SUMMARY

REPORTABLE

CASE NO: A 35/2006

IN THE HIGH COURT OF NAMIBIA

In the matter between:

LEONI ZAAHL AND OTHERS **APPLICANT**

Versus

SWABOU BANK LIMITED AND 4 OTHERS **RESPONDENT**

SMUTS

AJ

2006 November 23

Constitutional practice- If a litigant seeks to impugn conduct and especially to set aside legislation on grounds of an alleged conflict with the Constitution, a proper

basis must be set out in founding papers. The constitutional provisions relied upon must be identified and a basis should be set out as to how legislation or conduct conflicts with that constitutional provision.

Costs- Special order justified when a party makes unsubstantiated allegations of dishonesty in legal proceedings. This warrants censure of courts.

Held, Parties seeking to challenge the constitutionality of legislation need to set out a proper basis in their founding papers. The constitutional provisions relied upon should be identified. A basis should also then be set out as to how the legislation infringes the constitutional right in question. This would include placing evidence before Court, where required.

Held, Unsubstantiated allegations of fraud and dishonesty made in legal proceedings warrant censure and are to be discouraged and justify a special order as to costs.

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CORAM: SMUTS, AJ
HEARD ON: 2006.11.23
DELIVERED ON: 2006.11.23

JUDGMENT:

SMUTS, AJ:

[1] This opposed application was originally set down on 3 July 2006. A week before, the applicants filed a notice to postpone the application on the grounds of an application for legal aid made some time before.

[2] On the date of hearing, there was however no appearance by or on behalf of the applicants and the application was removed from the roll. First and second respondents thereafter on 30 August 2006, served a notice to apply for a trial date on the applicants by way of Deputy Sheriff. This was in the customary form and required the applicants to meet at the office of the Registrar on 28 September 2006 to obtain a trial date. This notice was followed by the service of the set down of this application for today's date. It was also served by the Deputy Sheriff.

[3] The applicants are not in attendance in Court today. Their names have been called out in both foyers of this Court. Nor have they filed any process after their application to

postpone of

20 June of this year.

[4] Ms Vivier appearing for the first and second respondents has moved for the dismissal of the application and also for an order striking out portions of the founding affidavit and substantial portions of the replying affidavit. The notice to strike out had previously been served upon the applicants.

[5] Ms Vivier also moved for a special order as to costs in view of statements made in both of the founding and replying affidavits.

[6] Thorough heads of argument were filed in advance of the prior date of hearing. Those heads address the application as well as the application to strike out and the question of costs.

[7] This application essentially concerns the sale in execution of immovable property, namely Erf 138 Extension 5, Khomasdal, which I refer to as “the property”. It belonged to the applicants.

[8] The following relief is sought in this application:

1. Setting aside the sale in execution of the property.

2. Ordering the third respondent, the Registrar of Deeds to reverse the transfer of the property and restore its ownership to the applicants.

3. Declaring the default judgment granted by the Registrar of the High Court as unconstitutional.

4. Ordering that the Court shall oversee sales in execution of homes.

5. Declaring the sale of the property below its market value as unconstitutional.

6. Declaring sections 66(1)(a) and 67 of the Magistrates' Court Act, 32 of 1944 as unconstitutional.

7. Ordering the respondents, except for the third, fourth and sixth respondents, to pay the costs of its application. (I would assume that this an intended reference to the fifth respondent because there is no sixth respondent cited in this matter.)

[9] The application was initially opposed by the fifth respondent, but his legal representatives subsequently withdrew. A detailed answering affidavit was provided by the first and second respondents, namely Swabou Bank Limited and First National Bank of Namibia Limited. The applicant thereafter filed a replying affidavit.

[10] The facts in this application are to be approached in accordance with the well established approach to disputed facts in motion proceedings laid down in Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A) at 634-635, consistently followed by this Court. In accordance with this approach, application proceedings will be adjudicated on the facts as set out in the applicant's founding affidavits which are admitted by the respondents together with facts alleged by the respondents, unless a denial by the respondents is of such a nature so as not to raise a genuine or a *bona fide* dispute of fact or is so farfetched that a Court is justified in rejecting it merely on the papers.

[11] In approaching the questions raised in this matter, my task is alleviated by reason of the fact that the applicants in the replying affidavit do not in any proper sense put in issue certain of the pertinent facts set out by the first and second respondents. Instead, the replying affidavit is replete with repeated allegations of fraud and other serious unlawful conduct including robbery, levelled against first and second respondents. I deal with this aspect in the context of the first

and second respondents' application to strike out these allegations.

]12] The relevant facts of this matter are briefly these: the property was encumbered by a mortgage bond in favour of the then South West Africa Building Society, established under Act 2 of 1986. This institution transferred all its assets and liabilities to Swabou Bank Limited which then became the successor of the rights, title and interests of the South West Africa Building Society in terms of section 52(A)(9)(b) of that Act. Swabou Bank Limited had a change of name to Swabou Investments Limited on 9 January 2004.

[13] On 3 March 2004, Swabou Investments Limited was converted from a public company to a private company called Swabou Investments (Pty) Ltd. On 1 July 2003, Swabou Bank Limited transferred its assets and liabilities and obligations, excluding its mortgage book to the second respondent, First National Bank of Namibia Limited. The excluded mortgage book was retained by Swabou Bank Limited which is now Swabou Investments (Pty) Ltd. This includes loans secured by

registered mortgage bonds including the applicants.

[14] As it happened, the applicants fell into arrears with their bond repayments in 2003. Summons was issued against them in the same year. It was not defended. Default judgment was granted and sales in execution were advertised on a few occasions. On each of these occasions payments were made to reduce the applicants' indebtedness and the sale was then averted. Following a subsequent default, a sale in execution proceeded on 28 September 2004. The property was sold for N$180,000.00. This sale was however later cancelled when the purchaser was not able to perform in terms of the agreement.

[15] A later sale in execution took place on 8 February 2005. This was to the fifth respondent although he has not been properly cited in these proceedings. Nor has his wife even been cited at all in these proceedings. In view of the conclusion I reach with regard to this application, it is not necessary to address this aspect any further.

[16] The sale was for the sum of N$198,000.00. On 18 August 2005 and pursuant to the sale, the property was then transferred to the fifth respondent and his wife. This application was launched only on 3 February 2006.

[17] In seeking to set aside the sale and the consequential relief directed at the transfer pursuant to the sale, the applicants have not placed any evidence before this Court of any vitiating irregularity or defect concerning the sale or the subsequent transfer. This relief would rather appear to be based upon the constitutional challenge mounted in paragraphs 3, 5 and 6 of the notice of motion which I have already cited.

[18] As far as the default judgment is concerned, I pause to point out that the summons was not opposed at the time. Nor has any defence to that action been raised in this application. Indeed, after the default judgment was granted, it is common cause that the applicants in fact paid further sums in respect of that very debt. As I have indicated, the relief against the default judgment would also appear to be based upon the

constitutional challenge.

[19] As is pointed out by Ms Vivier in her heads of argument, no constitutional provisions, and not even the term “unconstitutional”, were raised in the founding affidavit. There is no reference there to any provisions of the Constitution which are alleged to be infringed.

[20] In the notice of motion there are two sections in the Magistrates’ Court Act which are alleged to be in conflict with the Constitution. But there is no reference to these provisions in the founding affidavit and quite how these sections are alleged to be in conflict with the Constitution. There is also no reference as to how these provisions infringe against the applicants’ rights. In fact in considering this application, it is clear that those sections have nothing to do with the applicants. They were not invoked against them.

[21] The sale in execution instead took place in accordance with the Rules of the High Court – and not in terms of the section cited of the Magistrates’ Courts Act. For this reason alone, the challenged is entirely misconceived and the relief sought in that regard would fall to be dismissed.

[22] No reasons or grounds have been raised as to why the default judgment offends against the Constitution. There is a failure to refer to how the provisions and the conduct complained of offend against the constitutional provisions. There is also a failure to have placed any evidence before this Court as to the market value of the property and how the sale could then be unconstitutional on the basis of fetching a price below unspecified market values. For this reason alone, that relief is clearly not competent and also falls to be dismissed.

[23] If a litigant seeks to impugn conduct and especially to set aside legislation on the grounds of an alleged conflict with the Constitution, then a proper basis must be set out in the applicants' founding papers. This includes setting out the constitutional provisions relied upon and setting out a basis as to how the legislation or conduct infringes upon the constitutional

rights in question including placing evidence to that effect before Court.

[24] Although there has been an amendment to the Uniform Rules of Court in South Africa to provide for the manner in which constitutional issues are raised, the pronouncements of the South African Constitutional Court in dealing with this issue are, in my view, also apposite to Namibia, especially those which preceded the amendment to the Rules.

[25] In this regard I refer to the judgment by Ngcobo, J in Prince v President, Cape Law Society and Others 2001 (2) SA 388 (CC) at paragraph [22] where the learned judge stated:

> "[22] Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions 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 this 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 allow it the opportunity to present factual material and legal 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 a challenge in the papers or the 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 and make their case on appeal."

[26] A similar approach was echoed by that same Court by Ackerman, J, although with reference to the amended uniformed rule in South Africa in Shaik v Minister of Justice and Constitutional Development and Others 2004 (3) SA 599 (CC) in paragraphs [24] and 25] where the learned judge stated:

> "[24] The minds of litigants (and in particular practitioners) in the High Courts are focused on the need for specificity by the provisions of Uniform Rule 16A(1). The purpose of the Rule is to bring to the attention of persons (who may be affected by or have a legitimate interest in the case) the particularity of the constitutional challenge, in order that they may take steps to

protect their interests. This is especially important in those cases where a party may wish to justify a limitation of a chap 2 right and adduce evidence in support thereof.

[25] It constitutes sound discipline in constitutional litigation to require accuracy in the identification of statutory provisions that are attacked on the ground of their constitutional invalidity. This is not an inflexible approach. The circumstances of a particular case might dictate otherwise. It is, however, an important consideration in deciding where the interests of justice lie."

See also: Phillips and Others v The National Director of the Public Prosecutions 2006 (1) SACR 78 (CC) at paragraph [43]

[28] I may add in passing that in cases where legislation is challenged, it is usually considered appropriate to cite the Government in the person of the Attorney-General or the relevant Ministry or statutory agency charged with the

administration of the legislation in question. Although this was not done in this case, the Registrar of Deeds was however cited.

[29] In view of the conclusion which I have reached with regard to this matter, it is not necessary to further address this inadequacy. I am mindful that the applicants are not represented. They also brought this application at a time when they were not represented. But this does not absolve them from the duty when raising a constitutional challenge to properly specify the constitutional provisions relied upon and to place evidence in support of their challenge.

[30] I find that in this application there has been a comprehensive failure to do so in both respects. No constitutional provisions have been properly raised or even identified. Nor is there any evidence or material placed before this Court to show any conflict with any provision of the Constitution. The relief sought on constitutional grounds must thus fail.

[31] In reaching this conclusion, I am mindful of the judgment of the South African Constitutional Court, dealing with sections

66 and 67 of the Magistrates' Court Act referred to in paragraph 6 of the notice of motion in Jaftha v Schoeman and Others; Van Rooyen v Stoltz and Others 2005 (2) SA 140 (CC).

[32] As I have already indicated, those sections are not relevant to this case. Nor has any evidence been placed before this Court which can in any way show that there is any basis for applicants to raise any conflict of those provisions with the Constitution.

[33] I also stress that this matter not only deals with different statutory provisions, but that there is also an entirely different constitutional setting. There are different constitutional provisions applicable in South Africa, especially those with regard to housing.

[34] The reasoning in that judgement may well be distinguishable in any event, even though, as I have indicated, it would not be relevant to this application. A similar view was expressed by Muller, J sitting in an application where strikingly similar relief was sought. This occurred in Erica Beukes and

Another v South West Africa Building Society and 5 Others in an as yet unreported judgment delivered on 7 March 2006. He dismissed that application on several grounds.

[35] In a closely reasoned judgment, he also dealt in some detail with the state of the law concerning the challenging of a sale in execution after transfers have occurred to purchasers, as also occurred in this matter. The purchasers in this case, the fifth respondent and his wife, have an unassailable title and no evidence has been placed before this Court to disturb that.

[36] I am bound by his judgment in that regard, unless I am persuaded that it is clearly wrong. Not only has nothing been placed before me to suggest or persuade me that it is wrong, I am in respectful agreement with the conclusion he reaches and the approach adopted by him in this regard. For the reasons set out by him in his detailed analysis, I am also persuaded for this reason that it would not be competent to grant the relief sought in this regard.

[37] As I have stressed, there is no evidence of any defect or irregularity concerning the sale or relating to the granting of the default judgment which led out to it. I have also indicated

that a constitutional challenge directed at the default judgment and the sale of the property below its market value and the provisions in the Magistrates' Court Act was misconceived and ought to be dismissed.

[38] There is also no basis to direct that this Court should oversee sales in execution of homes. This aspect was also dealt with by Muller, J and I am in respectful agreement with what he states in that regard as well.

[39] It follows that the application is to be dismissed.

[40] I now turn to the application to strike out. In the short replying affidavit of approximately 7 pages, I noted that the applicants attribute fraud to the first and second respondents on no less than seven occasions. They accuse the first and second respondents of robbing the applicants and unspecified others on four different occasions. They also accuse them of making misleading statements and being party to a scam. There are also two references to fraudulent conduct in the founding papers. All of these allegations are not substantiated by any evidence. They are fully set out in the application to strike out. I see no purpose of quoting them in full in this

judgment.

[41] The application to strike them out is on the grounds of that they are scandalous and vexatious and are severely prejudicial to the first and second respondents. In certain instances, some passages are also are sought to be struck by raising new matter in reply.

[42] I find that the application to strike out is well founded on both grounds. In doing so, I apply Vaatz v Law Society of Namibia 1991 (3) SA 563 (Nm) at 566-567.

[43] The first and second respondents also seek a special order as to costs in view of the unfounded and unsupported allegations of fraud and dishonesty levelled against them. I agree that they are entirely unjustified in the sense that they are unsupported by any fact or material place before me.

[44] Ms Vivier points out that legal practitioner and clients costs may in any event arise by reason of the mortgage bond. But there could however been a novation and she moved for a special costs order on the basis of the scandalous statements made concerning the first and second respondents.

[45] Even if the terms of the mortgage bond provided for costs on a legal practitioner client scale, I certainly consider that such an order is warranted in the circumstances of this case as a mark of disapproval by reason of the unsubstantiated allegations of fraud and dishonesty levelled by the applicants against the first and second respondents.

[46] These allegations are compounded by being repeated and the intemperate terms used. The resort to unsubstantiated allegations of dishonesty in legal proceedings warrant the severe censure of Courts and are certainly to be discouraged.

[47] The Courts have justifiably held that unfounded attacks of this nature warrant a special order as to costs.

[48] I have been referred to several authorities by Ms Vivier. They include Jewish Colonial Trust Limited v Estate Nathan 1940 AD 163 and 184; Nel v Waterberg Landbouers Ko-Op 1946 AD 597 at 604; Herold v Sinclair and Others 1954 (2) SA 531 (A) at 539C-E; Ernest & Young and Others v Beinash and Others 1999 (1) SA 1114 (W) at 1148C-G; and Hudson and

Others NNO v Wilkens N.O. and Others 2003 (6) SA 234 (T) at 243. In addition, I have also had regard to Hawkins v Gelb and Another 1959 (1) SA 703 (W) and Spes Bona Bank v Portals Water Treatment 1981 (1) SA 618 (W) at 637.

[49] In exercising my discretion, I consider that costs on scale of legal practitioner and client are more than justified should be ordered, even in the absence of an agreement to pay costs on that scale by reason of these unjustified and unwarranted attacks upon the first and second respondent.

[51] I accordingly make the following order:

> This application is dismissed with costs and the application to strike out is granted with costs. The costs in both instances are to be on the scale as between a legal practitioner and client.

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SMUTS, AJ

ON BEHALF OF THE APPLICANTS:	IN DEFAULT
Instructed by:	
ON BEHALF OF THE RESPONDENTS:	MS VIVIER
Instructed by:	FISHER, QUARMBY & PFEIFER