

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

REASONS

Case no: HC-MD-CIV-MOT-REV-2016/00327

In the matter between:

GIDEON FRANCOIS JOUBERT
SUSAN-ANN MAUREEN JOUBERT

FIRST APPLICANT
SECOND APPLICANT

and

**THE MINISTER OF HOME AFFAIRS AND
IMMIGRATION**
**THE CHAIRPERSON OF THE IMMIGRATION
SELECTION BOARD**
THE IMMIGRATION SELECTION BOARD
THE IMMIGRATION TRIBUNAL
PERCY MCCULLUM

FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT
FOURTH RESPONDENT
FIFTH RESPONDENT

Neutral citation: *Joubert v The Minister of Home Affairs and Immigration* (HC-MD-CI-MOT-REV-2016-00327) [2018] NAHCMD 118 (03 May 2018)

Coram: USIKU, J
Heard: 03 October 2017
Delivered: 28 March 2018
Reasons: 03 May 2018

Flynote: Domicile – Domicile of choice – Requirements thereof.

Immigration Control Act 7 of 1993 – Interpretation of s 22(1) (d) read with s 22(2)(b) excludes computation of period of residence in Namibia if applicant is only resident by virtue of a permit issued in terms of s 27 of the Act.

Meetings of the Immigration Selection Board – Quorum not constituted – Decisions taken at inquorate meetings amount to a nullity.

Summary: The Applicants are South African citizens and are married to each other. The First Applicant was issued with a work permit during 2013, which has been renewed on a number of occasions until 2016. During June 2016, he was informed that his application for a new work permit was refused on 10 May 2016. He re-submitted the application and was informed during August 2016 that his application was again rejected on 05 July 2016.

Held that, the Applicants had established domicile.

Held further that, the Applicants are granted the relief they pray for.

ORDER

1. The First, Second and Third Respondents' decision taken on the 5th July 2016 (as well as on the 10th May 2016), rejecting the First Applicant's application for a work permit, is hereby reviewed and set aside.
2. It is hereby declared that the Applicants are domiciled in Namibia.

3. The First, Second, Third and Fourth Respondents are hereby directed to pay the costs of the Applicants in respect of this application, jointly and severally, the one paying the other to be absolved, which costs include the costs of one instructing and two instructed counsel.

REASONS

USIKU J:

Introduction

[1] On 28 March 2018, I issued an order after hearing arguments on 03 October 2017, in the following terms:

- '1. The First, Second and Third Respondents' decision taken on the 5th July 2016 (as well as on the 10th May 2016), rejecting the First Applicant's application for a work permit, is hereby reviewed and set aside.
2. It is hereby declared that the Applicants are domiciled in Namibia.
3. The First, Second, Third and Fourth Respondents are hereby directed to pay the cost of the Applicants in respect of this application, jointly and severally, the one paying the other to be absolved, which costs include the costs of one instructing and two instructed counsel.
4. I shall release the reasons for the above order on the 03rd May 2018 at 10:00.'

[2] What follows hereunder are the reasons for the above order.

[3] The Applicants are husband and wife and are nationals of South Africa. The First Applicant was approached by Swakop Uranium Ltd, a Namibian mining company, for permanent employment at its Husab mine. He accepted the offer and commenced his permanent employment on 01 November 2013. He was provided with a number of

temporary business and employment visas for the purposes of his employment, the first of those being a three month employment visa, from 10 October 2013. Later, he was furnished with a three-year employment permit, valid from 14 February 2014 to 15 February 2017.

[4] On 31 March 2015, the First Applicant's employment was terminated by his employer, Swakop Uranium Mine Ltd.

[5] On or about about 12 February 2016, the Chairperson of the Immigration Selection Board (the second Respondent), by letter, informed the First Applicant that the Minister of Home Affairs and Immigration (the First Respondent), had on 29 January 2016, cancelled the First Applicant's employment permit, because the First Applicant was no longer employed by Swakop Uranium Ltd. The Applicants were in the meantime requested to hand in their passports with the Ministry of Home Affairs and Immigration ('the Ministry') and when the Applicants received their passports, during February 2016, their visas had been cancelled and they were served with a letter requesting them to leave Namibia within seven days.

[6] When the Applicants handed in their passports with the Ministry, the First Applicant had at the same time applied for a new employment permit under Dynamic Engineering Solution CC, a Close Corporation which the First Applicant had established in the meantime. Subsequent to the aforesaid application for a new permit, a three months permit was granted valid from January 2016.

[7] The First Applicant applied for another employment permit and was informed in June 2016, that his latest application was rejected on 10 May 2016 on the basis that he does not meet the requirements of s 27(2)(c) of the Immigration Control Act, 7 of 1993 (the Act)¹. The First Applicant resubmitted his application during June 2016. During August

¹ Section 27(2) of the Immigration Control Act, 7 of 1993 provides that:

'(2) The board shall not authorize the issue of an employment permit unless the applicant satisfies the board that -

(a) he or she has such qualifications, education and training or experience as are likely to render him or her efficient in the employment, business, profession or occupation concerned; and

2016, he was verbally informed, upon a follow-up, that his application was rejected on 05 July 2016, for the same reasons as his previous application.

[8] On 21 October 2016, the Applicants launched the present application seeking an order in the following terms:

- '1. Reviewing and setting aside the decision by the first, second and third respondents to reject the first applicant's application for a work permit on 05 July 2016 (as well as 10 May 2016 insofar as it may be required).
2. Declaring the decisions referred to in prayer 1 above to be unconstitutional or null and void.
3. Declaring that the applicants are domiciled in Namibia.
4. Directing those respondents who oppose this application to pay the costs of this application jointly and severally, the one paying, the other to be absolved.
5. Granting such further or alternative relief as the above Honourable Court may deem fit.'

[9] The First to the Fourth Respondents opposed the application. The Fifth Respondent did not oppose the application.

The version of the Applicants

[10] The First Applicant relates that, with the promise of a permanent employment, he left South Africa and has been lawfully resident in Namibia since August 2013. The Second Applicant moved to Namibia during February 2015 as an accompanying spouse. The First Applicant contends that he has been continuously, lawfully and ordinarily resident in Namibia for at least three years.

[11] The Applicants aver that they have sold all their assets in South Africa as they have decided to make Namibia as their permanent home. During October 2014, the Applicants had acquired immovable property in Swakopmund and have monthly financial obligations

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- (b) the employment, business, profession or occupation concerned is not or is not likely to be any employment, business, profession or occupation in which a sufficient number of persons are already engaged in Namibia to meet the requirements of the inhabitants of Namibia; and
 - (c) the issue to him or her of an employment permit would not be in conflict with the other provisions of this Act or any other law.'

for the servicing of a mortgage bond over the said property. Furthermore, the Applicants contend that they do not own any property in South Africa or elsewhere and have nowhere to go in South Africa.

[12] The Applicants contend that they have been continuously, lawfully resident in Namibia since 2013 and have thus been so resident for a period in excess of two years. The intention of the Applicants has at all material times been, to make Namibia their permanent home. The Applicants argue, they are domiciled in Namibia by virtue of the provisions of s 22(1)(d) of the Act.

[13] The Applicants further contend that the decision taken by the First, Second and Third Respondents, to reject the First Applicant's application for renewal of a work permit, on the basis that the First Applicant did not meet the requirements in terms of s 27(2)(c) of the Act, has no foundation, as the First Applicant was previously provided with work permits. It must, therefore, be assumed that he met the requirements of the Act. In any event, the Applicants argue, the Respondents failed to provide the First Applicant opportunity to make representations in respect of any information in their possession, which they claim constituted a change in the circumstances, since the First Applicant last met the requirements of the Act. In acting as they did, the decision of the Respondents in that respect, amounts to a violation of the First Applicant's constitutional right to a fair hearing contained in Articles 5,7,8,12 and the right to fair, reasonable and lawful administrative action, under Article 18 of the Constitution.

[14] It is further the contention of the Applicants that, neither of the meetings of the 10 May 2016 and 05 July 2016 were properly constituted. There are six members appointed to the Third Respondent. A quorum is the majority of the appointed members, which translates to four members. From the attendance lists of both meetings, only three duly appointed members were present at the meetings. As such meetings were not properly constituted, any decision made in such meetings is a nullity in law.

The version of the Respondents

[15] The Respondents raised a point in limine, that the doctrine of 'unclean hands' prevents the Applicants from approaching the Court, while having no legal status in the country.

[16] In addition, the Respondents deny that the Applicants are domiciled in Namibia. According to the Respondents, s 22(1)(d) read with s 22 (2)(b) of the Act, excludes the Applicants from being domiciled in Namibia, because the First Applicant has only been in Namibia by virtue of employment permits issued in terms of s 27 of the Act.

[17] The Respondents contend further that the First Applicant was allowed to work for Swakop Uranium Ltd, as part of the conditions attached to his employment permit. When the First Respondent learnt that the First Applicant had stopped working for Swakop Uranium Ltd, she cancelled the Applicants' permits on 29 January 2016. In January 2016, a three month employment permit was issued to the First Applicant, which expired in April 2016. Since then, the Applicants remained in Namibia without the required permits.

[18] It is contended by the Respondents that the First Applicant's application for an employment permit was refused by the Third Respondent on 10 May 2016 and 05 July 2016, on the basis that he did not meet the requirements set out under s 27(2) of the Act. By virtue of the provisions of s 27 (6) read with s 39(1) and (2)(h) of the Act, the Applicants have become prohibited immigrants by operation of law.

Analysis

[19] From the foregoing paragraphs, it is apparent that two main issues call for determination by this court, namely:

- a) whether the Applicants are domiciled in Namibia as contemplated in s 22 of the Act, and
- b) whether the decision by the Respondents to reject the First Applicant's application for a work permit taken on 05 July 2016 (as well as on 10 May 2016) should be reviewed and set aside.

Domicile

[20] Section 1 of the Act defines 'domicile' as follows:

“domicile”, subject to the provisions of Part IV, 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;’

[21] The relevant portions of s 22 of the Act provide as follows:

‘(1) For the purposes of this Act, no person shall have a domicile in Namibia, unless such person –

- (a) . . . ,
- (b) . . . ,
- (c) . . . ,

(d) in the case of any other person, he or she 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.

(2) For the purposes of the computation of any period of residence referred to in subsection (1)(d), no period during which any person –

(a) . . . ,

(b) resided in Namibia only by virtue of a right obtained in terms of a provisional permit issued under section 11 or an employment permit issued under section 27 or a student’s permit issued under section 28 or a visitor’s entry permit issued under section 29;

(c) . . . ,

(d) . . . ,

(e)

shall be regarded as a period of residence in Namibia.’

[22] It is common cause that the Respondents oppose the declaratory relief sought by the Applicants on the basis that s 22 (1)(d) read with s 22(2)(b) of the Act excludes the Applicants from being domiciled in Namibia because the First Applicant has only been lawfully resident in Namibia by virtue of the employment permits issued to him in terms of s 27 of the Act.

[23] Domicile of choice is acquired by satisfying two requirements, namely;

- a) lawful physical presence; and
- b) intention to remain indefinitely in the country of choice.²

[24] Presence in the country is fulfilled in terms of s 22(1)(d) read with the definition of domicile in s 1 of the Act, if an applicant can prove that Namibia is the place where s/he has his/her home to which s/he returns as his/her permanent abode and not merely for special or temporary purpose and has been so present for a continuous period of two years.³

[25] Insofar as intention for the purposes of acquisition of domicile is concerned, the intention consists in the intention to reside permanently or for an unlimited period of time, in the country of choice.⁴

[26] In the present case, the Applicants contend that in computing the required two years continuous residence, they do not only rely on the permits issued in terms of s 27 of the Act, but also on their intention to permanently reside in Namibia. The Applicants, therefore argue that they have met the requirements of s 22(1)(d) read with s 22(2)(b) of the Act.

[27] I am of the opinion that the Applicants have put forth facts which are consistent with the intention they claim to have. They testified that they have sold everything in South Africa and have bought and live in a property they have acquired in Namibia. In the absence of any countervailing argument, I am satisfied that the Applicants have proved their intention to stay in Namibia permanently and have satisfied the requirements of domicile as contemplated in s 22, read with the definition of domicile as set out in s 1 of

² *Prollius v Minister of Home Affairs and Immigration and Holtmann v Minister of Home Affairs and Immigration* NAHCMD 343 (24 November 2017) para. 40-41.

³ *Prollius v Minister of Home Affairs and Immigration and Holtmann v Minister of Home Affairs and Immigration (supra)* para. 47.

⁴ *Prollius v Minister of Home Affairs and Immigration and Holtmann v Minister of Home Affairs and Immigration* para. 56.

the Act. Therefore, their presence in Namibia is not 'only' by virtue of the work permits issued to the First Applicant in terms of s 27 of the Act.

Validity of the decisions taken by the Third Respondent on 10 May 2016 and 05 July 2016

[28] According to the documents discovered by the Permanent Secretary of the Ministry of Home Affairs and Immigration, the following persons are the duly appointed members of the Third Respondent, namely:

- a) Patrick Nandago: member and Chairperson;
- b) Shane Albfius Mwiya: member;
- c) David ligonda: alternate member;
- d) Angela Dau-Pretorius: alternate member;
- e) Taunda Keeja: alternate member to Bollen Khama; and
- f) Bollen Khama: member

[29] The attendance register indicates that the following members of the Third Respondent attended the meeting of 10 May 2016, namely:

- a) B. Khama : Acting Chairperson;
- b) A. Mwiya;
- c) A. Dau- Pretorius; and
- d) V. S. Kujandeka

[30] The following members of the Third Respondent attended the meeting of 05 July 2016:

- a) P. Nandago: Chairperson;
- b) A. Dau-Pretorius;
- c) D. ligonda;
- d). K. Hoaseb; and

e) V.S Kujandeka.

[31] In respect of the meeting of 10 May 2016, it is apparent that V.S Kujandeka, is not one of the persons referred to as a duly appointed member of the Third Respondent. That meeting was, therefore, attended by three duly appointed members of the Third Respondent.

[32] As regards the meeting of 05 July 2016, K. Hoaseb and V.S Kuyandeka are not among the list of the duly appointed members of the Third Respondent. The meeting of 05 July 2016, was also attended only by three duly appointed members of the Third Respondent.

[33] In terms of s 25(7) of the Act, the quorum for any meeting of the Third Respondent shall be a majority of its members. Since the number of the duly appointed members is six, a quorum is constituted by the presence of four duly appointed members of the Third Respondent. Since the meetings were not properly constituted, any decision made at such meetings is a nullity and therefore falls to be reviewed and set aside.

[34] Having made the above findings in respect of domicile and on the validity of the aforementioned meetings, it is no longer necessary to determine the issue of whether the constitutional rights of the Applicants were violated.

[35] In regard to the issue of 'unclean hands' raised by the Respondents, I find that such argument has no substance. I am not aware of any authority and none was cited to me, supporting the proposition that lack of 'legal status' in Namibia constitutes a bar to approaching the courts for relief. The 'unclean hands' argument is therefore rejected in this matter.

[36] On the basis of the foregoing, I am satisfied that the Applicants have established basis for the relief they seek and same should be granted. It is for the reasons aforesaid that I made the order recorded in para [1] above.

B Usiku
Judge

APPEARANCES

APPLICANTS: R Heathcote (with him C E Van Der Westhuizen)
Instructed by Louis Karsten Legal Practitioners, Windhoek

RESPONDENTS: N Kandovazu (with him M Meyer)
of the Office of the Government Attorney, Windhoek

