REPORTABLE

CASE NO: SA 48/2014

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

MARIUS CORNELIUS DE WILDE	**APPELLANT**
and	
MINISTER OF HOME AFFAIRS	**RESPONDENT**

Coram: DAMASEB DCJ, SMUTS JA and O'REGAN AJA

Heard: **2 November 2015**

Delivered: **23 June 2016**

APPEAL JUDGMENT

DAMASEB DCJ (SMUTS JA and O'REGAN AJA concurring):

Introduction

[1] This appeal is concerned with whether a child whose parent had lawfully resided in Namibia for a considerable period on an employment permit issued under Namibian immigration legislation, is entitled to Namibian citizenship by birth under Art 4(1)*(d)* of the Namibian Constitution. The respondent is the Minister for Home Affairs whose

Ministry (since renamed the Ministry of Home Affairs and Immigration) took the decision which is the subject of the present appeal.

[2] The appellant (Mr de Wilde), a Dutch national, is the father of Bram De Wilde (Bram), a boy born in Namibia on 27 October 2009. Mr de Wilde lives and carries on business lawfully in Namibia since 2006 on the basis of an employment permit[1], first issued to him on 28 July 2006, and renewed since.

[3] The Ministry of Home Affairs denied Bram Namibian citizenship by birth, maintaining that his parents should have enjoyed permanent residence[2] to be 'ordinarily resident' in Namibia under the Article. The High Court agreed. The appellant is dissatisfied with that result and comes to this court on appeal.

[4] Mr de Wilde's case is that he and his wife, Ms Louise van den Meij who is also a Dutch national, had before Bram's birth decided to make Namibia their new home.

[5] Mr de Wilde launched proceedings in the High Court because the Ministry of Home Affairs had refused both to recognise Bram as a Namibian citizen by birth and to issue the minor child a full Namibian birth certificate.

[6] Mr de Wilde sought the following relief in the High Court:

[1] Issued in terms of s 27 of the Immigration Control Act 7 of 1993 (ICA).
[2] Granted in terms of s 26 of the ICA

'1. Declaring the minor, BRAM CORNELIUS DE WILDE, born on 27 October 2009, to be a Namibian citizen by birth as envisaged by Art 4(1)*(d)* of the Constitution of the Republic of Namibia.

2. Directing the respondent to, within 30 days from date of this order, issue the minor child, BRAM CORNELIUS DE WILDE, born on 27 October 2009, with a full Namibian Birth Certificate.

3. Costs of this application (only in the event of same being opposed).

4. Such further or alternative relief as this Honourable Court may deem meet.'

[7] The relief sought is premised on Art 4(1)*(d)* of the Constitution. In so far as it is relevant to the present dispute, Art 4 states as follows:

'Acquisition and Loss of Citizenship

(1) The following persons shall be citizens of Namibia by birth:

. . .

(c) those born in Namibia after the date of Independence whose fathers or mothers are Namibian citizens at the time of the birth of such persons;

(d) those born in Namibia after the date of Independence who do not qualify for citizenship under sub-article (c) hereof, and whose fathers or mothers are ordinarily resident in Namibia at the time of the birth of such persons: provided that their fathers or mothers are not then persons:

(aa) enjoying diplomatic immunity in Namibia under any law relating to diplomatic privileges; or

(bb) Who are career representatives of another country; or

(cc) who are members of any police, military or security unit seconded for service within Namibia by the Government of another country; or

(dd) who are illegal immigrants: provided further that Sub-Articles (aa), (bb), (cc) and (dd) hereof will not apply to children who would otherwise be stateless.

. . . .

(8) Nothing in this Constitution shall preclude Parliament from enacting legislation providing for the loss of Namibian citizenship by persons who, after the date of Independence:

. . . .

(c) have taken up permanent residence in any other country and have absented themselves thereafter from Namibia for a period in excess of two (2) years without the written permission of the Namibian Government: provided that no person who is a citizen of Namibia by birth or descent may be deprived of Namibian citizenship by such legislation.' (My underlining).

Founding affidavit

[8] Mr de Wilde instituted proceedings on behalf of Bram as biological father and natural guardian of the minor child. Ms Louise van den Meij, as biological mother of Bram, filed a confirmatory affidavit in support of the relief her husband seeks.

[9] Mr de Wilde asserts that he and Bram's mother have been 'ordinarily resident' in Namibia since 2006. In April 2006, they contacted Namibia's Ministry of Trade and Industry to inquire about investing in Namibia and to 'ultimately reside here' and received a positive response. They proceeded to apply for an employment and

residence visa for the purpose of conducting market research as a prelude to investing in Namibia and uplifting their roots in the Netherlands.

[10] Mr de Wilde was issued the first employment and residence permit on 28 July 2006. The permit was periodically renewed without objection until 31 August 2014 – a period of eight years. Buoyed by the outcome of the market research, Mr de Wilde and Bram's mother decided to start investing in Namibia with the intention to make Namibia their 'new home'. They registered two close corporations and sold all their property and assets in the Netherlands in order, as he says, to make a new life for the family in Namibia.

[11] The couple bought a residential property in Windhoek in November 2008 where they live. Although they were not married when they first came to Namibia, the couple got married in Windhoek on 1 October 2009. Bram's birth was registered with the Namibian Ministry of Home Affairs which issued a 'Non-Namibia Birth Certificate' in respect of Bram's birth. At the time of Bram's birth and registration, the De Wildes had been resident in Namibia for an uninterrupted period of three years on the basis of employment permits that were repeatedly renewed.

[12] According to Mr de Wilde, the Home Affairs official who issued Bram's non-Namibian birth certificate informed them that Bram could only be issued with a full Namibian birth certificate (signifying Namibian citizenship) if his parents were permanently resident in Namibia, a status which could only be obtained once they had

been resident in Namibia for more than five years. The couple accepted this statement because they did not know better.

[13] In September 2010, Mr de Wilde and Bram's mother increased their investment in Namibia by acquiring 33.3% membership (later increased to 50%) in two close corporations that together employ 60 workers.

[14] On 12 April 2012, Ms van den Meij gave birth to the couple's second son, Levi, in Windhoek. Levi was issued a full birth certificate (signifying Namibian citizenship by birth) by the Ministry of Home Affairs. Mr de Wilde and Ms van den Meij were perplexed by this, given that Bram had not been issued a full birth certificate, and their residential status in Namibia had not changed since Bram's birth. The couple sought legal advice and were advised that Bram was just as entitled to Namibian citizenship as Levi was. Efforts through their legal practitioners to have the matter resolved bore no fruit, hence the proceedings instituted in the High Court.

[15] Relying on Art 4(1)*(d)* of the Constitution for the contention that Bram had acquired Namibian citizenship by birth, Mr de Wilde pertinently states as follows:

> 'I categorically state that neither my wife nor I ever enjoyed diplomatic status in Namibia nor are or were we career representatives of another country in Namibia. We are also not and never have been members of any police, military or security unit seconded for service in Namibia by the Government of another country and we are not illegal immigrants. It is evident from our work visas issued to us from our initial entry into Namibia and all the renewals thereof, as well as the employment permits issued to us,

as renewed, that we have resided in Namibia ordinarily and with the intention to reside here indefinitely and we have been and remained domiciled here.'

[16] Mr de Wilde disputes that it is a requirement for Bram's citizenship by birth that he and Bram's mother should have enjoyed permanent residence in Namibia when Bram was born. He maintains that much becomes apparent from the fact that the authorities issued a full Namibian birth certificate in respect of Levi.

No answering affidavit by the respondent

[17] Although opposition was noted, the respondent chose not file answering papers to either gainsay the allegations made by Mr de Wilde in support of the relief sought, nor to put forward facts or legal contentions as regards the applicant's reliance on Art 4(1)*(d)*.

[18] The following facts asserted by Mr de Wilde therefore remain unchallenged:

(a) That Mr and Mrs de Wilde were lawfully resident in Namibia when Bram was born;

(b) That the couple came to Namibia three years before Bram was born in order to settle here ; and have remained here since;

(c) That Mr and Mrs de Wilde do not intend to return to the Netherlands as they have made Namibia their new home;

(d) That the couple sold their house and other property in the Netherlands because they want to settle in Namibia;

(e) That Mr de Wilde and his wife do not fall under any of the class of people mentioned in Art 4(1)*(d)*(aa) – 4(1)*(d)*(dd) of the Constitution ("the excluded categories"); and

(f) That Levi, who was also born in Namibia whilst Mr and Mrs de Wilde were on employment permits, is recognised as a Namibian citizen by the Namibian Government.

[19] The parties had submitted a joint report to the managing judge seeking to have the matter adjudicated by way of a stated case, based on the facts set out in Mr de Wilde's founding affidavit.

Judgment of the High Court

[20] The court *a quo* held that the words 'ordinarily resident' in Art 4(1)*(d)* must be given their natural and ordinary meaning informed by the context. The court went on to state that the words do not imply lawful residence 'simpliciter'; for if that were the case 'very absurd' consequences would follow: For example, it could result in granting the status of 'ordinarily resident' to a foreign tourist who, whilst on a visitor's permit in terms

of s 29 of the ICA, gives birth to a child who would then be presumed to be a Namibian citizen by birth.

[21] According to the High Court, the natural and ordinary meaning of 'ordinarily resident' as used in Art 4(1)*(d)* is something more than 'habitual and normally resident'. The court added that the purpose for which the person is resident in Namibia was irrelevant but that the person's residence in Namibia 'must have a sufficient degree of not only continuity (barring occasional and temporary absences from Namibia), but also permanence.'

[22] The expression 'ordinarily resident' must be so construed, the court *a quo* said, to enable officialdom to decide with ease whether or not a person was ordinarily resident in Namibia. Towards that end, the High Court reasoned that the test of ordinarily resident must be a simple one which can be 'applied reasonably . . . and without difficulty and applied with appreciable certainty by those whose responsibility it is to implement the provisions of Art 4(1)*(d)*'.

[23] According to the High Court, although 'ordinarily resident' is a matter of fact to be determined on the facts of each case, it could only be determined by reference to factors that lend themselves to objective proof. The court was not satisfied that the acquisition of an employment permit, given that, according to the learned judge, it was temporary in nature, met the test of 'permanence' necessary to amount to ordinarily resident. In the High Court's view, the renewal of an employment permit, such as was

relied on by Mr de Wilde, did not detract from the fact that it bestowed only a right to 'temporarily' reside in Namibia.

[24] The court *a quo* stated further that the selling by Mr and Mrs de Wilde of their property in the Netherlands, and their expressed intention not to return there in preference for settling in Namibia, was 'evidence as to their state of mind' and not susceptible of objective proof.

[25] Having rejected the notion that an employment permit could be a sufficient basis for the acquisition of ordinary residence in Namibia, the High Court concluded that:

> '. . . the acquisition of a permanent residence permit is evidence which would be susceptible of objective proof of the intention of the holder to reside in Namibia with a view, that is, the intention, to permanently reside in Namibia. And . . . "ordinarily resident" connotes continuous and permanent residence. And continuous and permanent residence is then proven on the basis of one being issued with a permanent residence permit.'

[26] That result was justified by the court *a quo* as follows:

> 'Thus, the test of "ordinarily resident" on the basis of the existence of a permanent resident (*sic*) permit is simple to apply. It is then reasonably established without difficulty that the holder of a permanent resident permit has proven his or her intention to reside in Namibia permanently.
>
> . . .

> In my opinion, it is only when a person has established his intention to reside in Namibia continuously and permanently can it be said that he or she is "ordinarily resident" in Namibia within the meaning of Art 4(1)*(d)* of the Namibian Constitution. And the objective proof of such intention is established only if 'such person is in possession of a permanent residency permit issued to him or her in terms of section 26 of the Immigration Control Act.'

[27] Since Mr de Wilde was not in possession of a permanent residence permit but an employment permit when Bram was born, his application was dismissed. The High Court did not make an adverse costs order.

Parties' submissions

Appellant

[28] Mr Vlieghe who appeared on appeal on behalf of Mr de Wilde submitted that the main ground of appeal is that the High Court erred in law in its interpretation of the phrase 'ordinarily resident' as used in Art 4(1)*(d)*. Counsel added that all the facts and circumstances on which the appellant relies for the inference of ordinary residence in Namibia occurred before Bram's birth. In other words, that Bram's parents had made Namibia their home before his birth.

[29] Mr Vlieghe stressed the importance accorded in the Constitution to citizenship by birth, as expounded by Maritz J (as he then was) in *Thloro v Minister of Home Affairs 2008 (1) NR 97 (HC) at 104I-J to 105A-C* as follows:

'[21] The principle 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, Art 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 Namibia government, or if they have taken up residence in such a country and absented themselves thereafter from Namibia for a period of more than two years without such permission. 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.' (My emphasis and footnotes omitted.)

[30] Mr Vlieghe submitted that this passage from *Thloro* demonstrates that citizenship by birth represents the closest bond one can have with Namibia; such that Parliament's power to regulate the acquisition of citizenship by birth had been removed by the framers of the Namibian Constitution.

[31] Counsel argued that the learned judge *a quo* assigned to the phrase 'ordinarily resident' an unduly restrictive interpretation and in so doing failed to fully consider the principles applicable to the interpretation of the Constitution. He submitted, relying on *S v Acheson* 1991 NR 1 (HC) at 10A-B that:

> 'The spirit and the tenor of the Constitution must . . . preside over and permeate the process of judicial interpretation and judicial discretion'.

[32] Not only is the Constitution not to be interpreted 'like any regulatory statute', counsel continued, but it should be accorded a purposive and value-based interpretation.

Respondent's concession

[33] On appeal, Mr Hinda, assisted by Mr Narib, appeared on behalf of the respondent. Mr Hinda accepted that the De Wilde couple does not fall under any of the excluded categories. Counsel also conceded that there is no evidence on record that the De Wilde couple are in Namibia as temporary visitors as contemplated in s 29 of the ICA.

[34] Mr Hinda submitted that he could not support the High Court's conclusion that 'ordinarily resident' is the same thing as permanent residence. Mr Hinda quite admirably drew to our attention the fact that the Constitution makes reference to 'permanent residence' in Art 4(8)*(c)* in so far as it authorises Parliament to enact

legislation to deny citizenship to persons who, amongst others, have taken up 'permanent residence' in another country and have absented themselves from Namibia for a period in excess of two years without the written permission of the Namibian government.

[35] In other words, the legislature by employing the concepts in the same Article could not have intended them to mean the same thing.

Respondent's concession properly made

[36] In the light of Mr Hinda's concession, I propose to first dispose of the question whether the High Court was correct in concluding that to be 'ordinarily resident' within the meaning of Art 4(1)*(d)*, a person must be in possession of a permanent residence permit in terms of the ICA.

[37] It appears that the provisions of Art 4(8)*(c)* were not brought to the attention of the court *a quo* because no reference is made to it in the written judgment. Had it been, the learned judge would have realised that by making reference to 'ordinarily resident' alongside 'permanent residence' in Art 4, the framers of the Constitution could not have intended the two to mean the same thing.

[38] Words must be interpreted in their context. The first point to be made about the present context is that there is a relationship between sub-art (c) and sub-art (d) of Art 4(1). Sub-article (c) confers citizenship by birth to persons born in Namibia after

Independence to a parent who is a Namibian citizen at the time of the birth of such person. For its part, sub-art (d) makes clear that its purpose is to confer citizenship by birth to persons who do not qualify under sub-art (c). Thus, by enacting sub-art (d), the framers of the Constitution extended citizenship by birth to a person born in Namibia after Independence to non-Namibian parents, if one of the parents was 'ordinarily resident' in Namibia at the time the child was born.

[39] Further, sub-art (d) contains a proviso, being the excluded categories, which denies citizenship by birth to a child arising from ordinary residence of a parent, if at the time of its birth the parents –

(a) enjoyed diplomatic immunity in Namibia;

(b) were career representatives of another country;

(c) were members of any police, military or security unit seconded for service within Namibia by another Government;

(d) were illegal immigrants.

[40] A proviso is a stipulation introduced in an enactment which contains an exception. Its effect is that the preceding part of an enactment is subject to the provisions of such stipulation. The effect of a proviso was correctly characterised as

follows in *Mphosi v Central Board for Co-Operative Insurance Ltd* 1974 (4) SA 633(A) at 645C-E:

> 'the effect of an excepting or qualifying proviso, according to the ordinary rules of construction, is to except out of the proceeding portion of the enactment, or to qualify something enacted therein, which but for the proviso would be within it; and such proviso cannot be construed as enlarging the scope of an enactment when it can be fairly and properly construed without attributing to it that effect'.

[41] In *R v Dibdin*[3], 1910 P 57, Lord Fletcher Moulton at p 125 said –

> 'The fallacy of the proposed method of interpretation (ie to treat a proviso as an independent enacting clause) is not far to seek. It sins against the fundamental rule of construction that a proviso must be considered in relation to the principal matter to which it stands as a proviso. It treats it as if it were an independent enacting clause instead of being dependent on the main enactment. The Courts, as for instance in such cases as *Ex parte Partington*, 6 QB 649; *In re Brockelbank*, 23 QB 461, and *Hill v East and West India Dock Co*, 9 App Cas 448, have frequently pointed out this fallacy, and have refused to be led astray by arguments such as those which have been addressed to us, which depend solely on taking words absolutely in their strict literal sense, disregarding the fundamental consideration that they appear in a proviso.'

[42] The significance of the proviso contained in sub-art (d) is that had it not been enacted, a person falling under any of the excluded categories (and that includes an illegal immigrant) could lay claim to ordinary residence entitling their offspring to Namibian citizenship by birth under Art 4(1)*(d)*. The Constituent Assembly in other

[3] Followed in South Africa in *Strydom v Engen Petroleum Ltd* 2013 (2) SA 187 (SCA).

words chose to extend citizenship by birth also to a person whose parents at the time of his or her birth fell within the excluded categories if it would have the result of making the offspring stateless. Thus, even an illegal immigrant in Namibia could be 'ordinarily resident' in the interest of an offspring who otherwise would be stateless.

[43] Mr Hinda agreed that the proviso creating excluded categories has the effect that persons not covered by it would fall amongst the class of individuals who could be ordinarily resident in Namibia as contemplated by Art 4(1)*(d)*. The significance of this concession is that a person living in Namibia on an employment permit under immigration legislation, or enjoying a residency status other than permanent residence is not, merely by reason of that fact, excluded from claiming to be 'ordinarily resident' in Namibia as contemplated by Art 4(1)*(d)*.

[44] That interpretation is strengthened by the fact that the Constitution itself in Art 4 makes reference to 'permanent residence' – a concept which was known to Namibian law when the Constitution was adopted.[4]

[4] The concepts of permanent residence and ordinary residence co-existed prior to the Constitution. All immigration legislation made applicable to South West Africa or which was specifically enacted for the Territory recognised the concept of 'permanent residence'. The Aliens Act 1 of 1937 in s 4 made provision for the grant of permanent residence by a Board and s 3 of the Aliens and Immigration Laws Amendment Proc 15 of 1989 made provision for the granting of permanent residence by the Board on fulfillment of conditions set out in s 3(c) of that Proclamation. In short, the concept of permanent residence was known to Namibian law when the Constitutional Assembly settled the Constitution in February 1990. Similarly, the concept of ordinary residence was used in several pieces of legislation pre-dating Independence: The Matrimonial Causes Jurisdiction Act 22 of 1939 gives the court jurisdiction in a divorce action if, inter alia, one of the spouses was 'ordinarily resident' for at least one year within the area of the court's jurisdiction on the date the action is commenced. The following Acts also employ the concept of ordinarily resident: Public Accountants and Auditors Act 51 of 1951 in ss 23(7) *bis* and 30(1)*(d)*; Income Tax Act 24 of 1981 in ss 1 and 15(1)*(f)*; Administration of Estates Act 66 of 1965 in ss 35(4) and 35(5)*(a)*.

[45] It becomes apparent therefore that the concepts of ordinarily resident and permanent residence were not intended to be interchangeable.

[46] The Constitution is the source of all law and must take precedence over other laws which are subordinate to it. Constitutional provisions are not determined by the content of legislation. Therefore, the framers of the Namibian Constitution intended the phrase 'ordinarily resident' to have a meaning distinct from permanent residence - contrary to the finding of the court *a quo* that the two meant the same thing.

[47] The court *a quo* therefore misdirected itself in holding that 'permanent residence' as defined in the ICA is a condition precedent to ordinary residence. In any event, it is jurisprudentially unsupportable to use a statute as a metric for the interpretation of the Constitution, especially in the face of the well-established principle that the Constitution should not be interpreted like an ordinary statute.[5]

Respondent's submissions in support of the High Court's order

[48] The thrust of Mr Hinda's submission in opposition to the relief, and in support of the judgment of the High Court, is best captured in the following paragraphs of the respondent's heads of argument:

> 'Therefore, the rights of the applicant and his wife, to continue to remain in Namibia, are dependent on the renewal of the employment permits, when such a permit expires. Irrespective of the applicant's express intention to remain in Namibia for an indefinite

[5] *Swart v Minister of Home Affairs, Namibia* 1997 NR 268 (HC), 1998 (3) SA 338 at 272C-E.

> period, on every occasion of renewal of that permit, a definite period is determined, during which the applicant may lawfully reside in Namibia. If the permit is not renewed, the applicant had to leave Namibia. The country to which "*he will naturally return as a matter of course, after this wanderings*"[6], is the country of which he bears the passport, the Netherlands.
>
> On the argument of the appellant, appellant's son could leave Namibia, after the employment permits of the appellant and his wife are not renewed, return later to Namibia as an adult and run for President. Many countries require a connection, stronger than the mere incidence of birth before a person can be considered a citizen by birth.' (Emphasis supplied.)

[49] Mr Hinda points out in his written heads of argument that citizenship comes with allegiance to Namibia and that a person may not have divided allegiances given the inherent security dangers of a divided loyalty. He added that citizenship is accompanied by the right to be elected to the highest office of President of the Republic of Namibia in terms of Art 28(3) of the Constitution. The sense one gets from these submissions is that the status of citizenship should not be lightly assumed.

[50] Based on the English case of *R v Barnet London Borough Council, Ex Parte Shah & others* [1982] 1 ALL ER 698 (*Shah*), which Mr Hinda suggested to be persuasive authority, he submitted that it could not have been the intention of the Constituent Assembly in enacting Art 4(1)*(d)*, that a person who is on an employment permit and who is admitted to Namibia for the limited purpose of employment and whose right to remain in Namibia is 'temporary, tenuous or precarious, dependent on

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[6] See *Cohen v CIR* 1946 AD 174 at 185.

whether or not such a right is renewed', should be considered to be ordinarily resident for purposes of Art 4(1)*(d)*.

[51] I get the clear impression that Mr Hinda takes the view that ordinary residence may not be invoked in circumstances where the authority to remain in Namibia is subject to termination by immigration authorities. Therefore, according to Mr Hinda, once an employment permit is not renewed, the applicant has to leave Namibia and must, on the authority of *Mulopo v Minister of Home Affairs* 2004 NR 164 at 167, take his children with him.

[52] In *Mulopo* the court decided that the rights of citizen children are not absolute as a child is under the control of its parents. *A fortiori*, Mr Hinda submitted, the rights of non-citizen children are also not absolute, as they fall under the authority of their parents. This argument needs no further consideration than stating that the present case is distinguishable from *Mulopo* in that in the latter case the parents who had no right to reside in Namibia sought to anchor their right to remain in Namibia on the fact that their child was a Namibian citizen and that they derived therefrom the right to remain in Namibia.

[53] Mr Hinda submitted that this is not a case where it is alleged that Bram will be stateless if he is found not to enjoy Namibian citizenship. Mr Hinda concluded his argument in the following way:

> 'We submit that a finding the employment permit is not sufficient to found ordinary residence, as contemplated in Art 4(1)*(d)* of the Constitution is sufficient and that this Honourable Court does not have to deal with the question whether a Permanent Residence Permit would be enough. We submit in any event, for reasons set out by the court *a quo* that Permanent Residence would suffice.' (My underlining)

Appellant's contrary submissions

[54] Mr Vlieghe argued that the High Court misconceived the nature of an employment permit when it held that it accorded only a temporary status. He argued, and correctly in my view that, properly construed, s 27 does not have a time limit for residence and no limit to the number of times that it may be renewed. That much is borne out by the fact that the employment permits of the De Wildes have been renewed time and time again for close to a decade. That distinguishes an employment permit from a visitor's entry permit issued in terms of s 29 of the ICA to a visitor for a period not exceeding 12 months in order to 'sojourn temporarily' in Namibia.

[55] Mr Vlieghe made a very compelling submission that Art 4(1)*(d)* is the only provision in which the Constituent Assembly elected not to attach a minimum period of residence for ordinary residence for the purpose of acquiring Namibian citizenship. Thus, in terms of Art 4(3)*(a)*(bb), a non-Namibian may acquire citizenship by marriage if he or she in good faith gets married to a Namibian and subsequent to such marriage had ordinarily resided in Namibia for a period of not less than two years. Under Art 4(4), citizenship by registration may be claimed by a non-Namibian who was ordinarily resident in Namibia at the date of Independence and had been so resident for a

continuous period of not less than five years. In terms of Art 4(5), citizenship by naturalisation may be applied for by a non-Namibian if such person is ordinarily resident in Namibia for a continuous period of not less than five years.

[56] The court *a quo* adopted a test which it considered was capable of mechanical application and not requiring the exercise of discretion based on the facts of a particular case, although incongruously a suggestion was made that the facts of the case should determine whether ordinary residence was established. In my view, the court *a quo* unduly sought to promote the interest of officialdom through certainty at the expense of the interests of the child. A more beneficial interpretation would have yielded an entirely different result to that reached by the court *a quo.*

[57] In its 'spirit and tenor' the Constitution of Namibia seeks to avoid statelessness and to grant citizenship by birth to as varied a class of people as possible as exemplified by the extension of citizenship by birth to even the offspring of illegal immigrants in order to avoid statelessness.

[58] Against that backdrop, Art 4(1)*(d)* must be given a generous and purposive interpretation that advances the interests of a child born in Namibia rather than one that limits such interests.

Respondent's reliance on the English case of *Shah*

[59] As I earlier pointed out, Mr Hinda relies on the English case of *Shah* for the proposition that 'ordinarily resident' cannot be supported by residency in Namibia based on an employment permit.

[60] The leading case on the interpretation of the phrase 'ordinarily resident' in England is *R v Barnet London Borough Council: Ex parte Shah and Other Appeals* [1983] 1 All ER 226 (HL). Lord Scarman, in whose speech the rest of the members of the Committee concurred, said this at p 235e-f:

> 'Unless, therefore, it can be shown that the statutory framework or the legal context in which the words are used requires a different meaning, I unhesitatingly subscribe to the view that "ordinarily resident" refers to a man's abode in a particular place or country which he has adopted voluntarily and for settled purposes as part of the regular order of his life for the time being, whether of short or of long duration.'

[61] Lord Scarman made clear that 'ordinarily resident' is not a term of art and is 'ultimately a question of fact, depending more upon the evidence of matters susceptible of objective proof than upon evidence as to state of mind' (p 344). His Lordship added (at p 235*d*) that it did not involve an intention to live in a place indefinitely-except to the extent that absence may destroy the degree of continuity needed to establish ordinary residence.

[62] In reaching this conclusion, the court stressed that it was applying the ordinary meaning of the term and cited with approval the following dicta from two 1920s House

of Lords tax cases. In *Levene v Inland Revenue Commissioners [1928] AC 217*, 225 Viscount Cave LC said:

> 'I think that [ordinary residence] connotes residence in a place with some degree of continuity and apart from accidental or temporary absences.'

And in *Inland Revenue Commissioners v Lysaght [1928] AC 234*, 243 Viscount Sumner said:

> 'I think the converse to "ordinarily" is "extraordinarily" and that part of the regular order of a man's life, adopted voluntarily and for settled purposes, is not "extraordinary".'

[63] Accordingly under the test set down in *Shah,* ordinary residence is established if there is a regular habitual mode of life in a particular place 'for the time being', 'whether of short or long duration', the continuity of which has persisted apart from temporary or occasional absences. In addition, the residence must be voluntary[7] and be adopted for 'a settled purpose'. A settled purpose may be evidenced by a sufficient degree of continuity in a specific place.

[64] For the purpose of demonstrating that *Shah* is not authority for the proposition that a status less than permanent residence would not suffice to found ordinary residence under English law, Lord Scarman had the following to say (at 235*h-i*):

[7] The presumption is that a person is in a country or territory voluntarily.

> 'There are two respects…in which the mind of the propositus is important in deterring ordinary residence. The residence must be voluntarily adopted.
>
> . . . .
>
> And there must be a degree of settled purpose. The purpose may be one or there may be several. It may be specific or general. All the law requires is that there is a settled purpose. This is not to say that the propositus intends to stay where he is indefinitely; indeed his purpose, while settled, may be for a limited period. Education business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode. And there may well be many others. All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.'

[65] Like in the case before us, in *Shah* the Divisional Court (and in some respects the Court of Appeal) had erred in attaching decisive significance to the immigration status of the persons who sought to rely on ordinary residence[8]. The immigration status might throw light on the question, but it is not a decisive factor.[9]

[66] The attempt on Mr Hinda's part to describe the approach of the House of Lords to 'ordinarily resident' as requiring a presence in the host country which was not dependent on termination by the authorities, is not supported by that court's ratio.

[67] The argument that an employment permit is temporary in nature and may not be renewed and thus making the residence in Namibia of the holder precarious is in any event not sound.

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[8] See Shah (HL) at 237.
[9] Ibid at 238h-i.

[68] In the first place, it assumes that the holder of an employment permit is without recourse if it is not renewed. A refusal to renew an employment permit must comply with Art 18 of the Constitution. It must be for a valid and lawful reason and must not be unfair or unreasonable. As was said by this court in *Ex parte Attorney-General in Re: the Constitutional Relationship between the Attorney General and the Prosecutor General* 1998 NR 282 (SC) at 290C:

> 'In a constitutional State the government is constrained by the constitution and shall govern only according to its terms, subject to its limitations and only for agreed powers and agreed purposes.'

[69] Secondly, the argument reintroduces in disguised form the High Court's conclusion that nothing short of permanent residence will suffice to place oneself within the embrace of Art 4(1)*(d)*. Accordingly, Mr Hinda's reliance on *Shah* to suggest that residence in terms of an employment permit cannot constitute ordinary residence within the meaning of Art 4(1)*(d)* cannot be accepted.

Conclusion on the proper interpretation of Art 4 (1)*(d)*

[70] In determining whether or not a person is ordinarily resident as contemplated by Art 4(1)*(d)*, each case must be considered on its facts. As Ramsbottom J observed in *Biro v Minister of the Interior 1957 (1) SA 234* (at 239), the phrase ordinarily resident is not a technical expression - it must be interpreted in the context in which it is used. Key considerations will include whether the person concerned normally lives in Namibia, and is therefore not merely visiting Namibia, and whether the person has no immediate

intention of permanent departure. Moreover, proof of ordinary residence will require more than a person's mere say-so. The intention to make Namibia one's habitual home must be established by facts which are capable of objective proof. Evidence will thus need to be led to show that the person is indeed normally resident in Namibia. Such evidence will include the person's place of residence, the period of residence in Namibia, as well as his or her livelihood, and other relevant factors.

[71] In every case where a person relies on ordinary residence under Art 4 (1)*(d)*, the responsible administrative officials must apply their minds to the facts to determine if the claim of ordinary residence has been established. If the facts and circumstances necessitate doing so, they would be well within their rights to ask the person seeking to invoke Art 4 (1)*(d)* to justify his or her claim and to provide proof of the facts on which they rely for their claim to ordinary residence under the Article. The one thing the administrative officials cannot do is to abdicate the responsibility to consider each case on its merits.

Law to facts

[72] The respondents chose not to file answering papers to meet Mr de Wilde's allegations that he had chosen Namibia as his home; that he disavowed his homeland and wished to settle in Namibia for the purpose of making it the new home for himself and his family. He is lawfully resident in the country and was so when Bram was born. The disqualifying factors that would have negated the incidence of ordinary residence do not apply in his case.

[73] In addition, given the undisputed fact that the De Wildes sold their home and property in the Netherlands and bought and live in a property they acquired in Namibia and carry on business in this country in a serious way, how could it conceivably be said that Namibia is not the place to which they return naturally and as a matter of course after their wanderings?

[74] Absent any denial by the respondent that the appellant (a) intended to make Namibia his and his family's new home; (b) that he acquired and increased his business interests in this country for the purpose of settling here; (c) that he sold his property in his homeland and acquired property here because this is where he wishes to settle; and (d) that he has no desire to return to his homeland but to live in Namibia, I am satisfied that the appellant discharged the evidential burden that he is ordinarily resident in Namibia within the meaning of Art 4(1)*(d)* ; and was so when Bram was born.

[75] The undisputed facts demonstrate that Mr de Wilde and Bram's mother had, prior to the birth of Bram, established in Namibia a settled routine of life which shows that they normally and customarily live in Namibia.

[76] I am satisfied that Mr de Wilde demonstrated that he developed a nexus to Namibia which went beyond a casual association such as a visiting tourist. The

example of a pregnant tourist given by the court *a quo* certainly does not fit the facts of the present case.

[77] The result the High Court should have reached therefore is that Bram had acquired Namibian citizenship by birth on account of his parents being 'ordinarily resident' in Namibia on the date of his birth on 27 October 2006, as contemplated by Art 4(1)*(d)* of the Namibian Constitution.

Costs

[78] Mr Hinda accepted that there would be no justification why the appellant should not be granted his costs in the event that he is successful.

[79] Mr Vliege who appeared in the matter without instructed counsel brought to our attention that he was assisted in the research and preparation of the appeal by another practitioner from his firm and beseeched the court to allow costs in the appeal in respect of two counsel. I did not understand Mr Hinda to have a problem if such an order were made and would accordingly allow the appellant the costs of two counsel.

The order

[80] The following order is made:

1. The appeal succeeds and the order of the High Court is set aside;

2. The order of the High Court is substituted for the following order:

'1. The minor child Bram Cornelius DE WILDE, born on 27 October 2009, is hereby declared to be a Namibian citizen by birth as envisaged by Art 4(1)*(d)* of the Constitution of the Republic of Namibia.

2. The respondent is directed, within 30 days from date of this order, to issue the minor child, Bram Cornelius DE WILDE, born on 27 October 2009, with a Full Namibian Birth Certificate.

3. The applicant is granted the costs of the application for one counsel.'

3. The appellant is granted the costs of the appeal to include two counsel.

_____
DAMASEB DCJ

_____
SMUTS JA

_____

O’REGAN AJA

APPEARANCES

APPELLANT:	S Vlieghe
	Instructed by Koep & Partners
RESPONDENT:	G S Hinda (with him G Narib)
	Instructed by the Government Attorney