CASE NO.:

IN THE HIGH COURT OF NAMIBIA

in the matter between:

STEPHEN CHARLES SWART **Applicant**

and

MINISTER OF HOME AFFAIRS **Respondent**

CORAM: MARITZ, A.J.

Heard on: 1996-11-9

Delivered on: 1997-11-21

JUDGMENT

MARITZ, A.J. The applicant is a South African citizen resident in Namibia. He has been so resident since 1982. It is his declared

intention to become a Namibian citizen by naturalisation. However, when he applied for such citizenship, officials in the Ministry of Home Affairs required of him to submit a copy of his permanent resident permit in support of his application. The applicant does not have and never had such a permit but contended that he was lawfully resident in Namibia and that his application should be considered without the need for him having to first apply for and obtain such a permanent residence permit. The opposing views held by the parties resulted in an impasse. When the officials failed to process the applicant's application for citizenship without proof of permanent residence under such a permit, the applicant brought this application for an order declaring that he was eligible for the granting of Namibian citizenship by naturalisation without having to apply for and obtain a permanent residence permit and for a *mandamus* directing the respondent to process his application for Namibian citizenship.

The facts of this matter are not in dispute. It is also common cause that the applicant was lawfully resident in Namibia at all relevant times immediately prior to 21 March 1990, being the date on which Namibia gained its independence. Mr Coetzee, appearing on behalf of the respondent, expressly conceded that, in terms of the applicable legislation prior to independence, the applicant, as a South African

citizen, did not require any authority to enter the then South West Africa and to reside therein. That much is clear from the provisions of section 3(2)(b) of the Residence of Certain Persons in South West Africa Regulation Act, 1985. In terms thereof certain persons (such as the applicant), who had been ordinary resident in the "*territory*" immediately before the commencement of that Act, were exempted from having had to obtain a permit to "*stay or remain*" that territory for longer than 30 days. Being a South African citizen, the applicant was also not an "*alien*" as defined in section 1 of the Aliens Act, 1937 and thus not required under the provisions of section 2 of that Act to be in possession of a permanent or temporary residence permit to "*enter or be in*" that territory.

Mr Coetzee, who appeared on behalf of the Respondent, contended that the applicant's right to remain in Namibia as a South African citizen came to an end not later than 12 months after the date of Independence. He argued that Article 4(4) of Namibian Constitution afforded persons, who had been ordinary resident in Namibia for a period of not less than five years immediately before and on the date of Independence but who had not acquired Namibian citizenship by birth, decent or marriage, a period of one year to claim Namibian citizenship by registration if they renounced any other citizenship they held. If they failed to do so, he submitted they either had to leave the country or had to obtain

permission from the authorities to stay on in Namibia like any other "*alien*" under the Aliens Act. That, he argued, was by necessity implied by the Constitution.

Counsel for the applicant, Ms Conradie and Mr Light, in a detailed argument submitted that the legality of the applicant's residence in Namibia was not affected by Namibia's independence or by any constitutional provisions or, for that matter, any statutory amendments promulgated thereafter.

It is correct, as Mr Coetzee submitted, that the applicant could have claimed Namibian citizenship by registration within the period of twelve months from the date of Independence. He had that right but did not exercise it. He has not advanced any reason for having failed to do so. However, it will serve very little purpose in the circumstances of this case to speculate about the reasons for his failure because it does not seem to me to make any difference in law whether his failure could be attributed to ignorance on his part about his right to claim citizenship by registration within the twelve month period after Independence or to his unwillingness to part with his South African citizenship at the time.

Counsel for the respondent forcefully advanced that it could not have been intended by the framers of our Constitution that persons such as the applicant could stay on indefinitely in Namibia without having to comply with any further formalities or without having acquired residence permits. This proposition seems to me to be well founded. On basis of that contention he then sought to build his next argument: It is by necessity implied in Chapter 2 of the Constitution that such persons must have residence permits to be or remain lawfully in the country.

I have been invited by Mr Light to reject the submission of Mr Coetzee on the basis of the normal rules applicable to the interpretation of statutes. He argued that, according to those rules a term can only be implied "*if effect cannot be given to the statute as it stands unless the provision sought to be implied is read into the statute*". (Taj Properties (Pty) Ltd v Bobat, 1952(1) SA 723 (N) at 729G; D.E.P Investments (Pty) Ltd v City Council, Pietermaritzburg, 1975 (2) SA 261 (N) at 265H;). I agree that if that test is to be applied to the interpretation of a constitutional instrument, Mr Coetzee's submission must fail. I am, however, reluctant to apply the ordinary rules of interpretation without more to the construction of the Constitution.

One should, I think, be careful not to interpret the constitutions like any regulatory statute – and certainly not "*like a last will and testament, lest indeed they become one."* (Prof. P. Freund "The Supreme Court of the United States" (1951), 29 Can. Bar Rev. 1080 at 1087). The reasons for that are apparent. Some have been mentioned by Dale Gibson in a commentary on the interpretation of the Canadian Charter of Rights and Freedoms (W.S. Tarnopolsky and G-A Beaudoin (ed.) "The Canadian Charter of Rights and Freedoms: Commentary", p 26):

> "*Constitutions are, for one thing, more important than most other laws. They form the foundation of all laws. They are intended to be much longer-lived than ordinary legislation, continuing to operate in social, economic and political conditions unimagined when they were first formulated. One source of its longevity is the difficulty involved in amending constitutions…Finally, constitutions tend to employ less precise language, requiring greater judicial elaboration than other legislation. As an American writer has put it:*
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> > *'The Constitution is an intentionally incomplete, often deliberately indeterminate structure for the participatory evolution of political ideas and governmental practices.'*".

I would rather deal with the Respondents submission on the basis of the well recognised distinction between "citizenship" and "residence". In Roman law a distinction was made between Roman citizens and aliens ("*peregrini*") who had the right to reside within the confines of the geographical boundaries of the Roman State but who lacked Roman citizenship. According to Joubert JA in Magida v Minister of Police, 1987(1) SA 1 (AD) "(t)he *ius civile* was that branch of Roman private law

which applied to Roman citizens *cives Romani* only (*ius proprium civum Romanorum*) whereas the *ius gentium* was that branch of Roman private law which was available to both Roman citizens and *peregrini*." (at 7H). That distinction is still recognised in our law where foreigners are, for example, not accorded the same rights of entry into and residence in Namibia as citizens. Ms Conradie referred to a number of other examples where foreigners are accorded lesser rights than citizens. (See: Dugard "*International Law – A South African Perspective*" at p 184; Nyamakazi v President of Baputhastwana, 1992(4) SA 540 (BGD) at 579C and Tshwete v Minister of Home Affairs (RSA), 1988(4) SA 586 (AD) at 607G).

It is with that distinction in mind that one should further examine of the purpose and scope of the provisions of Chapter2.

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 citizenship and, at the same time, affording others the opportunity to become Namibians should they meet certain prescribed criteria. The purpose of Chapter 2 of the Constitution is to define the qualifying criteria relating to those persons who are

automatically Namibian citizens by operation of law (citizens by birth and by descent); those who may by right claim to become citizens (citizens by marriage and by registration) and those who may otherwise acquire such citizenship (by naturalisation or by conferment under Act of Parliament).

It is not the purpose of the constitutional provisions in that Chapter to prescribe the administrative criteria, requirements and formalities relating to entry, stay and departure of persons who are not Namibian citizens. Those are matters expressly left to Parliament to regulate. An illustration thereof is Article 4(5) which contemplates that criteria relating to "*legality of residence*" could be "*prescribed by law*". Chapter 2 deals with the acquisition and loss of citizenship and not with the legality of residence of non-citizens. That distinction, and the fact the Chapter 2 of the Constitution deals with citizenship of Namibians and not with the residence requirements of foreigners have not been fully appreciated in the respondent's submissions.

The fallacy of the implied prohibition which the Respondent is seeking to read into the Constitution can perhaps be illustrated by the following example: If, for reasons of comity and economic co-operation between Southern African states, they should enter into a treaty requiring the domestic laws of each one of the member states to be amended to allow

for the unhindered cross-border travel and residence of all the citizens of those states, would the Namibian government be required to amend the Constitution before it could promulgate such legislation? I think not. Under our Constitution, as I understand it, the entry, departure and residence of foreigners are matters left to Parliament to regulate by law.

The applicant, to qualify to apply for Namibian citizenship by naturalisation, must satisfy a number of constitutional requirements and statutory criteria. The constitutional requirements are prescribed in Article 4(5), which reads as follows:

> "*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:*
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> *(a) are ordinary resident in Namibia at the time when the application for naturalisation is made; and*
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> *(b) have been so resident in Namibia for a continuous period of not less than 5 (five) years (whether before or after the date of independence); and*
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> *(c) satisfy any other criteria pertaining to health, morality, security or legality of residence as may be prescribed by law.*"

The criteria contemplated in paragraph (c) are contained in section 5 of the Namibian Citizenship Act, 1990 which was promulgated shortly after the date of Independence. Most of those criteria are not relevant for

purposes of the issues to be determined in this application and I shall therefore only refer to the criteria relating to "*the legality of residence*".

Section 5(1)(a) thereof incorporates the constitutional requirements by indirect reference. Section 5(1)(b) requires an applicant for Namibian citizenship by naturalisation to satisfy the respondent that "*he or she has been lawfully admitted to Namibia for residence therein*". Moreover, section 5(3)(d) states that, for the purposes of the computation of the period of residence or ordinary residence required before such an application may be made (5 years), no period during which the applicant has entered or remained in Namibia as a visitor "*by error, oversight, misrepresentation or in contravention of any law*" should be taken into consideration. The other paragraphs of that subsection are not relevant to the facts of this matter.

It follows that if the applicant had entered or remained in Namibia "*by error, oversight, misrepresentation or in contravention of any law*" during the period of 5 years immediately preceding the submission of his application for citizenship by naturalisation or if he cannot satisfy the respondent that he had "*been lawfully admitted to Namibia for residence therein",* his application should fail. At the heart of the issues between the parties therefore, lies the question whether applicant's continued

presence in Namibia after the date of Independence was unlawful. In deciding on this issue, it is important to consider the legality of the applicant's residence in Namibia within the chain of constitutional and legislative developments affecting such residence.

As I have indicated, it is common cause between the parties that the applicant has entered Namibia lawfully in 1982 and that he had been lawful in the country at least until the date immediately before the date of Independence. In terms of Article 140(1) of the Constitution, all laws which were in force in Namibia immediately before the date of independence continued, subject to the other provisions of the Constitution, to be of force until repealed or amended by an Act of Parliament or until declared unconstitutional by a competent Court. Amongst those laws were the Residence of Certain Persons in South West Africa Regulation Act, 1985; the Admission of Persons to the Territory Regulation Act, 1972 and the Aliens Act, 1937. Those laws were not amended by the Constitution and the applicant's right to continued residence thereunder remained unaffected on the date of Independence.

When the Namibian Citizenship Act was promulgated in 1990, it repealed the Residence of Certain Persons in South West Africa Regulation Act, 1985 and amended the Admission of Persons to the Territory Regulation

Act, 1972 and the Aliens Act, 1937. The amendment of the latter Act included the substitution for the expression "South African citizen" of the expression "Namibian citizen". Pursuant to that amendment the applicant became an "alien" within the definition of that Act and subject to the provisions of section 2 thereof. That section provides as follows:

> "*2. Subject to the provisions of sections 7bis and 12 no alien shall-*
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> *(a) enter or be in Namibia for purposes of permanent residence therein, unless he is in possession of a permit to enter the Namibia for the said purpose, issued to him in terms of section 4; or*
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> *(b) enter or be in the Namibia or any particular portion of the Namibia for the purpose of temporary sojourn therein, unless he is in possession of a temporary permit issued to him in terms of section 5 (1) or unless he has been permitted to enter under section 7."*

Section 7bis is not relevant to this application. Section 12(1)(a) provides that:

> "*The provisions of section 2 shall not apply –*
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> *(a) to an alien who has lawfully acquired a domicile in Namibia or who, prior to the first day of February 1937, lawfully entered Namibia for the purpose of permanent residence therein;*"…

If the applicant had acquired lawful domicile in Namibia at the time he became an "alien" by virtue of the amendment to the Aliens Act in 1990, he was not subject to the requirement of a residence permit

contemplated in section 2 of that Act in order to be lawfully resident in Namibia.

According to section 1 of the Aliens Act, the word "*domicile*" has the meaning ascribed to it in section 1 of the Admission of Persons to Namibia Regulation Act, 1972. That Act, as amended by the Namibia Citizenship Act, defines "*domicile*", subject to the provisions of subsections 1(2), (3) and (4), to mean "*the place where a person has his present permanent home or present permanent residence or to which he returns as his present permanent abode, and not merely for a special or temporary purpose.*"

Section 1(2) provides that, for a person to acquire such *domicile* he or she must have resided continuously in Namibia for a period of three years other than in terms of a conditional or temporary residence permit. The other subsections referred to are not relevant for purposes hereof. On a proper interpretation of that definition and its application to the facts in this matter, it appears to me that the applicant was domiciled in Namibia both on the date of Independence and the date on which he became an "alien" within the definition of the Aliens Act.

It is perhaps necessary to mention that, for the applicant to "*acquire*" such domicile, he was not required to perform any positive act. That much is clear from the judgement in Tshwete v Minister of Home Affairs (RSA) 1988 (4) SA 586 (A) where Joubert J.A. dealt with an almost identical provision in South Africa (at 608 I- 609 C):

> "*This contention overlooks the fact that the applicant acquired ex lege a domicile by birth in the Republic of South Africa and that he subsequently acquired a domicile by choice at Nkqonkqweni where*

> *he was permanently resident. It also overlooks the fact that the word 'domicile' in section 12(1)(a) has the meaning ascribed to it in section 30 of the Immigrants Regulation Act 22 of 1913, the gist of which I quoted supra as pertaining to 'present permanent residence'. …. Because the appellant was lawfully domiciled and permanently resident in the Republic of South Africa when he became a peregrine on 4 December 1981 he falls, in my judgement, within the provisions of section 12(1)(a) of the Aliens Act 1 of 1937. It follows accordingly that the provisions of s 2 of the latter Act are inapplicable to the applicant.… The appellant is therefore entitled to an order that he has the right of being permanently resident in the Republic of South Africa without any permit or exemption.*"

I am therefore of the opinion that, prior to the subsequent repeal of the Aliens Act, the applicant fell within a class of persons exempted under section 12(1)(a) from having had to obtain a permanent residence permit under the Aliens Act to legalise their residence in this country.

The relevant sections of the Aliens Act, 1937 were repealed by section 60(1) of the Immigration Control Act, 1993. Section 2(1)(b) of the Immigration Control Act (to the extent that it is relevant to the facts of this case) excludes the application of Part V (dealing with the limitation of entry into and residence in Namibia, permanent residence permits, employment permits, students permits and visitors entry permits) and Part VI of the Act (dealing with prohibited immigrants, arrest, detention and removal of prohibited immigrants) to "*any person domiciled in Namibia who is not a person referred to in paragraph (a) or (f) of section 39(2).*"

Paragraphs (a) and (f) of section 39(2) deal with certain categories of prohibited immigrants and do not apply to the applicant.

In terms of section 1 of that Act "*domicile*" is defined in almost identical terms as the repealed definition. Subject to the provisions of Part IV of the Act, it "*means the place where a person has his or her home or permanent residence or to which such person returns as his or her permanent abode, and not merely for a special or temporary purpose.*"

The only provisions of Part IV relevant to this matter is section 22(1)(d) which provides that "*no person shall have a domicile in Namibia, unless such a person 'is lawfully resident in Namibia, whether before or after the commencement of this Act, and is so resident in Namibia for a continuous period of two years*" and subsection (2) of that section which limits the computation of the "*continuous period of two years*" to exclude any period during which such a person "*has entered or resided in Namibia through error, oversight, misrepresentation or in contravention of the provisions of this Act or any other law*".

I am satisfied on the papers before me that the applicant did not enter or resided in Namibia through error, oversight, misrepresentation or in contravention of any law. He was so resident for a period of more than two years before the date on which that Act had become law. It follows that he has been domiciled in Namibia within the contemplation of section 2(1)(b) of that Act and therefore exempted from the requirements of that Act relating to permanent or temporary residence permits.

The applicant asks that the respondent be directed to process the applicant's application for citizenship within one month from the date on which this order is granted. Although not specifically raised by the respondent, such a period does not seem to me to allow an adequate opportunity for the respondent to investigate and apply his mind

properly to the application for naturalisation. I therefore propose to grant a longer period within which the application is to be processed.

In the result, the application is granted and it is ordered as follows:

1. The applicant is declared eligible for the granting of Namibian citizenship by naturalisation without first having to apply for and obtain a permanent residence permit.

2. The respondent is directed to process the applicant's application for citizenship as soon as possible, but in any event no later than three months from the date of this order.

3. The respondent is ordered to pay the applicant's costs of this application.

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Maritz, A.J.