CASE NO. (P) A 159/2000

POPPY ELIZABETH TLHORO v MINISTER OF HOME AFFAIRS

2008/07/02

Maritz, J *et* Mainga, J

CONSTITUTIONAL LAW

Citizenship – naturalisation – Article 4(5)(c) – meaning of "security" – whether Parliament may require renunciation of foreign citizenship and allegiance as condition to conferring Namibian citizenship by naturalisation

Citizenship – meaning of - naturalisation – importance and implications

Citizenship – constitutional citizenship-scheme - purpose, tenor and spirit underlying scheme – powers of Parliament to make laws regulating acquisition of citizenship

Citizenship – dual citizenship contemplated by constitution – ambit of prohibition in s.24 of Namibian Citizenship Act, No. 14 of 1990

Citizenship - Namibian Citizenship Act, No. 14 of 1990 – constitutionality of sections 5(1)(g), 24 and oath of allegiance

Case No. (P) A159/2000

IN THE HIGH COURT OF NAMIBIA

In the matter between:

POPPY ELIZABETH TLHORO **APPLICANT**

versus

MINISTER OF HOME AFFAIRS **RESPONDENT**

(HIGH COURT APPEAL JUDGMENT)

CORAM: MARITZ, J. *et* MAINGA , J.

Heard on: 2000-08-25

Delivered on: 2008-07-02

REASONS FOR JUDGEMENT

MARITZ, J:

[1] Citizenship is a personal bond between an individual and the State. It signifies continuing membership of an independent political community and whilst it incorporates all the civil and political rights arising from that legal relationship, it also entails the duty of obedience and fidelity. It is the foundation of every independent body politic and binds the members thereof together in a constitutional unit in which they all share a common loyalty. It is important.

[2] The applicant, already a citizen of South Africa, in addition sought to obtain citizenship of Namibia by naturalisation.

> "Naturalization is not a matter to be taken lightly. To seek and to obtain it is not something that happens frequently in the life of a human being. It involves his breaking of a bond of allegiance and his establishment of a new bond of allegiance. It may have far-reaching consequences and involve profound changes in the destiny of the individual who obtains it. It concerns him personally, and to consider it only from the point of view of its repercussions with regard to his property would be to misunderstand its profound significance. In order to appraise its international effect, it is impossible to disregard the circumstances in which it was conferred, the serious character which attaches to it, the real and effective, and not merely the verbal preference of the individual seeking it for the country which grants it to him."[1]

[3]The applicant acquired her South African citizenship by birth. She entered the then South West Africa on 2 February 1981. She has been resident in the territory – which became the Republic of Namibia on the date of Independence – ever since. It is not in issue that she entered the then South West Africa lawfully and that she subsequently acquired lawful "domicile" in the territory.[2] Her status changed to that of an "alien" as defined in the *Aliens Act, 1937* when s. 29 of the *Namibian Citizenship Act, No. 14 of 1990* (hereinafter referred to as the "Act") substituted for "South African citizen" the expression "Namibian citizen" shortly after Independence. The change did not affect the legality of her continued residence in the country. She was exempted by s. 12(1)(a) of the *Aliens Act* from the statutory requirements relating to temporary or permanent residence permits otherwise required by s. 2 of that Act of aliens who take up residence in the country (c.f. *Swart v Minister of Home Affairs, Namibia* 1997 NR 268 (HC) at 278A-B.).

[4]The applicant's difficulty, therefore, does not so much relate to the legality of her residency, but manifested itself when, after a sojourn in South Africa, she presented herself at a port of entry on the international border between Namibia and South

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[1] The judgement of the International Court of Justice in the Nottebohm Case (Liechtenstein v Guatemala) 1955 ICJ Reports 4 at 24

[2] As defined in s. 1 of the *Admission of Persons to Namibia Regulation Act, 1972*.

Africa to re-enter Namibia: being an alien, the Immigration Officer was understandably reluctant to allow her re-entry without a temporary or permanent residence permit. As it happened, the officer eventually relented but the experience left her shaken and apprehensive that she might be denied re-entry in future by an immigration officer with lesser understanding or appreciation of her legal rights to residency. She was also concerned that without any official documentation recognizing her right to residence in Namibia, she would be at risk of being arrested as a suspected prohibited immigrant under the *Immigration Control Act, 1993*. The thought that she could obtain her release in due course by proving her right to residence in Namibia was, understandably, of cold comfort.

[5]Although she could have addressed these concerns by applying for a permanent residence permit, she decided to rather apply for Namibian citizenship by naturalisation. Her application was approved - not without considerable difficulty and numerous threats of legal action, I should add. The approval was subject to sections 5(1)(g) and 26 of the Act, i.e. that she should renounce her South African citizenship when she takes up Namibian citizenship and that she would be required to take an oath of allegiance to the Republic of Namibia before a certificate of naturalisation would be issued to her in terms of s. 5(6) of the Act. The oath (or solemn affirmation), which is prescribed in the First Schedule to the Act, requires an unreserved renunciation of all allegiance and fidelity to any foreign country or Head of State.

[6]The applicant was not willing to renounce her South African citizenship. She intended to return to and take up residence in her country of birth at some time in the future and was reluctant to do anything which could compromise her South African citizenship. She wanted to retain the security that she could return to her country of birth as of right. For the time being, however, she planned to reside and work in Namibia. She maintains that the provisions of the Act requiring renunciation of her South African citizenship are unconstitutional and, therefore, moved the following relief (as amended) against the Minister of Home Affairs:

> "1. Setting aside section 5(1)(g) of the Namibian Citizenship Act, Act No 14 of 1990 ... as invalid and contrary to the Namibian Constitution.
>
> 1A. Declaring the phrase 'I unreservedly renounce all allegiance and fidelity to any foreign country or the Head of State of whom I have heretofore been a citizen, and that' in the First Schedule of the Namibian Citizenship Act, as invalid and contrary to the Namibian Constitution.
>
> 2. Setting aside section 26 of the Namibian Citizenship Act as invalid and contrary to the Namibian Constitution.
>
> 3. Declaring that the applicant need not renounce her South African Citizenship for respondent to grant her a Certificate of Naturalisation as a Namibian citizen.
>
> 4. Declaring that applicant may at the same time be a citizen of Namibia and any other country or countries.
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> 5. Directing respondent to issue to applicant a certificate of naturalisation and a Namibian passport within one month of the granting of an order by the above Honourable Court.
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> 6. Granting the applicant such further or alternative relief as the above Honourable Court may deem fit.
>
> 7. Directing that respondent pay the costs of the application."

[7]The respondent opposed the application and, in an answering affidavit filed on his behalf by Elizabeth Negumbo, the Chief of Immigration in the Ministry of Home Affairs, set forth the grounds of such opposition and a brief synopsis of the historical background to the formulation of the statutory requirements for the acquisition of

Namibian citizenship by naturalisation. The applicant sought to strike some of those allegations and, when the matter was called, her case was argued by Mr Light and that of the respondent by Ms Erenstein ya Toivo.

[8]The Court dismissed the application immediately after the hearing but declined to make an order of costs. What follows are the reasons for that order, which I should add, have also been requested by the applicant.

[9]The principal issue, central to the dispute between the litigants, is whether it is constitutionally permissible for Parliament to oblige an alien who has applied for Namibian citizenship by naturalisation to renounce his or her citizenship of and allegiance and fidelity to any foreign country in order to acquire Namibian citizenship. Ancillary to that issue is the legitimacy of applicant's assertion that she is entitled to dual citizenship, i.e. Namibian citizenship by naturalisation and South African Citizenship by birth.

[10]The provisions of the Act which require renunciation of foreign citizenship - either expressly or by necessary implication – are those referred to in the Notice of Motion and it will be helpful in the analysis which follows if I were to quote them at the outset: Section 5 of the Act, insofar as it bears relevance to this application, reads:

> "5(1) The Minister may, upon application made in the prescribed form, grant a certificate of naturalisation as a Namibian citizen to any person who satisfies the Minister that –
>
> > (a) he or she complies with the requirements and conditions for the acquisition of citizenship by naturalisation; and ...

> (g) he or she is willing to renounce the citizenship of any foreign country of which he or she is a citizen; ..."
>
> (6) A certificate of naturalisation shall not be issued to any person over the age of 14 years until that person has taken the oath of allegiance or, if such person objects on religious grounds to the taking of an oath, made a corresponding solemn affirmation before one of such persons designated by the Minister."

The "oath of allegiance" referred to in s. 5(6) is defined in s. 1(1) of the Act as the oath of allegiance set out in the First Schedule of the Act, which reads as follows:

> "I, A.B., do hereby declare on oath that I unreservedly renounce all allegiance and fidelity to any foreign country or the Head of State of whom I have heretofore been a citizen, and that I will be faithful to the Republic of Namibia, observe its laws, promote all that which will advance it and oppose all that may harm it.
>
> So Help Me God."

Section 26 of the Act prohibits dual citizenship in the following terms:

> "Subject to the provisions of this Act or any other law, no Namibian citizen shall also be a citizen of a foreign country."

[11]The constitutional measure against which the constitutionality of these provisions falls to be determined, according to Mr Light who appeared for the applicant, is that of Article 4(5) of the Namibian Constitution. It reads:

> "4(5) Citizenship by naturalisation may be applied for by persons who are not Namibian citizens under Sub-Articles (1), (2), (3) or (4) hereof and who:
>
> (a) are ordinary resident in Namibia at the time when the application for naturalisation is made; and
>
> (b) have been so resident in Namibia for a continuous period of not less than five (5) years (whether before or after the date of Independence); and
>
> (c) satisfy any other criteria pertaining to health, morality, security or legality of residence as may be prescribed by law."

[12]The applicant contends that the statutory requirements relating to the renunciation of citizenship of any foreign country before Namibian citizenship by naturalisation may be granted do not fall within the authorised constitutional criteria of "health,

morality, security or legality of residence". For the renunciation requirements to be valid and *intra vires* Parliament's powers under the Constitution, they must pertain to those criteria, she submits. The only two criteria which may conceivably relate to the renunciation requirements, her counsel contends, are those of "morality" and "security" and neither of them can authorise legislation requiring renunciation of foreign citizenship. Her counsel argues that persons are not more or less moral if they renounce or do not renounce their citizenship and do not pose any greater or lesser danger to the community or the security of the State in doing or not doing so. The applicant further contends with reference to other provisions of the Constitution that dual nationality is allowed under the Constitution and that any law purporting to prohibit it is unconstitutional. Finally, it is submitted that Parliament's powers to make further laws regulating the acquisition or loss of citizenship as contemplated by Article 4(9) of the Constitution are also limited: such laws may not be "inconsistent with (the) Constitution". Inasmuch as sections 5(1)(g) and 26 and part of the oath of allegiance in Schedule 1 of the Act are inconsistent with the Constitution, the general powers of Parliament under Article 4(9) cannot avail the Respondent.

[13]The respondent is dismissive of these contentions. Ms Erenstein ya Toivo submits on his behalf that the statutory renunciation provisions of the Act are not inconsistent with the Constitution. She contends that, unable to demonstrate that they are in conflict with any constitutional right, criteria or requirement, the applicant's counsel "divines" an inconsistency on the basis of the "*expressio unius*"-maxim by arguing that the renunciation requirement does not fit into the categories of "criteria pertaining to health, morality, security or legality of residence as may be prescribed by

law" within the meaning of Article 4(5) of the Constitution and, therefore, that it is *ultra vires* Parliament's powers under Article 4(9) of the Constitution. This argument, the respondent submits, is a strained and austerely legalistic interpretation that would purport to create conflict by implication only.

[14]The interpretation advanced by the applicant, so the respondent contends, ignores the purpose, tenor and spirit of the constitutional citizenship scheme, the plain meaning of Articles 4(5) and 4(9) of the Constitution and the presumption of constitutionality.

[15]In my view, a brief assessment of the purpose, tenor and spirit underlying the constitutional citizenship-scheme is a useful and logical starting point from which to approach the constitutionality of the statutory renunciation requirements in the Act and Schedule thereto. The purpose, tenor and spirit of the constitutional citizenship scheme constitute the context within which Articles 4(5) and 4(9) of the Constitution must be interpreted and is an important aid in ascertaining the meaning and import of the words used therein. Parliament's legislative powers to regulate the acquisition of Namibian citizenship by naturalization must be exercised within the four corners of the Constitution generally and the meaning of those provisions in particular.

[16]The constitutional template of values and words is, after all, the evolving mould against which Parliament's legislative designs are judicially reviewed when they are attacked as overly broad or too restrictive – whenever permissible, allowing for a margin of legislative appreciation in the assessment of society's values and mindful

that Parliament has been constitutionally clothed with plenary powers and that it has been democratically elected to design by statute what is best suited to society's immediate or future needs.

[17]One of the unique, characterising features of our Constitution is the incorporation of a substantial citizenship scheme not normally present in others[3]. Who are and who may become citizens of a particular State are questions normally left for determination by Parliament in other sovereign jurisdictions.

[18]The reason behind the inclusion of the Namibian citizenship scheme in our Constitution lies in the long and painful history of our nation's birth. During the decades preceding Independence many Namibians, unable to bear or unwilling to tolerate the iniquities and injustices of colonialism, racism and apartheid, left the country – some fleeing to escape extermination by war upon them; others emigrating to find dignity, life and refuge elsewhere; many to take up the struggle against those injustices … but most of those who had left, were determined that they and their descendants would return one day when the country of their birth has been liberated from colonial rule. During the years of exile, whether by necessity or choice, many expatriates married – not always with those who shared their origin or culture - and founded first or second generation families in many countries all over the world where they had been given sanctuary. Others, again, immigrated or migrated to the territory during German and South African rule and many remained and adopted the country as home for them and their families – some for a number of generations before

[3] c.f. Carpenter G, "*The Namibian Constitution – ex Africa Aliquid Novi after All?*" and Van Wyk, Wiechers and Hill, "*Namibia, Constitutional and International Law Issues*", p 31-32

Independence. There were also those who came to the territory as part of the German and South African security forces to enforce and maintain colonial rule. Not all of them had left before Independence.

[19]Soon after the implementation of the United Nations Security Council Resolution 435 of 1978 on 1 April 1989 (referred to in Article 146(2)(d) of the Constitution), many thousands of those who had left Namibia during the struggle for Independence returned to participate in the political process leading up to the Independence of Namibia through free and fair elections under the supervision and control of the United Nations. Having sacrificed so much during exile, it was important for them and those who had suffered in the war of liberation to take up their rightful places in a free, unified and sovereign Namibia and to ensure citizenship for them, their families and their descendants. So too, it must have been for the other inhabitants of the country – whatever their origins. Hence, it was an historical imperative for the Constitutional Assembly who had to draft and adopt the Namibian Constitution to define who would become citizens or qualify for citizenship of the Namibian nation upon Independence and to outline who would be citizens or qualify for citizenship thereafter.

[20]These considerations were also alluded to in *Swart v Minister of Home Affairs*, *Namibia, supra,* at 274:

> "Given the historical background within which our Constitution was framed, it had to address the diversity of origin of all Namibia's people to bring about one nation under a common citizenship – accommodating everyone with a rightful claim to such a citizenship and, at the same time, affording others the opportunity to become Namibians …"

[21]The principal purpose of a substantially constitutional – as opposed to a purely legislative – citizenship scheme was to guarantee citizenship as of right or the right to acquire citizenship for certain categories of persons upon and after Independence whilst, at the same time, allowing in broader terms the acquisition of citizenship by other categories of persons to be regulated wholly or partly by Parliament in future.

[22]The tenor in which the Constitution frames the citizenship scheme reflects an inverted relationship between the intimacy of a person's bond with Namibia and the powers entrusted to Parliament to regulate the acquisition or loss of citizenship. But for a number of narrowly defined exceptions, Article 4(1) of the Namibian Constitution recognises the automatic acquisition of Namibian citizenship as of right by the mere incidence of birth in the country (*ius soli*). Those falling within the ambit of the Sub-Article become Namibian citizens purely by operation of law and they are not required to do anything as a precondition to the conferral of Namibian citizenship upon them. The automatic acquisition of Namibian citizenship by birth may not be otherwise regulated or derogated from by an Act of Parliament. Parliament may not deprive individuals of Namibian citizenship by birth – not even if, after the date of Independence, they have acquired the citizenship of any other country, or served in the armed forces of such a country without permission of the Namibian government or if they have taken up residence in such a country and absented themselves thereafter from Namibia for a period of more than 2 years without such permission[4]. The only manner in which persons falling within this category may be deprived of Namibian citizenship is by voluntary renunciation in a formal deed to that effect[5].

[4] Compare the *proviso* to Article 4(8) of the Constitution
[5] Article 4(7) of the Constitution

[23]Much the same holds true for the second group: those who have acquired the right to Namibian citizenship by descent (*ius sanguinis*), except that in their case, Parliament may require of them to register as citizens as a precondition to the acquisition of citizenship and, in relation to those born after Independence, may require registration within a specific time and at a place mentioned in paragraph (b) of Article 4(2).

[24]In respect of the third and fourth groups (those who are citizens by marriage or registration), there are stringent residency requirements and Parliament may enact legislation providing for the loss of Namibian citizenship in circumstances referred to in Article 4(8).

[25]Parliament has the same powers to provide for the loss of Namibian citizenship in respect of those falling within the fifth group, i.e. those who have acquired citizenship by naturalisation. But, in addition to those powers and residency requirements, Parliament may also lay down criteria pertaining to health, morality, security or legality of residence in order to acquire citizenship by naturalisation[6].

[26]In respect of honorary and other forms of individualised citizenship based on a person's special skill or experience or commitment to or services rendered to the Namibian nation (the sixth group), Parliament may authorise the conferment of Namibian citizenship on "fit and proper" persons[7].

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[6] Article 4(5)(c) of the Constitution
[7] Article 4(6) of the Constitution

[27]Finally, Parliament is granted plenary powers by Article 4(9) to make laws, not inconsistent with the Constitution, regulating the acquisition or loss of Namibian citizenship. Arguably, it may under this provision allow for the acquisition of other conceivable categories of Namibian citizenship - as it has done as for those who had left Namibia "owing to persecution by the colonial government which was in control of the country before 1915" under the *Namibian Citizenship Special Conferment Act, No 14 of 1991*.

[28]Thus, as this brief analysis show, in the spectrum allowed by Article 4 for the conferral or acquisition of Namibian citizenship, Parliament's regulatory powers range between none and broad – depending on the closeness of the person's connection with the country (i.e. by birth, descent, marriage with ordinary residence for 2 years; registration with ordinary residence upon Independence and for the 5 preceding years; naturalisation with ordinary residence upon the date of application and for a continuous period of 5 years and satisfying certain criteria, etc.).

[29]Before referring to the spirit of the Constitution relevant to the assessment of the issues, it is convenient to briefly pause and consider the constitutionality of s. 26 of the Act in the context of the inverted relationship referred to in the previous discussion. Although the section prohibits Namibian citizens to also be citizens of other countries, it does so subject to "the provisions of this Act or any other law". Inasmuch as the Constitution is one of the "other" laws contemplated in the proviso to

the prohibition[8], the contention that the prohibition falls foul of the Constitution is clearly untenable. The prohibition is expressly made subject to the provisions of the Constitution and, therefore, no conflict can arise. The applicant, I thought, eventually conceded that much. For that reason, prayer 2 of Notice of Motion failed. Although the Constitution does not expressly allow dual citizenship, it follows naturally and logically from the implementation of its provisions and was expressly contemplated as a possibility. Two examples will suffice to illustrate the point. It stands to reason that, given the international drive to eliminate statelessness[9], that most or all Namibians who became Namibian citizens by birth on the date of Independence were also citizens of the sovereign States whose citizenship they held the day before. Unless they were deprived of their foreign citizenship in terms of the laws of those States, they remained citizens thereof upon Independence notwithstanding the fact that they had also automatically acquired Namibian citizenship by operation of law. Moreover, if permitted under the laws of a foreign State, Namibian citizens by birth or descent are at liberty to acquire citizenship of those States even after Independence without being at risk of losing their Namibian citizenship (compare Art. 4(8)(a) of the Constitution and the proviso thereto).

[30]The spirit which permeates the design of the Namibian citizenship scheme must have been inspired by the expressed commitment of the Namibian people to "strive to achieve national reconciliation and to foster peace, unity and a common loyalty to a single state" (c.f. par 5 of the Preamble to the Constitution). These are powerful words which, in my view, must be accorded their full weight and which, together with the

[8] S. 2 of *The Interpretation of Laws Proclamation, No. 37 of 1920*
[9] The 1961 *UN Convention on the Reduction of Statelessness*

constitutional purpose and tenor of the citizenship scheme, must guide the Court in the interpretation of Parliament's legislative powers under Article 4(5)(c) of the Constitution in general and in assessing the constitutionality of the statutory demand for foreign citizenship-renunciation as a prerequisite to the acquisition of Namibian citizenship by naturalisation in particular.

[31]I am strengthened in this purposive, value-based approach by the interpretation of the Constitution in a long line of judgments of this Court since Independence. It is the spirit and tenor of the Constitution, Mahomed AJ (as he then was) held in *S v Acheson,* 1991 NR 1 (HC) at 10A-B; 1991 (2) SA 805 (Nm) at 813A-C, which must "preside and permeate the processes of judicial interpretation and judicial discretion". "The Constitution of a nation", he said in the same breath, "is not simply a statute which mechanically defines the structures of government and the relations between the government and the governed. It is a 'mirror reflecting the national soul', the identification of the ideals and aspirations of a nation; the articulation of the values bonding its people and disciplining its government." This approach has subsequently been endorsed by the Supreme Court in *S v Van Wyk*, 1993 NR 426 (SC) at 456F and *S v Kandovazu*, 1998 NR 1 (SC) at 3H [10].

[10] Compare also: *Minister of Defence v Mwandinghi,* 1993 NR 63 (HC) at 70D-F; *Cultura 2000 and Another v Government of the Republic of Namibia and Others,* 1992 NR 110 (HC) at 122D; *Ex Parte Attorney-General In Re: The Constitutional Relationship between the Attorney-General and the Prosecutor-General,* 1998 NR 282 (SC) at 290E and, more recently, *Ekandjo-Imalwa v The Law Society Of Namibia and Another; The Law Society of Namibia and Another v The Attorney-General of The Republic of Namibia and others,* 2003 NR 123 (HC) at 132F).

[32]Whilst loyalty to the Namibian State may well be assumed from Namibian citizens tied to the country by birth or blood (*jus soli* or *jus sanguinis*[11]), others not so intimately or closely connected may be required to demonstrate their loyalty and allegiance to Namibia by renouncing their citizenship of the other State and to take an oath of allegiance to Namibia. It is significant to note in this context that in Art. 4(4) the renunciation of any other citizenship is demanded by the Constitution itself from those who wished to become Namibian citizens by registration. The demand for loyalty to a single State (from persons other than those from which it may be assumed by reason of birth or descent) is therefore not alien to the Constitution but conforms to the spirit thereof; it does not run counter to the citizenship scheme in the Constitution but is expressly envisaged in certain instances. Whether it is a permissible precondition to the acquisition of Namibian citizenship by naturalisation as contemplated by Art. 4(5)(c), when viewed against the matrix of the preceding observations, is the issue which must be considered next.

[33]The elegance with which the Constitution deals with ever-changing values and circumstances lies in the use of words and concepts of general import which allows for a measure of flexibility in the interpretation and application thereof. Those are the kind of words used in paragraph (c) of Article 4(5). It allows Parliament to prescribe, in addition to the qualifying criteria contained in paragraphs (a) and (b), any other criteria "pertaining to health, morality, security or legality of residence" for persons who may wish to apply for Namibian citizenship by naturalisation. Whilst I remind

[11] Which, incidentally, is one of the constitutional requirements for a person to become President of the country – Art. 28(3).

myself that one may not "stretch or pervert the language" [12]to interpret the Constitution to mean "whatever we might wish it to mean"[13], this Court may not strike down legislation falling within the ordinary meaning, scope and ambit of the words used in the empowering Article.

[34]The word "security" in the context of the Article, Mr Light contends, means "most probably that the applicant not be a danger to the safety of the state and to the community". Whilst these notions undoubtedly fall within the meaning of the word, must its meaning be so limited? I think not. The word is not qualified - as in other parts of the Constitution (by the word "national" in Articles 11(5), 12(1)(a), 13(1), 21(2) an 26(5)(a) or "internal" in Art 115 or by "in its international relations" in Art 96). There is nothing in the article suggesting that it should not also be interpreted in its ordinary sense on a more personal level, i.e. as meaning "the state of being or feeling secure"[14]. The word "secure", in turn, includes the following: "certain to remain safe and unthreatened … feeling free from fear or anxiety". Just as the word "health" in the article may be interpreted to refer both to the personal health of the prospective applicant and that of the community and the word "morality" may refer to the character of the person as well as the moral values of the community, I do not find any reason why the word "security" may not be interpreted to apply to the security of the State, that of the community in its various regions and interest groups and that of individuals. Moreover, the meaning of the word "security" is often coloured by the context in which it is used – the context, in this instance, being that of citizenship. To

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[12] As Seervai cautions in *The Constitutional Law of India*, 3rd ed., Vol I at p 68

[13] *Per* Kentridge AJ, I in *S v Zuma and Others*, 1995 (2) SA 642 (CC) at 652 *in fine*

[14] *The Concise Oxford English Dictionary*, 10th ed., 2002, p 1296

understand the interrelationship between security and citizenship, it is necessary to reflect for a moment on the meaning of citizenship.

[35]As a term of constitutional law, “citizenship" according to Dugard[15], "is best used to describe the status of individuals internally, particularly the aggregate of civil and political rights to which they are entitled". Booysen[16] defines it as the legal bond between an individual and a particular State. According to him, citizenship confers a particular status upon an individual in the constitutional system of which the individual is a citizen and encompass the totality of political and civil rights to which the individual is entitled in that State. From an international perspective, however, that relationship is generally referred to and governed by the principles relating to "nationality". In the *Nottebohm* case[17], the International Court of Justice dealt with “nationality” as follows[18]:

> “According to the practice of States, to arbitral and judicial decisions and to the opinions of writers, nationality is a legal bond having as its basis a social fact of attachment, a genuine connection of existence, interests and sentiments, together with the existence of reciprocal rights and duties. It may be said to constitute the juridical expression of the fact that the individual upon whom it is conferred, either directly by the law or as the result of an act of the authorities, is in fact more closely connected with the population of the State conferring nationality than with that of any other State. Conferred by a State, it only entitles that State to exercise protection *vis-à-vis* another State, if it constitutes a translation into juridical terms of the individual’s connection with the State which has made him its national.”

[36]Whilst I recognise the sometimes notional, sometimes subtle and sometimes very real difference between the legal concepts of “citizenship” and “nationality”[19], they

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[15] *International Law: A South African Perspective*, 3rd ed., p.283
[16] *Volkereg*, 2nd ed., p.163
[17] 1955 ICJ Reports 4
[18] at 23 *in fine*
[19] Booysen,*op cit.*, p163 and Starke, “*Introduction to International Law*”, p341-3

are, within the context of Namibian law, for the greater part, essentially two sides of the same coin: the one being definitive of the legal relationship between the Namibian State and its citizens in a national context and the other definitive of the same legal relationship and its implications in the broader context of international law[20]. Admittedly, the generality of this proposition must be qualified by the exceptions thereto – as is all too evident from some of the international authorities referred to in this judgment - but, they are not material to the real issues in this case and do not require further elaboration for purposes of this judgement. I shall therefore refer to the legal consequences of "citizenship" in national law and of "nationality" in international law in discussing the aggregate of relevant civil, political and other rights, duties and obligations arising both nationally and internationally from the legal relationship between the Namibian State and its citizens.

[37]With this in mind, I shall next examine whether and, if so, how the requirements that applicants for Namibian citizenship by naturalisation must be willing to renounce their citizenship of foreign countries in s.5(1)(g) and to "renounce allegiance and fidelity to any foreign country or the Head of State" relate on the criterion of "security" referred to in Art 4(5)(c) of the Constitution and I shall do so firstly in the context of national security, thereafter in the context of the security of the public or communities and, finally, on a more personal level.

[38]Art 118(1) of the Constitution requires the establishment of a Namibian Defence Force by Act of Parliament "in order to defend the territory and national interests of

[20] c.f. M Wiechers, "*Kleurlingburgerskap in Suid-Afrika*", 1972 THRHR 1; Dugard, *op cit*, p 282 and *Tshwete v Minister of Home Affairs (RSA)*, 1988 (4) SA 586 (A) at 613E -614G

Namibia". Having been so established under the Defence Act, No. 1 of 2002, it is arguably one of the most important agencies of State responsible for defending and maintaining the territorial integrity and national security of Namibia. The Act established the Defence Force to act and conduct military operations in the national defence of Namibia; to prevent or suppress any armed conflict which, in the opinion of the President, may be a threat to the security of Namibia; to combat terrorism (which by definition includes the use of violence against persons or property such as acts which endangers or is likely to endanger the safety, health or free movement of persons; causes or is likely to cause serious damage to property; seriously disrupts the rendering or supply of any essential service to the public or puts the public in fear; or endangers the maintenance of law and order) and, in appropriate circumstances, to prevent or suppress internal disorder in Namibia; to preserve the life, health or property of people in Namibia and to maintain essential services. Given these vital security-related objectives of the Namibian Defence Force, it is unsurprising that the Act expressly prohibits the appointment of persons other than Namibian citizens as members of the Defence Force[21].

[39]Unwavering allegiance and loyalty to Namibia and a willingness to sacrifice – if required – even your life for her is clearly one of the most important underlying reasons for the citizenship requirement in the Act. The security objectives and concerns may well be compromised if persons serve in the Force with divided loyalties or, worse, actual loyalties to foreign countries or Heads of State – more so if the belligerence of those foreign countries threatens the territorial or internal security

[21] Compare s. 7(1)(a) of the Defence Act read together with the definition of "citizen" in s. 1 thereof

of Namibia. Allowing persons to become citizens of Namibia by naturalisation without requiring of them to renounce their foreign citizenship and taking an oath of allegiance to Namibia will open the door for those persons to become members of the Namibian Defence Force. The national security of Namibia, the security of the defence force and its members is likely to be severely endangered if those persons were to gather intelligence and pass it on to enemy forces of the country to which they (also) owe allegiance. In fact, if the renunciation and allegiance requirements as a condition to the acquisition of Namibian citizenship by naturalisation are removed, it may afford a country with hostile intentions an easy way to infiltrate the Namibian Defence Force and jeopardise national security.

[40]The converse is also true. If those who have acquired Namibian citizenship by naturalisation without the renunciation requirements join the Namibian Defence Force but later resign because of their allegiance to and citizenship of another country with hostile intentions and return to that country, not only will the considerable costs expended in their training be lost, but the information gained by them about strengths and weaknesses of the Namibian Defence Force in personnel, equipment, strategies, logistics, readiness and the like may constitute vital intelligence information which may be used to undermine national security.

[41]I shall briefly refer to another example: I appreciate that aliens who reside in Namibia, in law, also owe obedience and fidelity to Namibia, albeit merely temporarily and only as a consequence of their territorial - rather than a personal bond

(as in the case of citizenship) - with the Namibian State[22]. This legal assumption is all good and well in times of peace and economic prosperity when one may not always adequately appreciate national security concerns. In times of war or armed conflict, however, those concerns become more pertinent and pressing in reality. Normally, citizens of a belligerent State who would find themselves in Namibia at the outbreak of war or the commencement of hostilities may, subject to the *Geneva Convention of 1949 for the Protection of Civilian Persons in Time of War*, be placed under house arrest or be interred in the interest of national security, irrespective of their legally assumed duties of obedience and fidelity. Those who have obtained Namibian citizenship without the renunciation requirements would not fall within the provisions of the Convention and may be at liberty to go about like any other citizen whilst, in truth, they are actually enemy nationals with allegiance to the hostile State. This too, may have serious implications for Namibia's national security.

[42]The security of various communities in Namibia may also be compromised if Namibian citizenship by naturalisation may be obtained without the renunciation requirements. It is, in my view, also for reasons of security that the Namibian Constitution requires that only Namibian citizens may elect or be elected as members of the National Assembly[23] and that Parliament requires Namibian citizenship for persons to elect or be elected as members of the National Council, Regional Councils and Local Authority Councils[24]. Parliament also reserved certain important public

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[22] See: Starke, *Introduction to International Law*, 10th ed., p350
[23] Art. 46(1)(a) of the Constitution
[24] Section 13(1) of the *Electoral Act*, No. 24 of 1992, s. 6(1) of the *Regional Councils Act*, No. 22 of 1992 and s. 7(1) of the *Local Authorities Act*, No. 23 of 1992 read with Articles 17(1) and 69(1) of the Constitution

offices responsible for the management of Namibia's strategically important water and electricity infrastructure for Namibian citizens[25]. The same applies to broadcasting and communication[26]; the Government's commercial land reform programme[27]; its anti-corruption drive[28]; the chief executive officers of local and regional authorities[29] and, importantly, all the permanent staff members of the Public Service[30].

[43]These requirements ensure that those elected to public office, many of those appointed to manage strategically important agencies of Government and all of those permanently appointed in the Public Service will put the interests of Namibia and her people first; that their decisions and conduct are unlikely to be compromised by loyalty to a foreign country or its Head of State and that Namibians may enjoy the security of knowledge that those holding these vital public offices will discharge their duties, functions and obligations to the Namibian people and State in the people's best interests and for the peace, order and good government of the country.

[44]Security on a local, regional or national level may be severely compromised if members of the public suspect that those holding such offices whilst having citizenship of and allegiance to another State promote the interests of those States

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[25] Compare: the citizen-requirement of directors or members of the controlling bodies under the *Namibia Water Corporation Act*, No. 12 of 1997, the *Water Resources Management Act*, No. 24 of 2004 and the *Electricity Act*, No. 2 of 2000

[26] cf. the *Namibian Broadcasting Act*, No. 9 of 1991; the *Namibian Communications Commissions Act*, No. 4 of 1992 and the *Namibia Press Agency Act*, No. 3 of 1992

[27] Members of the Land Advisory Commission established by s 2 of the *Agricultural (Commercial) Land Reform Act*, No. 6 of 1995

[28] The citizenship-requirement for the Director and Deputy Director of the Commission under the *Anti-corruption Act*, No. 8 of 2003

[29] Under the *Local Authorities Act*, No. 23 of 1992 and the *Regional Councils Act*, No. 22 of 1992

[30] Section 18(2) of the *Public Service Act*, No. 13 of 1995

rather than that of Namibia in the execution of their powers. An example that springs to mind is that of Walvis Bay and the islands off the shore of Namibia. Those areas remained under South African control for some time after Independence notwithstanding the provisions of Art 1(4) of the Constitution. They were finally re-integrated pursuant to the provisions of the *Walvis Bay and Off-shore Islands Act*, No. 1 of 1994. Many persons resident in the enclave at the time of its reintegration were South African citizens. Provision had to be made to also allow those residents willing to renounce their South African citizenship to be integrated into Namibia and that was done by allowing for naturalisation on condition of renunciation in s. 3(2) of the Act. If the renunciation requirement had not been set and those residents could become Namibian citizens without willingly forfeiting their citizenship of and allegiance to South Africa, the management of such a strategically important area (at least on local authority level) might well have been compromised by persons holding public office whilst having a foreign allegiance. This, in turn, would have undoubtedly raised a number of security concerns.

[45]In my view, these security considerations are not unlike those which moved the Constituent Assembly to require of those desiring to become Namibian citizens by registration to renounce their citizenship of other countries[31]. The same considerations are also pertinent to the legislative requirement that those who wish to become Namibian citizens by naturalisation should renounce foreign citizenship and take an oath of allegiance to Namibia and disavows allegiance to any other State.

[31] Article 4(4) of the Constitution.

[46]Another example where the security of communities may be compromised if citizenship by naturalisation is granted without the renunciation requirement is in the area of employment. Section 19(2) of the *Affirmative Action (Employment) Act*, No.29 of 1998 requires of employers to give preferential treatment to suitably qualified persons of designated groups in filing positions and, to give preference to Namibian citizens where two or more persons from designated groups qualify for appointment to the same positions. Over and above the intention to affirmatively redress imbalances occasioned by past discriminatory practises in the area of employment prior to Independence, it is evidently intended to provide a measure of employment security to Namibians in cases where they are competing with foreigners for the same appointment. It is the existence of such provisions and employment practices which allays xenophobic fears – and I need not mention the many security concerns which may arise if xenophobic unrest were to sweep through the country because of the perception that foreigners are being employed in positions where suitably qualified Namibians are available. If persons may become Namibian citizens without renouncing their foreign citizenship and, as a consequence, qualify for preferential appointment, those perceptions may well arise and threaten security both on an employment and national level.

[47]As I have held earlier in this judgment, considerations of security may also arise on a personal level if the renunciation requirements for naturalisation are struck. This judgement does not allow for the many examples which may be cited and I shall only mention one in the context of municipal law and a few more in the context of international law.

[48]The *Minerals (Prospecting and Mining) Act*, No. 33 of 1992 reserves small scale mining for Namibian citizens only. As such, it accords the large number of small scale miners the security that they are protected within that sphere of economic activity. They need not compete against foreigners for those resources on a small scale-basis. Needless to say, the scheme designed by the Act to provide security to Namibians within that area of economic activity may be frustrated if foreigners are allowed to escape the much more onerous and investor-intensive requirements of large scale mining by simply becoming Namibian citizens through a process of naturalisation without renouncing their citizenship of or allegiance to a foreign State. Opening the exploitation of our mineral resources in that manner is likely to threaten the economic existence of Namibians who depends on it for an income and may also result in xenophobic uprisings.

[49]In the context of international law, “nationality” has a number of important incidents: it entitles the person to diplomatic protection abroad and, consequently casts upon the State concerned the responsibility to extend protection to its subjects when abroad; the State "of which a particular person is a national may become responsible to another State if it has failed in its duty of preventing certain wrongful acts committed by this person or of punishing him after these wrongful acts are committed"; the State concerned has a duty to receive own nationals back on its territory; the nationality of persons may determine their status as enemies in time of war; States may, in the absence of treaties to the contrary, refuse to extradite its

nationals to another State requesting surrender and States may exercise criminal or other jurisdiction on the basis of nationality and the like[32]. In short:

> "…(T)he state has a certain responsibility for the acts of its citizens or other persons under its control of which its agents know or ought to know and which cause harm to the legal interest of another state. On the other hand, the state has a legal interest represented by its citizens, and those harming its citizens may have to account to the state protecting the latter. This accountability may take the form of subjection to the extra-territorial application of the national criminal law to acts harming citizens. More important than this, however, is the diplomatic protection exercised by a state in respect of its nationals. If nationals are subjected to injury or loss by an agency for which another state is responsible in law, then, whether the harm occurs in the territory of a state, or *res communis*, i.e. the high seas or outer space, or in *terra nullius*, the state of the persons harmed may present a claim on the international plane".[33]

[50] One only needs to read this passage - and many books have been written on the incidents of nationality mentioned therein – to understand the relationship between the notions of "security" and "nationality". Statelessness (the total loss of nationality of any kind) is, according to Starke[34] "a condition which not only means great hardship and lack of security for individuals; but involves the existence of a serious gap in the application of international law". It follows logically from the *nexus* between the two concepts that the acquisition of the nationality of one State by naturalisation without renunciation of any other nationality the individual may hold, casts upon the conferring State most or all of the duties, rights and obligations arising from the incidence of nationality in relation to that individual which another State already bears. The simultaneous existence of two – sometimes competing - sets of rights, duties and obligations in international law vested in two sovereign states in relation to

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[32] Starke, *op cit.*, p 342-3
[33] Brownlie, *Principles of Public International Law*, 4th ed., p.518-9
[34] *op cit.*, p 346

the same individual are matters affecting both the security of the individual and that of the two states concerned.

[51] A case which illustrates the point on one of the many incidences of nationality is that of *Nottebohm* (to which I have referred to earlier and Ms Eerenstein ya Toivo has referred to in argument). The case, brought shortly after the end of the Second World War, involved a dispute between the Principality of Lichtenstein and the Republic of Guatemala before the International Court of Justice. The Government of Lichtenstein asked the Court to adjudge and declare that the "Government of Guatemala in arresting, detaining, expelling and refusing to re-admit Mr. Nottebohm and in seizing and retaining his property without compensation acted in breach of their obligations under international law and consequently in a manner requiring the payment of reparation" and, as a consequence claimed special and general damages for the wrongful arrest, detention, expulsion and refusal to readmit; accounting and payment of damages equivalent to that which Nottebohm would have earned otherwise and either restoration of the property to him together with damages for deterioration alternatively, payment of the estimated market value of the seized property had it been maintained. One of the defences raised by Guatemala was that the matter was not admissible for adjudication because "the Principality of Liechtenstein has failed to prove that M. Nottebohm, for whose protection it is acting, properly acquired Liechtenstein nationality in accordance with the law of the Principality; because, even if such proof were provided, the legal provisions which would have been applied cannot be regarded as in conformity with international law and because M. Nottebohm

appears in any event not to have lost, or not validly to have lost, his German nationality."

[52]The International Court of Justice, after an incisive analysis of nationality and the principles to be applied in ascertaining the "real and effective nationality" of a person in such instances, pointed out[35] that diplomatic protection and "protection by means of international judicial proceedings constitute measures for the defence of the rights of the State"; it confirmed that "by taking up the case of one of its subjects and by resorting to diplomatic action or international judicial proceedings on his behalf, a State is in reality asserting its own rights - its right to ensure, in the person of its subjects, respect for the rules of international law"; and concluded[36] that the claim was inadmissible because "(n)aturalisation was asked for not so much for the purpose of obtaining a legal recognition of Nottebohm's membership in fact in the population of Liechtenstein, as it was to enable him to substitute for his status as a national of a belligerent State (Germany) that of a national of a neutral State, with the sole aim of thus coming within the protection of Liechtenstein but not of becoming wedded to its traditions, its interests, its way of life or of assuming the obligations - other than fiscal obligations - and exercising the rights pertaining to the status thus acquired." The proprietary and personal security which Nottebohm, a German citizen by birth, sought from the Principality of Liechtenstein by acquiring citizenship of the Principality by naturalisation and which the Principality sought to enforce in international judicial proceedings therefore failed for the very reason that he had sought and obtained the

[35] at p 25 of the report
[36] At p 26 of the report

nationality of Liechtenstein for reasons of convenience and not because he has turned his true allegiance ("becoming wedded") to that Principality.

[53] For these reasons we concluded that the notion of "security" in Article 4(5)(c) must be interpreted with the purpose, tenor and spirit underlying the constitutional citizenship-scheme in mind; that citizenship by naturalisation falls more towards the end of the spectrum of the citizenship-scheme thus allowing Parliament greater powers to appreciate and legislate criteria pertaining to "security" as the word in its ordinary meaning and content applies in a national, regional, local and personal context; that there is a rational and reasonable connection between the criterion of "security" and the legislative requirements in section 5(1)(g) of the Act that an applicant for Namibian citizenship by naturalisation must be willing to renounce the citizenship of any foreign country of which he or she is a citizen and that a successful applicant must declare that he or she "unreservedly renounce all allegiance and fidelity to any foreign country or Head of State" of which he or she is a citizen before being issued with a Certificate of Naturalisation under the Act; that Parliament acted within its powers under the Constitution when it prescribed those requirements and that the application therefore had to fail.

[54]In view of this conclusion, the Court does not intend any disrespect to the forceful, yet conflicting, contentions made by counsel for the two litigants if it declines to consider whether Parliament was not, in any event, entitled to enact the renunciation requirements under Art 4(9) of the Constitution. I have already referred to two instances where Parliament has exercised those powers (in Act 14 of 1991 and Act 1 of 1994). Whether Parliament was also entitled to draw on this Sub-Article to

lay down criteria in addition to those contained in Art 4(5)(a)-(c) is best left for consideration on another occasion. In declining to express any view on those contentions, I am mindful of the Supreme Court's admonition in *Kauesa v Minister of Home Affairs and Others*, 1995 NR 175 (SC) at 184A that "(c)onstitutional law in particular should be developed cautiously, judiciously and pragmatically if it is to withstand the test of time" and its commendation of the practice that a Court should in constitutional matters "decide no more than what is absolutely necessary for the decision of a case".

[55]The issues raised in the application were constitutional and complex in nature and of public importance. To her credit, respondent's counsel did not move an order of costs in the event of the application being unsuccessful. It is an attitude which this Court has commended on several occasions.

[56]It is for these reasons that we made an order at the time that the application be dismissed and declined to make any order of costs.

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MARITZ, J

I concur.

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MAINGA, J