our Courts that generally the execution of a judgment is automatically suspended upon the noting of an appeal, with the result that, pending the appeal, the judgment cannot be carried out and no effect can be given thereto, except with the leave of the court which granted the judgment. To obtain such leave the party in whose favour the judgment was given must make special application. (See generally *Olifant's Tin B Syndicate v De Jager* 1912 AD 377 at 481; *Reid and Another v Godart and Another* 1938 AD 511 at 513; *Genticuro AG V Firestone SA (Pty) Ltd* 1972 (1) SA 589 (A) at 667; *Standard Bank of SA Ltd v Stama (Pty) Ltd* 1975 (1 SA 730 (A) at 746). The purpose of this rule as to the suspension of a judgment on the noting of an appeal is to prevent irreparable

[3] 2011 (1) NR 272 (HC).
[4] 1977 (3) SA 534 (A).
[5] *Witvlei Meat v Agricultural Bank of Namibia* 2014 (1) NR 22 (HC) at 26 G; *Walmart Stores Incorporated v Chairperson, Namibia Competition Commission And Others* (Case No. A 61/2011, 15 June 2011).

damage from being done to the intending appellant, either by levy under a writ of execution or by execution of the judgment in any other manner appropriate to the nature of the judgment appealed from (*Reid's* case *supra* at 513). The Court to which the application for leave to execute is made has a wide general discretion to grant or refuse leave and, if leave be granted, to determine the conditions upon which the right to execute shall be exercised (see *Voet,* 49.7.3; *Ruby's Cash Store (Pty) Ltd v Estate Marks and Another supra* at 127). This discretion is part and parcel of the inherent jurisdiction which the court has to control its own judgments (*cf Fismer v Thornton* 1927 AD 17 at p. 19).'

[20] In exercising this discretion the court should, in my view, determine what is just and equitable in all the circumstances, and, in doing so, would normally have regard, *inter alia*, to the following factors:

(1) the potentiality of irreparable harm or prejudice being sustained by the appellant on appeal (respondent in the application) if leave to execute were to be granted;
(2) the potentiality of irreparable harm or prejudice being sustained by the respondent on appeal (applicant in the application) if leave to execute were to be refused;
(3) the prospects of success on appeal, including more particularly the question as to whether the appeal is frivolous or vexatious or has been noted with the *bona fide* intention to reverse the judgment but for some indirect purpose, e.g. to gain time or harass the other party; and
(4) where there is the potentiality of irreparable harm or prejudice to both appellant and respondent, the balance of hardship or convenience as the case may be.

[21] These are the considerations that I will take into account in determining whither the interests of justice lie in the present application. I do so because as earlier stated, this excerpt has been held to accurately depict the picture of the law in this respect even in this jurisdiction. Before I do so, however, there is one argument that was raised on behalf of the 1st respondent in the heads of argument. The argument advanced was that the applicant has not made out a case for the relief sought but merely regurgitated the legal requirements for the granting of leave to execute. In this regard, it was submitted that the court should not be expected to read the entire record in order to come to a view on whether the applicable principles were fully met, but these should set out with

sufficient particularity in the affidavit filed in support of the application. It was urged upon the court to dismiss the application on this ground alone. Is there merit in this contention?

[22] I have had full regard to the affidavit filed by the applicant in support of the application. At para 7, the deponent addressed the issue of the general rule that an order suspends the execution and operation of the judgment and proceeds in the next paragraph to set out the prejudice that the applicant would suffer if the ordinary and general rule were to apply, namely that the land in question is required for the purpose of settling landless Namibian citizens. After setting out the requisites for the grant of the order, as discussed above, the deponent proceeded to deal with each of the requirements in turn. In this regard, reasons are proffered as to why each requirement should be found to favour the applicant's case.

[23] I do not, unfortunately share the sentiments expressed by Mr. Heathcote that the applicant did not set out briefly and succinctly the essential facts which could enable the court to fully deal with the application but merely regurgitated the requirements for the grant of the relief as set out in case law. As I have endeavoured to show above, the applicant did address the factual allegations on the basis of which the prayer sought is predicated. In addition, the applicant also adumbrated the requisites for the grant of the relief sought, having in separate paragraphs dealt with the factual allegations relevant to each requirement. Nothing more should in my considered view be expected from an applicant. In this regard, I am of the considered opinion that argument should fail and I so order.

Irreparable harm if order is granted

[24] In a nutshell, the applicant's case in this regard is that it has had a favourable judgment from this court for the eviction of the 1st respondent from the premises and that the land in question is being required and earmarked to settle many Namibians who do not have land and that any delay in effecting the judgment will have deleterious effects on the many people who stand to benefit from the land in question. This

argument is raised in order to meet the potentiality of harm or prejudice if the application is not granted.

[25] I am of the view that the applicant has made out a case in respect of this leg. The issue of scarcity of land in Namibia is real and this has forced the Government to engage in programmes geared towards alleviating the land issue. That countless Namibians live in squalor conditions as a result of scarcity of land is one of which this court is entitled to take judicial notice. Although the 1st respondent might suffer prejudice as an individual, I am of the view that the greater good is likely to be met by the grant of the application, considering as I should, that this court found that the 1st respondent had no right to remain on the land, a matter that is to some extent challenged on appeal.

[26] It was argued by Mr. Heathcote that the land is earmarked for settlement of landless Namibians is merely the *ipse dixit* of the applicant and which is not supported by any documents e.g. the list of persons who have applied in order to show the genuineness of the applicant's avowed position and benefit for the greater number of Namibians. I am of the view that it is not necessary for the applicant to have burdened this application with the list of persons who have applied for land. There is no suggestion or even intimation that the Government, which had been adjudged to be the lawful owner of the property, is being anything than candid before this court as to the use to which it intends to put the land, considering its position as the owner and which the 1st respondent does not appear to contest. This argument should not avail the respondent in my considered view and I so hold.

Irreparable harm if application is refused

[27] This issue is closely tied closely to the one discussed immediately above. In essence, it would seem to me that the 1st respondent claims that the balance of convenience or hardship lies in his favour. It was argued on his behalf that if evicted, he will be subject to the elements as it were, considering that the said farm constitutes his primary home and that he has nowhere else to go. The fact of the matter, which

appears to be established, is that the applicant is the owner of the property in question and the 1st respondent has no right to remain in occupation of the property for the reason that the lease agreement entered into between the parties ended by effluxion of time. The 1st respondent had to make other arrangements when the time for the end of the lease agreement drew nigh and moreso when the proceedings were instituted, in case the court did not find in his favour.

[28] Furthermore, it would seem to me that the 1st respondent, if successful, could have a claim for enrichment had he not conceded that he had not made out the case for that relief. In the event that he did have a case, the applicant would in all likelihood be in a position to meet whatever judgment this court may have been minded to issue as compensation and this would have to be relief granted quite apart from the 1st respondent continuing to remain in occupation of property without any lawful justification to do so, especially when the owner has chosen to exercise its right to reclaim the said property.

[29] In *Ralph Rickert Mouton v Naftalie Nathaniel Gaoseb*[6]*,* this court dealt with a matter in which stay of proceedings was being sought on the basis that the applicants had a pending application for condonation and reinstatement of their case before the Supreme Court. Although the facts differ, what is common is that the applicants remained in occupation of the property which had been purchased by the respondent and were not paying any rent and had no basis to continue in occupation of the said premises.

[30] In dealing with the issue of the balance of convenience or prejudice, the court expressed itself in the following terms in this regard:[7]

'On the other hand, the applicants are staying in the property which was sold and enjoying all the privileges without paying any rent or other means to the registered owner. Payment of costs, it stands to reason, cannot eradicate or even ameliorate the harm and

[6] Case No. 1 4215/2011.
[7] *Ibid* at para [29].

prejudice that the respondent continues to suffer. The depositions of the applicants offer nothing but cold comfort to the respondent. Simply put, the inconvenience and prejudice, properly put in the scales in this matter, tilt heavily in the direction of the refusal of the application for stay of proceedings. If the applicants were offering a monthly rental at market value or whatever standard, and this is acceptable to the respondent, different considerations on the topical issue of prejudice may well have changed the complexion of the matter.'

[31] It would appear to me that the sentiments of the court in the above matter, although on different facts are applicable considering the issue of prejudice and the fact that the applicants in that case wanted to remain in occupation of the property whilst awaiting applications for condonation when their right to continue in occupation had in terms of the law come to an abrupt end. The respondent was, on the other hand servicing a mortgage bond yet deriving no benefit from his doing so.

[32] It might be opportune to cite with approval the sentiments expressed by Smuts J (as he then was) in *Witvlei Meat* case, *supra* at para 49. There the learned Judge said:

'Taking into account and weighing the prejudice of the parties, it would seem to me, in the exercise of my discretion, that the applicant has been singularly unsuccessful in establishing that the real dictates of substantial justice would favour the granting of this relief. Indeed, the applicant has remained in occupation of the premises for some three years without a right to do so. It would seem in this application that it considers that it should be able to do so for a further two years whilst the matter proceeds on appeal. To permit it to do so in the face of such unmeritorious defence to the eviction would not, in my view accord with substantial justice'.

[33] The sentiments expressed by the learned Judge are largely applicable in the instant case save that I have not yet expressed myself on the question of the prospects of success on appeal in the present matter, an issue I shall proceed to deal with presently. Suffice it to mention that the balance of convenience and the demands of substantial justice accord with the upholding of the application of the applicant. There are many people who stand to benefit from the granting of the order at this point, than the rights of one individual, whom this court has found in the trial has a meritless

defence. Jeremy Bentham, that old philosopher in his utilitarian principles spoke of the greatest happiness for the greatest number. This would suggest the grant of the application on the question of balance of convenience/ prejudice to the parties herein.

Prospects of success

[34] The next question for determination is whether on the facts of this case, and properly considering the record of proceedings, including the judgment of this court, the applicant has convinced this court that he has prospects of success. In this regard, it must be placed on the record as to what the approach and attitude of the court must be. This was, in my view properly and accurately captured in the applicant's heads of argument by Mr. Hinda for the Minister as follows:[8]

'In other words, what the Honourable Court has to look at, based on the grounds of appeal is whether such grounds have any prospects of success on appeal. This court has thus to revisit its own judgment, disabusing its mind in the determination of whether the appeal has any chances of success. If the chance of success on appeal is non-existent, the more the reason there is for the court to grant leave to execute. On the contrary, if the prospects of success on appeal are good, the application for leave to execute has lesser chances for success. The balance must be determined by the potential prejudice and irreparable harm to the respective parties.'

[35] In other words, the trial court should not seek to preserve its own judgment by sticking to its guns as it were and at all costs. Put differently, the court must not be seen or perceived to be "married", as it were, to its judgment, as it is usually said, for better or for worse. It should approach the matter form an impartial position, with its mind being open to the fact that it may, on reflection and with the benefit of hindsight, have erred in its judgment, regard being had to the matters of law and/or fact raised by the appellant

[8] Para [28] p11 of the applicant's heads of argument.

in the notice of appeal and to the fact that another court may come to a different conclusion on the matter.

[36] The chance of this court choosing to be "married" to its judgment is somewhat ameliorated in the instant case for the reason that I am not the trial judge as stated earlier. The temptation to protect one's views expressed in the judgment are dramatically reduced. And I have to deal with this matter disabusing my mind of the predilections and approach to the matter from an unbiased point of view and this is what I have set myself out to do and to the best of my ability.

[37] In this matter, the applicant has strongly urged this court to find that the 1st respondent has no prospects of success on appeal and needless to say, the latter has adopted a different posture on this matter. Crucial to this enquiry, in my view, is the fact that the 1st respondent, in his plea to the applicant's claim in reconvention, admitted occupation of the farm in question but claimed that the government's claim to ownership of the farm was contingent on his claim in convention. In the alternative, he averred that he was the *bona fide* possessor of same and in the event the court held that the applicant had a better claim to ownership of the property, that he made useful improvements thereon in the amount of N$ 800 000, thus constituting the enrichment claim.

[38] The court found and held that this claim was abandoned by the 1st respondent during the hearing and the 1st respondent's counsel conceded that they had failed to prove same. It becomes clear, in view of the foregoing, that the 1st respondent has no reasonably sustainable defence to the applicant's claim and to this extent, his prospects of success on appeal are dim, if they exist at all. In respect of the 1st respondent's claim in convention, the trial court held that the 1st respondent had failed to show that he had complied with the obligations imposed on him by the written agreement he had entered into with the 2nd respondent and that he had therefore failed to discharge the onus thrust upon him. This is a finding that I am unable to fault, regard had to the entire conspectus of the matters facing the trial Judge.

[39] Further compounding the 1st respondent's misery, so to speak, is the court's finding that in his claim for specific performance, the 1st respondent had failed to show by admissible evidence that he had, for his part, performed his own obligations under the contract. Neither could he show that he was ready, able and willing to perform his own obligations in terms of the written agreement or that he was unlawfully prevented from so doing by the actions of the applicant. I cannot find fault with the finding of the learned Judge President in this regard and for his conclusion that the course sought to be adopted by the 1st respondent seemed to fly in the face of the parole evidence rule, a course that cannot be allowed in terms of the law, where the contractants have committed themselves to the terms in writing, as a memorial of their agreement.

[40] Mr. Heathcote argued that the applicant in his heads did not deal with the merits of the findings by the trial court but confined himself to the enrichment claim. This may well be so but this court has had a look at the record and the judgment and is of the view that there are no prospects of success on the main claim either from the findings of the trial court on both matters of law and fact. He also submitted that although the 1st respondent may have conceded on the issue of the enrichment claim, they are still at large to reconsider their stance on the issue. One wonders whether a party, on such crucial matters should be allowed approbate and reprobate at the same time. I do not attach any significance to this argument as there is nothing before court to indicate the withdrawal of the concession, if it could be properly made in the first place and I do not presently find it profitable nor desirable to venture into that prospective discourse.

[41] In view of the foregoing, I am of the considered opinion that the applicant has demonstrated that the 1st respondent does not have reasonable prospects of success on appeal. I therefore find that the applicant is on *terra firma* regarding this element as well.

Collateral challenge and propriety of raising constitutional issues for the first time on appeal

[42] There is one issue which occupied both counsel's time during the argument of the matter and this related to the constitutionality argument that the 1st respondent belatedly raised, namely he sought to challenge the constitutionality of the provisions of s. 17 of the Act on appeal. The issue for debate was whether it was proper for that course to be adopted when the issue was never raised for determination by the trial court and only found its way into the fray at the post-trial and post judgment stage. Is it permissible to raise this matter at this stage? The other point of contention was whether the challenge was collateral or direct. The applicant's position was that it was a collateral constitutional challenge and not a direct one and the 1st respondent was otherwise inclined.

[43] In dealing with the issue of collateral challenge, the learned Shivute C.J. had the following luminary remarks to say in *Black Range Mining v Minister of Mines and Energy N.N.O.*:[9]

'As a general principle, a collateral challenge to an administrative act or decision occurs when the act or decision is challenged in proceedings whose primary object is no the setting aside or modification of the act or decision. The general thread that runs through the case law is that a collateral challenge may be allowed where an element of coercion exists: a typical example is where the subject is threatened with coercive action by a public authority into doing something or refraining from doing something and the subject challenges the administrative act in question "precisely because the legal force of the coercive action will most often depend upon the legal validity of the administrative act in question." It must be the right remedy sought by the right person in the right proceedings.'

[44] Whatever the merits or demerits of the collateral challenge argument, in my view, the question for determination is whether it is permissible practice to raise a constitutional challenge of an issue for the first time on appeal as the 1st respondent purports to do. In this regard, it must be noted that the issue of the constitutionality of s.

[9] 2014 (2) NR 320 at 329 para [20].

17 of the Act was never raised before the trial court as an issue but has suddenly sprung to life after the life of the litigation before this court.

[45] The applicant's counsel referred the court to the judgment of the South African Constitutional Court in *Prince v President, Cape Law Society, And Others.*[10] Mr. Heathcote implored this court not to have much regard to this judgment as in that case the court dealt with the issue of whether or not new evidence may be permitted to be adduced on appeal. That is partly correct. That is not all though.

[46] Regarding issues that are relevant in the present proceedings, Ngcobo J,[11] writing for the majority of the court had this to say about the proper place and time to bring constitutional challenges:

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

It is accordingly clear that the court made some remarks that are pertinent to this case and are instructive and therefore applicable.

[47] If there was any doubt about the importance of raising constitutional issues at the launch of proceedings, then this issue was put to bed by Mainga J.A. in *S v Paulo*[12] in the following language:

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[10] 2001 (2) SA 388 (CC).
[11] *Ibid* at p.389 para [22].
[12] 2013 (2) NR 366 at p. 374 para [16].

'The procedure adopted by the appellants to raise the constitutionality of two more presumptive provisions in this court without the benefit of the views of the court below, has the effect of obliging this court to sit effectively as a court of first and final instance on the issue. Needless to say, this court is the highest court in the land and it is not generally desirable for a court to sit as a court of first and last instance. In *Namib Plains Farming and Tourism CC v Valencia Uranium (Pty) Ltd and Others* 2011 (2) NR 469 (SC) at 474D-475E, this court declined to entertain an issue of standing in environmental cases on which the high court had not made any ruling. In *Bruce and Another v Fleecytex Johannesburg CC and Others* 1998 (2) SA 1143 (CC) (19998 (4) BCLR 415; [1998] ZACC 3) at 1148D-E, The Constitutional Court of South Africa, albeit in a different context, stated as follows:

[8] It is moreover, not ordinarily in the interests of justice for a court to sit as a court of first and last instance, in which matters are decided without there being any possibility of appealing against the decision given. Experience shows that decisions are more likely to be correct if more than one court has been required to consider the issues raised. In such circumstances the losing party has an opportunity of challenging the reasoning on which the first judgment is based, and of refining arguments previously raised in the light of such judgment."

[48] At paragraph [18], the Supreme Court proceeded to say the following:

'The appellants' failure to raise the constitutionality of the s 10 (1) (e) properly and timeously in the high court, also inhibits their ability to raise it now before this court for the same reasons. Without derogating from the observation in *Gurirab v Government of the Republic of Namibia*, above, it should be as a matter of general principle that issues of the nature under consideration be raised in courts from which the appeal arises, before they can be entertained in this court. The views of the court below are of particular significance and value to us. This court being a court of ultimate resort in all cases, will entertain proceedings as a court of both first and last instance 'only when it is required in the interest of justice'. And only in circumstances where it will be appropriate to do so'.

[49] In view of the foregoing, I am of the considered view that for the Supreme Court to entertain a constitutional matter as a court of both first and last instance, the circumstances calling for that procedure to be adopted must be exceptional, because

the general rule, as stated by that court, is for such matters to serve before the court of first instance. Furthermore, the party seeking to have the court perform such function must be able to show and the Supreme Court must be satisfied that the interests of justice demand that the Supreme Court sits in that unusual composite capacity. I am of the view that nothing is said in the instant matter that would allow this court to give its imprimatur for such a drastic course to be adopted in the circumstances. I am of the view that the point taken by the applicant in this regard must be upheld as I hereby do.

[50] On the totality of the issues before me, I am of the considered view that it is unnecessary to consider the last element of the four considerations set out in the *South Corporation* case (*supra*). I am of the view that the applicant has worthily discharged the onus placed upon it in terms of the provisions under consideration.

[51] In the premises, I issue the following order:

1. The application for leave to execute the judgment of this court delivered on 16 March 2015 under Case No. I 1852/2007 is hereby granted, notwithstanding the noting of an appeal to the Supreme Court of Namibia.
2. The 1st respondent is ordered to pay the costs of this application.

[52] I would, in closing, wish to acknowledge the late delivery of the judgment in this matter which was explained to the parties' representatives. This was partly due to the heavy roll and particularly the enormity of the issues raised. This was further compounded by the fact that I did not sit as the trial judge in this matter yet some of the issues raised for determination touched on the prospects of success in this matter, therefor requiring a close examination of certain parts of the record. As it is often said, justice is sweetest when it is freshest. By the same token, it has been said that justice hurried, may be justice buried.

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TS Masuku

Acting Judge

APPEARANCES:

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