



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 147/2013

In the matter between:

MARIUS CORNELIUS DE WILDE**APPLICANT**

and

THE MINISTER OF HOME AFFAIRS**RESPONDENT**

Neutral citation: *De Wilde v The Minister of Home Affairs* (A 147/2013) [2014] NAHCMD 160 (22 May 2014)

Coram: PARKER AJ

Heard: 3 April 2014

Delivered: 22 May 2014

Flynote: Citizenship – By birth – Requirements of in terms of art 4(1)(d) of the Namibian Constitution – Father or mother of person must be ordinarily resident in Namibia at time of his or her birth – For purposes of art 4(1)(d) ‘ordinarily resident’ means continuously and permanently resident in Namibia – Court held that proof of ‘ordinarily resident’ is ultimately a question of fact, depending more on the evidence of matters susceptible of objective proof than on evidence as to state of mind – Court held further that there is the need for simple test for respondent to apply when determining whether a person is ordinarily resident in Namibia – Court held further that the words ordinarily resident must therefore be construed so as to enable the respondent’s administrative bodies and administrative officials to establish without undue difficulty whether a person is ordinarily resident in Namibia – Court found that

since the applicant resided in Namibia on the strength of temporary employment permits applicant was not ordinarily resident in Namibia within the meaning of art 4(1)(d) of the Namibian Constitution – For applicant to be ordinarily resident applicant must be in possession of permanent residency permit.

Summary: Citizenship – By birth – Requirements of in terms of art 4(1)(d) of the Namibian Constitution – Father or mother of person must be ordinarily resident in Namibia at time of his or her birth – For purposes of art 4(1)(d) ‘ordinarily resident’ means continuously and permanently resident in Namibia – Applicant (and his wife) are on temporary employment permits – Applicant applied to the respondent to issue a Full Birth Certificate (Namibian) to applicant’s son born during the time the applicant is on employment permit status and therefore sojourning in Namibia temporarily – Court found that in terms of s 24(b) of the Immigration Control Act a person who resides in Namibia on the basis of an employment permit which is a temporary permit has not established his intention to reside in Namibia permanently and accordingly is not ordinarily resident in Namibia for purposes of art 4(1)(d) of the Namibian Constitution – Consequently, the respondent was correct in refusing to issue a Full Birth Certificate (Namibian) to the applicant’s son – Consequently, court found that applicant has not established a right that may be protected by a declaratory order – Accordingly court dismissed the application.

ORDER

- (a) The application is dismissed.
- (b) I make no order as to costs

JUDGMENT

PARKER AJ:

[1] The applicant's application is on notice of motion in which he seeks primarily a declaratory order declaring the minor child Bram Cornelius de Wilde (born on 27 October 2009) to be a Namibian citizen by birth in terms of art 4(1)(d) of the Namibian Constitution and, concomitantly, a prayer that the court directs the respondent to issue Bram with a Full Namibian Birth Certificate. The respondent has moved to reject the application.

[2] The power of this Court to grant declaratory orders flow from s 16 of the High Court Act 16 of 1990 which provides that the Court has power –

(d) ... in its *discretion*, and at the instance of any interested person, to enquire into and determine any *existing, future or contingent* right or obligation, notwithstanding that such person cannot claim any relief consequential upon the determination. (My emphasis)

[3] After Bram's birth and upon an application to the respondent's Ministry ('Ministry') by Bram's father, Mr de Wilde (the applicant), and Bram's mother (Mrs de Wilde) was issued by the Ministry with a 'Full Birth Certificate: Non-Namibian'. When Bram was born, Bram's father and mother had been residing in Namibia on the strength of work permits which, according to the founding affidavit, 'were continually renewed'. It is not stated in the affidavit the frequency at which the permits were renewed; and no copies of the initial permits and of the renewals are attached to the affidavit. I am, therefore, unable to say when the initial permits were issued and at what frequency they were renewed. Be that as it may, on the papers, I find that Mr and Mrs de Wilde were resident in Namibia on the strength of work permits issued by the Ministry.

[4] This factual finding leads me to the next level of the enquiry. The basis on which the applicant has approached the court for a declaratory order is simply this, that is to say, according to the applicant, he the applicant and Mrs de Wilde 'were ordinarily resident in Namibia at the time when Bram was born' and so, therefore, Bram is 'entitled to Namibian citizenship by birth as contemplated in Article 4(1)(d) of the Constitution of the Republic of Namibia'.

[5] As I see it, the only issue that the court should determine is whether Bram qualifies for Namibian citizenship on the basis that his parents, Mr and Mrs de Wilde,

were allegedly ordinarily resident in Namibia at the time of his birth, within the meaning of art 4(1)(d) of the Namibian Constitution. It is not in dispute that at the time of the birth of Bram his parents were resident in Namibia on the strength of work permits issued in terms of s 27 of the Immigration Control Act 7 of 1993 ('the Act'), as I have found previously. But were they 'ordinarily resident' in Namibia within the meaning of article 4(1)(d) of the Namibian Constitution? That is the only question to be determined in order to dispose of the application.

[6] Put simply, Mr Vlieghe, counsel for the applicant, argues that Bram's parents were ordinarily resident in Namibia on the basis that they were at the material time issued with employment permits and they had certain businesses going. Mr Hinda SC, assisted by Mr Narib, represents the respondent and he argues the opposite way thus: a person who has been issued with an employment permit is resident in Namibia but he or she is not ordinarily resident in Namibia within the meaning of the article 4(1)(d) of the Namibian Constitution.

[7] It now behoves me to undertake a construction of the words 'ordinarily resident' in art 4(1)(d) of the Namibian Constitution. In this regard, I should commend both Mr Vlieghe and Mr Hinda for their industry for submitting comprehensive heads of argument and referring authorities to the court. I have pored over the authorities and I have applied principles distilled from those that are of real assistance on the points under consideration.

[8] In order to cut my way through the thicket of so many interpretations given to the phrase 'ordinarily resident' by our superior courts and foreign courts of comparable jurisdiction, I should start with this. In my opinion the words 'ordinarily resident' should be given their natural and ordinary meaning (see *Shah v Barnet London Borough Council and other appeals* (1983) 1 ALL ER 226 (House of Lords at 234), but natural and ordinary meaning by context. See *Rally for Democracy and Progress and Others v Electrical Commission of Namibia and Others* 2009 (2) NR 793 (HC).

[9] Having given the words 'ordinarily resident' their natural and ordinary meaning by the legal context in which the words are used in art 4(1)(d) of the Namibian Constitution, I conclude that the words do not imply 'lawful resident' *simpliciter* in the legal context of art 4(1)(d). I have pored over *Ministry of Home Affairs v Dickson*

2008 (2) NR 665 (SC) at 683F where Chomba AJA stated that ‘ordinarily resident’ implies lawful residence. I understand the court in *Dickson* to hold that an illegal immigrant – as at common law – could never, for as long as his or her residence in the host country remained unlawful, acquire the citizenship of that host country. In that context ‘ordinarily resident’ in Namibia connotes lawfully resident in Namibia. That is the law. But that is not the law at play here in the present proceeding, for, if the phrase ‘ordinarily resident’ in Namibia within the meaning of art 4(1)(d) is intended to convey ‘lawful residence’ then very absurd consequences would follow; consequences which the framers of the Namibian Constitution could not have intended. Take for instance this illustration. A woman, X, is issued with a visitor’s entry permit in terms s 29 of the Immigration Control Act 7 of 1993 and is thereby permitted to sojourn in Namibia for six months, commencing 1 June 2013. X gives birth to baby X on 5 June 2013, that is, during X’s sojourn in Namibia. It would monumentally absurd to argue that since X is lawfully resident in Namibia, X is ordinarily resident in Namibia within the meaning of art 4(1)(d) of the Namibian Constitution, and so, therefore, baby X qualifies for Namibian citizenship in terms of art 4(1)(d). The conclusion is irrefragable that the phrase ‘ordinarily resident’ does not imply ‘lawful resident’ for purposes of art 4(1)(d).

[10] I have set out the baby X illustration for a purpose. It is to make the point that the mere incidence of birth in Namibia does not qualify the person born for automatic acquisition of Namibian citizenship as of right: the person’s father or mother must be ordinarily resident in Namibia at the time of the birth of such person. In this regard, it must be remembered that the *ratio decidendi* of *Thloro v Minister of Home Affairs* 2008 (1) NR 97 (HC) is that requiring an applicant, a propositus for citizenship by naturalisation in terms of art 4(5) of the Namibian Constitution to renounce her South African citizenship is not unconstitutional. *Thloro* is not concerned with the interpretation and application of s 4(1)(d).

[11] I have set out baby X illustration to make also the following point. The natural and ordinary meaning by context, that is by the legal context of art 4(1)(d) of the Namibian Constitution, is something more than ‘habitually and normally resident’ in Namibia. See *Shah v Barnet London Borough Council and other appeals* [1983] 1 ALL ER 226 (House of Lords) at 234b-f. The issue is not the purpose for which a person is resident in Namibia. In my opinion, to be able to take advantage of art 4(1)(d) a person’s residence in Namibia must have a sufficient degree of not only

continuity (barring occasional and temporary absences from Namibia), but also permanence. The natural and ordinary meaning of the words is that 'it results in the proof of ordinarily resident', which is ultimately a question of fact, depending more on the evidence of matters susceptible of objective proof than on evidence as to state of mind. (*Shah v Barnet London Borough Council and other appeals* at 235i-236a, per Lord Scarman) There is, therefore, the need for a simple test for the respondent and the respondent's Ministry's administrative bodies and administrative officials charged with the responsibility to implement art 4(1)(d) (and other provisions) to apply. See *Shah* at 236a. In this regard, the words must be construed so as to enable the respondent's Ministry's administrative bodies and administrative officials to establish whether a person is ordinarily resident in Namibia without undue difficulty. See *Shah* at 238b. After all; if art 4(1)(d) is not given real meaning and implemented, the provisions there would remain high-falutin ideals; to be admired and not to be implemented. But that could not have been the intention of the framers of Namibian Constitution.

[12] Thus, as I have said previously, the implementation of the constitutional provision should lend itself to a simple test; a test that can be applied reasonably, applied without undue difficulty and applied with appreciable certainty by those whose responsibility it is to implement the provisions of art 4(1)(d). And above all, as I have said previously, proof of 'ordinarily resident' by a person is a question of fact, depending more on the evidence of matters susceptible of objective proof than on evidence as to state of mind.

[13] Mr Vlieghe's submission lands primarily on the point that the applicant and Mrs de Wilde have made Namibia their home. And what is the basis of counsel's submission? It is this; and it is a rehearsal of a statement in the founding affidavit: The applicant and his wife sold all their property and assets in the Netherlands, the country of their birth because they did not have any intention to move back to the Netherlands and were going to make a new life for themselves in Namibia and be domiciled in Namibia. That, in my view, is evidence as to their state of mind. I shall return to this conclusion in due course.

[14] Mr Hinda argues that that is not enough because the applicant and Mrs de Wilde are lawfully resident in Namibia on the strength of employment permits issued in terms of s 27 of the Immigration Control Act 7 of 1993. And for Mr Hinda, the

applicant and Mr de Wilde 'were admitted to Namibia for the limited purpose of employment and their right to remain in Namibia is temporary, tenuous or precarious, dependent on whether or not such a right is renewed'.

[15] That an employment permit is a temporary permit cannot be controverted. The Immigration Act says so in s 24. Accordingly, in my opinion, it matters not whether as is in the case of the applicant and Mrs de Wilde the employment permit has been renewed several times. The renewability of an employment permit cannot affect its statutory nature of temporariness. The applicant says he and his wife have the intention not to move back to the Netherlands; but their right to remain in Namibia is temporary. And, as I have mentioned previously, the proof of ordinary residence in terms of art 4(1) of the Constitution is 'ultimately a question of fact, depending more on the evidence of matters susceptible of objective proof than on evidence as to state of mind'. See *Shah v Barnet London Borough Council and other appeals* at 235i-236a.

[16] The question that arises is this. Is there anything evidence of which would be susceptible of objective proof and which lends itself to a simple test which can be applied in the interpretation and application of art 4(1)(d) of the Namibian Constitution? On the evidence I find that there is in the law such a thing and I do not find – and it has not been established – that provision of the law is offensive of the Constitution. I am referring to s 26 of the Immigration Control Act. In terms of s 26 of the Act a person who is issued with a permanent residence permit is entitled to '*reside permanently in Namibia*'. (Italicized for emphasis) On the other hand; a person who is resident in Namibia on the strength of an employment permit is not so entitled. In this regard s 24 of the Immigration Control Act says it all; and the provisions there confirm the conclusion I have reached. Section 24 provides:

'Subject to the provisions of section 35, no person shall-

- (a) enter or reside in Namibia *with a view to permanent residence therein*, unless such person is in possession of a permanent residence permit issued to him or her in terms of section 26; or
- (b) enter or reside in Namibia *with a view to temporary residence therein*, unless-

- (i) in the case of any person who intends to enter or reside in Namibia for the purpose of employment or conducting a business or carrying on a profession or occupation in Namibia, such person is in possession of an employment permit issued to him or her in terms of section 27; or
- (ii) in the case of any person who intends to enter or reside in Namibia for the purpose of attending or undergoing any training, instruction or education at any training or educational institution in Namibia, such person is in possession of a student's permit issued to him or her in terms of section 28; or
- (iii) in the case of any person who intends to enter or reside for any other purpose, such person is in possession of a visitor's entry permit issued to him or her in terms of section 29.'

[17] I find that the acquisition of a permanent residence permit is evidence which would be susceptible of objective proof of the intention of the holder thereof to reside in Namibia with a view, that is, the intention, to permanent residence in Namibia. And as I have stated previously, '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.

[18] Thus, the test of 'ordinarily resident' on the basis of the existence of a permanent resident permit is simple to apply. It is then reasonably established without undue difficulty that the holder of a permanent resident permit has proven his or her intention to reside in Namibia permanently. In that case the test for determining one's intention to reside permanently is simple to apply and the respondent's administrative bodies and administrative officials are able to establish without undue difficulty whether the propositus for 'ordinarily resident' status has established his or her intention to reside in Namibia 'with a view to permanent residence therein'. See s 24(a) of the Immigration Control Act. 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 a person is in possession of a permanent residency permit issued to him or her in terms of section 26' of the Immigration Control Act. See s 24(a) of the Act.

[19] On the facts and with the greatest deference to the applicant, I find it utterly absurd, fallacious and self-serving for the applicant to contend that he has intention to remain in Namibia permanently when the immigration status he possesses is evidenced by an employment permit which he obtained 'with a view to temporary residence' in Namibia. See s 24(b) of the Immigration Control Act. In sum, the applicant possesses a temporary permit to reside in Namibia.

[20] In sum, in my view, the phrase 'ordinarily resident' in Namibia means continuously and permanently resident in Namibia, barring, of course, short periods abroad for business holidays and suchlike pursuits. And it can easily be established whether a person has established by objective proof his intention to reside in Namibia and with the intention to remain permanently resident in Namibia if the 'person is in possession of a permanent residency permit issued to him or her in terms of section 26' of the Immigration Control Act. After all, as I said previously, 'the natural and ordinary meaning' of the words 'ordinarily resident ... results in the proof of ordinary residence, which is ultimately a question of fact, depending more on the evidence of matters susceptible of objective proof than or evidence as to state of mind'. (*Shah v Barnet London Borough Council and other appeals* at 235i-236a, per Lord Scarman)

[21] Accordingly, I conclude that the possession of a permanent residency permit is evidence of a person's intention to reside in Namibia and intention to 'permanent residence therein', and, accordingly evidence of 'ordinarily resident' in Namibia within the meaning of art 4(1)(d) of the Namibian Constitution. This conclusion as to the interpretation and application of art 4(1)(d) is in tune with the natural and ordinary meaning of the words 'ordinarily resident' and it conduces to the intention of the framers of the Namibian Constitution, which intention has been given real meaning capable of implementation by the Parliament in the Immigration Control Act 7 of 1993, which, as I have said, has not been shown to be offensive of the Namibian Constitution. It follows that a person is not ordinarily resident in Namibia within the meaning of art 4(1)(d) if that person resides in Namibia 'with a view to temporary residence' in Namibia and for which he or she has been issued with an employment permit in terms of s 24(b), read with s 27, of the Act.

[22] Based on these reasoning and conclusions, I hold that the applicant or Mrs de Wilde was not ordinarily resident in Namibia within the meaning of art 4(1)(d) of the

Namibian Constitution when Bram was born; and, *a priori*, Bram does not qualify for Namibian citizenship by birth and is, therefore, not entitled to be issued with 'Full Birth Certificate (Namibian)'.

[23] Having so held, I determine that the applicant has failed to establish a right which this court, in the exercise of its discretion, may protect; whereupon the application fails. I decline to make any costs order for this reason. I accept Mr Vlieghe's submission that the applicant, on two occasions, wrote to the respondent's Ministry and the Government Attorney with the view to settling the dispute outside the surrounds of the court but the Ministry and the Government Attorney did not answer those letters. They rebuffed the applicant's efforts without explanation; efforts which were aimed at avoiding litigation. Consequently, although the applicant has been unsuccessful, I think this is a good case where the successful party should be denied his costs.

[24] One last point. It is the point that Levi, who was born of the applicant and Mrs de Wilde before Bram was born, was issued with a 'Full Birth Certificate (Namibian)' by the respondent. This issue should not concern this court. No evidence was placed before the Court explaining why the respondent took the decision about the status of Levi's birth certificate. In any case, Levi's birth certificate is not part of the dispute that this court is entitled to adjudicate in this matter pursuant to art 80(2) of the Namibian Constitution.

[26] In the result, I make this order:

- (a) The application is dismissed.
- (b) I make no order as to costs.

C Parker
Acting Judge

APPEARANCES

APPLICANT : S Vlieghe
 Of Koep & Partners, Windhoek

DEFENDANT: G S Hinda SC (assisted by G Narib)
 Instructed by Government Attorney, Windhoek