REPORTABLE
CASE NO.: SA 34/2007

IN THE SUPREME COURT OF NAMIBIA

In the matter between

MINISTER OF HOME AFFAIRS **APPELLANT**

and

LAURENTIUS DICKSON **FIRST RESPONDENT**

SAROLINA FREDRIKA DICKSON **SECOND RESPONDENT**

CORAM: Shivute, CJ, Strydom, AJA, Chomba, AJA

HEARD ON: 31/03/2008

DELIVERED ON: 24/10/2008

APPEAL JUDGMENT

CHOMBA, AJA:

[1] This unprecedented appeal is a sequel to a judgment handed down in the Court *a quo* pursuant to a notice of motion in which the two respondents herein had applied for the following orders to be made against the present appellant:

1) Reviewing and correcting or setting aside the decision taken by the respondent during November 2003 rejecting the first applicant's application for Namibian citizenship.

2) Declaring the aforesaid decision unconstitutional and/or null and void.

3) Declaring that the first applicant has been ordinarily resident in Namibia as the spouse of a Namibian citizen for two years prior to his application of (*sic*) Namibian citizenship.

4) Declaring that the first applicant is eligible for the granting of Namibian citizenship on the basis of his marriage to a Namibian citizen, namely the second applicant.

[2] Prayers 5 and 6 were the usual run of the mill ones regarding, respectively, costs and further or alternative relief which the Court might deem fit. In the course of the proceedings, however, Ms Hancox, who was the respondents' counsel, successfully applied for the second prayer to be amended by striking out the word "unconstitutional". To make it neater, the words "and/or" which followed after the deleted word are also removed. The four above prayers were critical and formed the hub of the proceedings in the trial Court. They were all granted as prayed. In the appeal before us they were equally central to the integrity of the case.

[3] It is worthwhile alluding at this early juncture to an apparently important facet of this matter. In the course of the proceedings of the present appeal, it was mentioned that the first respondent was facing a threat of deportation from Namibia. It was stated that the enforcement of the deportation order made by the Minister was merely stayed for the purpose of facilitating negotiations relating to

the first respondent's citizenship application. However, on the basis of the prayers made in furtherance of the originating notice of motion as read with the orders handed down by the Court *a quo* (which orders will be reproduced in due time later on), the deportation order is not an issue in this appeal. In the event, any reference to it in the course of this judgment will merely be incidental.

[4] For the sake of convenience, I shall henceforth refer to the parties by the designations they bore in the Court *a quo*, which means that Laurentius Dickson will feature as first applicant, his wife, Sarolina Fredrika Dickson, as second applicant while the Minister of Home Affairs will be referred to as the respondent.

[5] Notwithstanding the fact that he filed a notice to defend the application commenced against him, the respondent never filed an answering affidavit. Consequently the facts as deposed by the first applicant in his affidavit supporting the notice of motion was, quite rightly, determined in the Court *a quo* to be undisputed. In summary those facts may be stated as follows:

[6] The first applicant is evidently a Tanzanian who was born in Dar-es-Salaam, Tanzania, on 5th November 1964. As a young man in his mid-twenties, he embarked on an adventure the consequence of which was that he entered Namibia through the Caprivi region via Zambia. That was in May 1989. He did so in contravention of the Namibian immigration laws. When in Windhoek he, with the assistance of a man who spoke his language, Swahili, vainly tried to be registered as a refugee at the office of the United Nations High Commissioner for Refugees. This was not surprising because in his founding affidavit, he described

himself as a seeker of a better life which he was unable to attain in his home country. In the circumstances there was no basis for any claim on his part to refugee status. Having failed to be so registered, he subsequently traversed the country and eventually found himself in Walvis Bay on the west coast of Namibia. He claims that he achieved this with the help of some persons we may figuratively call good Samaritans. Whilst in Walvis Bay, he, with the connivance of some other persons, fraudulently obtained a Namibian birth certificate. Thus armed, it was easy for him to masquerade as a Namibian in that he secured employment without being in possession of an employment permit, obtained a Namibian passport. By 1995, for some unexplained reason, he was even able to obtain a duplicate birth certificate.

[7] While still working in Walvis Bay, in 1990 he met his wife to be, one Sarolina Namases, a Namibian citizen. She was born in Walvis Bay on 29 October 1965. In February 1994, the two tied the knot and became Mr. and Mrs. Dickson. They have since raised a family of three children. Prior to that marriage, however, the first applicant had a child with another Namibian woman who has since passed on. The first applicant has lived in Walvis Bay all along since his arrival there.

[8] On 13 February 2001, the law caught up with him. Immigration officials arrested and detained him pursuant to section 42 of the Immigration Control Act, No. 7 of 1993 (the Immigration Control Act). That section provides as follows:

> "42 (1)(a) When a person who enters or has entered or is found within Namibia, on reasonable grounds is suspected of being a prohibited immigrant in terms of any provisions of this Act, an immigration officer may –

(i) if such person is not in custody, arrest such person or cause him or her to be arrested without a warrant; and

(ii) pending the investigations to be made in terms of subsection (4) by such immigration officer, detain such person or cause him or her to be detained in the manner and at the place to be determined by the Minister, for such period, not exceeding 14 days, or such longer period as the Minister may determine, not exceeding 14 days at a time."

It is unnecessary at the moment to reproduce the remaining provisions of the section. This may be done in due course as need arises.

[9] Despite being temporarily released from custody in terms of subsection (3) of section 42 aforesaid, the first applicant was later prosecuted and on 25 June 2002, was convicted by a Walvis Bay magistrate of fraudulently obtaining a duplicate Namibian birth certificate and a Namibian passport. He was consequently fined N$4000.00. Two months later, he was served with a notice of application for authorisation to deport him from Namibia on the ground that he was a prohibited immigrant. This was followed up by an actual deportation order requiring him to leave Namibia by 6 September 2002. However, after protracted negotiations by his lawyers with the Government Attorney's office, the deportation order was stayed apparently temporarily.

[10] The first applicant used the moratorium thus given to him in applying for registration as a Namibian citizen. He made the application pursuant to section 3 of the Namibian Citizenship Act, No. 14 of 1990 (the Citizenship Act), as read with Article 4(3)(a) of the Namibian Constitution. Article 4(3)(a) provides an opportunity

to foreigners to be registered as Namibian citizens if they comply with the following requirements, *viz*:

(a) marriage in good faith to a Namibian citizen; and

(b) being ordinarily resident in Namibia for two years subsequent to such marriage as a spouse of such citizen; and

(c) applying to become a citizen of Namibia.

[11] Section 3 pursuant to which the citizenship application was actually made is couched in the following terms:

"3(1) The Minister shall, subject to the provisions of subsection (3), upon application made in the prescribed form by any person who complies with the requirements and conditions for the acquisition of citizenship by marriage, issue to such person a certificate of registration to that effect.

(2) Any person to whom a certificate of registration has been issued in terms of subsection (1) shall become, from the date of issue of such certificate, a Namibian citizen."

Again the rest of the subsections of this section are not critical to this appeal and, therefore, it is unnecessary to reproduce them at this stage.

[12] The application was addressed to the Ministry of Home Affairs. In due course, the first applicant received the following reply from that Ministry:

"MINISTRY OF HOME AFFAIRS

Department of Civic Affairs
Private Bag 13200
WINDHOEK

13/4/3-2000/03

Mr. L. Dickson
P.O. Box 2557
WALVIS BAY

Dear Mr. Dickson

Re: APPLICATION FOR NAMIBIAN CITIZENSHIP BY MARRIAGE

The subject matter above refers.

Kindly be informed that your application for the above mentioned matter was unsuccessful due to your unfavourable police record.

If there are more queries, please do not hesitate to call this office.

Yours faithfully

(signed) Mrs. L.T. Kandetu
Deputy Director
Aliens Control, Citizenship & Passports"

[13] It was that rejection of the citizenship application which prompted the filing of the notice of motion from which these proceedings emanated. In the notice of motion proceedings the trial judge heard only Ms Hancox, counsel for the applicants. Mr. Swanepoel, counsel for the respondent, was unable to address the Court as he had received no instructions from his client. Thereupon the trial judge reserved judgment and in due course, having found in favour of the applicants, made the following orders:

(i) The decision taken by the respondent during November, 2003, rejecting first applicant's application for Namibian Citizenship is set aside.

(ii) The aforesaid decision is declared null and void.

(iii) It is hereby declared that first applicant has been ordinarily resident in Namibia as the spouse of a Namibian citizen for two years prior to his application for citizenship.

(iv) It is hereby declared that first applicant is eligible for the granting of Namibian citizenship on the basis of his marriage to a Namibian citizen, namely, second applicant.

(v) Respondent is directed to pay the costs of this application.

[14] The respondent was not happy with the judgment and hence this appeal, which was predicated on the following grounds:

"2 The learned judge erred when he found that the respondent's refusal to grant citizenship to the first applicant violated second applicant's constitutional rights to (a) reside and settle anywhere in Namibia and (b) to leave and return to Namibia.

2.1 The learned judge erred in finding that first applicant was not heard before the decision by the respondent was made.

2.2 the learned judge erred in finding that the respondent acted unreasonably and that her decision had no plausible justification and she failed to take into account relevant information.

2.3 Although the learned judge correctly held that first applicant's unfavourable police report was a factor to be taken into account, the learned judge erred in finding that the respondent placed too much weight on this factor; the learned judge erred in not finding that for this reason alone the respondent, under the circumstances, was justified in refusing to grant the first applicant Namibian citizenship."

THE ISSUES WHICH AROSE IN THE APPEAL

[15] Taking into account all the written heads of arguments which the parties filed, together with the oral submissions made by the parties' legal representatives in the course of hearing this appeal, I discern the following issues to have been raised which, therefore, need to be determined:

(1) Whether or not the first applicant, as a person who, in good faith, was married to a Namibian citizen, was ordinarily resident in this country subsequent to such marriage.

(2) Whether or not the status he might have acquired in consequence of such marriage entitled him to be registered as a Namibian citizen.

(3) Whether or not in considering the first applicant's citizenship application and subsequently rejecting it, the Minister of Home Affairs

(the Minister) breached the *audi alteram partem* rule of natural justice.

(4) Whether or not by rejecting the application as stated in (3) above, the Minister violated the second applicant's fundamental freedom to reside and settle in any part of Namibia, or the freedom to freely leave from and later to return to Namibia.

(5) Whether or not in rejecting the said application the Minister violated both applicants' right to private and family life.

(6) Whether or not in considering the first applicant's said application the Minister failed to take into consideration matters which he should in fact have taken into consideration, or whether he took into account information which he should not have taken into consideration.

The foregoing list is not intended to be exhaustive. Should it become necessary, there will be need to consider any other pertinent issues.

EVALUATION OF THE ISSUES

[16] I shall deal with the foregoing issues seriatim save that, since the first two are interrelated, it is convenient to treat them together. To this end the first two issues may be compounded into the following question. Was the first applicant ordinarily resident in Namibia at the time of submitting his citizenship by marriage application and had he, at that time, acquired the right to be registered as such citizen?

[17] In answering the preceding question, let me start by stating the palpably undeniable fact: the first applicant's physical presence in Namibia since the time of entry into the country. According to the evidence in his founding affidavit as buttressed by the submissions made on his behalf by Mr. Tjombe, the first applicant had resided in Namibia continuously from 1989 until 2003 when his application for citizenship was rejected. That was a total of some fourteen years. Of this total, he resided in Namibia for more or less nine years as a person who was married to a Namibian citizen. It is equally an indisputable fact that his marriage to the second applicant was contracted in good faith. However, the question, which still remains to be answered, is whether on those bald facts the first applicant can be said to have been ordinarily resident in Namibia. Secondly, can it be incontestably claimed that in consequence of the foregoing, he had acquired the constitutional right to be accorded Namibian citizenship by marriage?

[18] This compound issue was hotly debated by both sides. Mr. Tjombe contended for a number of reasons that the first applicant was ordinarily resident in Namibia at the material time. One such reason was that the law of Namibia, as expressed in the Immigration Control Act and the Citizenship Act, did not define the term "ordinarily resident". Therefore, according to Mr Tjombe as I understood him, the term should be interpreted to mean the place which a person would habitually return to after his/her travels, a place one would call home. He distinguished that term from the word "residence" which, according to him, means the place marking a person's physical presence at any given time. In offering that definition of the term "ordinarily resident", Mr. Tjombe relied on the case of

Commissioner for Inland Revenue v Kuttel 1992 (3) SA 242(A)**,** at pages 247 – 248. Extending his contention by analogy, Counsel referred to section 22 of the Immigration Control Act which in terms of clause (c) of subsection (1) vests Namibian domicile in a foreigner who is ordinarily resident in Namibia by virtue of getting married to a Namibian citizen. He asserted that the said term as used in that clause could not entail a requirement of lawful residence especially when it is juxtaposed with clause (d) of the same subsection which accords Namibian domicile to foreigners other than those married to Namibian citizens. The latter clause requires that in relation to such other foreigners, their residence in Namibia should be lawful. For the sake of clarity, it is necessary to reproduce clause (d). It states:

> "(d) in the case of any other person, he or she is <u>lawfully resident</u> in Namibia, whether before or after the commencement of this Act and is so resident in Namibia, for a continuous period of two years." (The emphasis is mine)

[19] As I understood him, Mr Tjombe argued that it was not by accident that in the provision relating to ordinary residence there was no reference to lawful residence. He, in this regard, also referred to sub-article (5) of Article 4 of the Namibian Constitution, which, in addition to requiring that an applicant for citizenship by naturalisation should be ordinarily resident in Namibia, also requires legality of residence, among other requirements.

[20] Still furthering his argument on this issue, Counsel prayed in aid of it by citing the case of *Swart v Minister of Home Affairs***,** *Namibia* 1998 (3) SA 338 (NmHC)**,** at 344H, where Maritz AJ, as he then was, stated the following:

> "Given the historical background within which our Constitution was framed, it had to address the adversity 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 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 an Act of Parliament)."

[21] Counsel submitted, and quite correctly so, that that case spelt out the different ways in which Namibian citizenship could be acquired, and how one category of citizenship could be differentiated from another. I find nothing controversial in *Swart's* case as it only sets out what the law promulgates. In fact *Swart* spells out one cardinal point: it declares that the Constitution accommodates everyone into citizenship if they have a "rightful claim" (in the case of those who qualify by reason of birth or descent), or in the case of others, if they meet the necessary "criteria."

[22] In wrapping up his argument on this issue, Mr. Tjombe concluded that once an affected person satisfied the requirements of Article 4(3) of the Namibian

Constitution, the Minister had no discretion in the matter; he had to register such person as a Namibian citizen. A discretion could only be exercised in the case of applications for citizenship by naturalisation, he argued. That was because in that case, criteria such as health, morality, security or legality of residence may be prescribed as requisites for eligibility. The rationale of the argument was that in such a case, the Minister could use his or her objective judgment as to the fitness of the applicant to be so registered. In Mr. Tjombe's view, the lawmaker put a foreigner married to a Namibian citizen (as mentioned above) in a more favourable situation in contrast to other seekers for Namibian citizenship.

In the result, he strongly asserted that the first applicant was ordinarily resident in Namibia at the time of applying for registration as a citizen, and that that was on the ground that he was married to a Namibian citizen in good faith.

[23] In considering the undoubtedly strong submissions made by Mr. Tjombe, I propose to start by inquiring into the state of the law as it was before the current Constitution of Namibia, the Citizenship Act and the Immigration Control Act were put in place. In particular, I pose the question "What was the status of an illegal immigrant as regards his domicile and ability to acquire the citizenship of his host country?"

I pose this question because the first applicant in this case is a self-confessed illegal immigrant to Namibia. As we have seen, he entered Namibia illegally in 1989; he at one time unsuccessfully attempted to be registered as a refugee in Namibia; but determined to continue his residence in Namibia, in September 1989

he fraudulently procured a Namibian birth certificate. By the latter action, he was enabled to, and did, later obtain an identity card and eventually a Namibian passport. Needless to say that after those illegal achievements, he became an impostor and masqueraded as a Namibian citizen for more or less twelve years until he was detained by the immigration officials in February 2001.

[24] Before the independence of Namibia the statute law, which governed the issue of acquisition of citizenship, was the South African Citizenship Act, No. 44 of 1949. By that Act any foreigner living in South West Africa (now Namibia) and who met the requirements of that Act became a South African citizen. However, there is no need to examine the provisions of that Act because at the attainment of Namibia's independence, it was repealed and replaced by this country's own Citizenship Act. Unfortunately, the latter Act does not contain provisions which can throw a helpful light on the question posed in the preceding paragraph. I shall consequently consider only the position under the common law, because, as I shall presently show, that law does deal with the matter at issue.

[25] The learned author, C.F Forsyth, states the following in his work entitled *Private International Law: the modern Roman and Dutch Law including the jurisdiction of the Supreme Court***,** 3rd ed., at pages 119, 122 and 130:

> **"III Domicile Proper: The types of Domicile**
>
> Our common law knows three types of domicile: *domicile of choice* – which may in certain factual circumstances be acquired by persons of full capacity by deciding to settle in a certain country – the *domicile of dependence* – which is the domicile assigned by law to a wife or minor child – and the *domicile of origin* – which is the

domicile of a parent (the husband when legitimate, the mother otherwise) assigned to a child upon birth and which plays a controversial gap-filling role when neither a domicile of choice nor a domicile of dependence is operative.

IV Domicile of Choice

At common law a domicile of choice is acquired by an independent person with capacity to acquire it, when he or she fulfils the *factum* requirement of lawful residence within the country and concomitantly has the necessary *animus,* the intention to remain permanently (or possibly indefinitely) in that country. The Domicile Act 1992, in section 1(2), however, simply provides that domicile of choice is 'acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period.' Although the statute talks of 'lawful presence' and the common law of 'lawful residence', for reasons given below, this is not believed to be a significant difference.

Under both common law and the statute *animus* and *factum* must both exist and they must exist concomitantly at some point in order for a domicile of choice to be acquired."

[26] In regard to the *factum* component of the domicile of choice, author *Forsyth* continues as follows:

"*Factum:* the requirement of residence

At common law the term residence used here, although commonplace in decided cases, is a misnomer. For the purposes of the law of domicile it means simply lawful physical presence; it does not bear a technical meaning such as it has in other branches of the law. The Domicile Act 1992 speaks simply of 'lawful presence' and, it is submitted, this is the same concept as used in common law. This is precisely what the Law Commission had in mind in recommending the use of 'lawful presence.'

The residence must, of course, be lawful. The illegal immigrant cannot acquire a domicile in the country he has chosen."

[27] The learned author further continues at page 130 as follows:

> **"The domicile of deportees and those who, if resident, are unlawfully resident in the country of choice.**
> Here the position is relatively simple. In order to acquire a domicile of choice in a country, the *propositus* must be lawfully resident there; if his residence depends on having to evade immigration authorities and continuing to evade the police, or other authorities seeking to eject him from the country, then he cannot acquire a domicile in that country, notwithstanding the existence of *animus manendi* and, of course, his physical presence there."

[28] It is necessary to comment here that in terms of Article 140 of the Namibian Constitution, all laws which were in force in Namibia immediately before independence continued to be in force after independence until they are repealed or amended by an Act of Parliament, or until they are declared unconstitutional by a competent Court. Most of the laws thus saved were South African for historical reasons which it is unnecessary to delve into for the purpose of this judgment. Suffice it to state, however, that since Namibia is now a sovereign state, no South African legislation enacted after independence can apply to Namibia. For this reason, it is otiose to discuss the South African Domicile Act of 1992 referred to in the above quotation from Forsyth's book. On the other hand, the common law position which that author has expounded is the same that obtains in Namibia.

[29] Admittedly, the foregoing extracts Forsyth's book do not deal with citizenship (which is the main issue *in casu*), but they relate to domicile. However, except in relation to honorary citizenship (see section 6 of the Citizenship Act) and

citizenship by birth and that acquired by descent (for which see Article 4(1) and (2) of the Namibian Constitution), domicile is a perquisite before acquisition of Namibian citizenship, but domicile is itself not attainable unless it is preceded by lawful residence in the country of choice. Therefore, it may be said that residence is the stepping-stone to the acquisition of citizenship. Hence persons eligible for registration as citizens by marriage, by registration and by naturalisation are those who have been ordinarily resident in Namibia for a prescribed period of time. (*vide* subarticles (3), (4) and (5) of Article 4 of the Namibian Constitution). If in order to acquire the latter citizenships one has to previously be domiciled in Namibia, which entails prior lawful residence therein, it must follow, in my opinion, that what Forsyth states in his book as extracted above applies to citizenship aspirants as well.

[30] From the foregoing it is beyond peradventure that at common law an illegal immigrant cannot, as long as he continues to be unlawfully resident in the country of choice, acquire the domicile of choice of that country. Consequently, since, except in the case of citizenship by birth and by descent as well as honorary citizenship, residence is the stepping stone to the eventual acquisition of other citizenships, it must be equally true that an illegal immigrant can never, for as long as his or her residence in the host country remains unlawful, acquire the citizenship of that country.

[31] The next question I pose is whether the common law position has been altered by the coming into existence of the Namibian Constitution and the

consequential enactment of the Namibian Citizenship and Immigration Control Acts.

[32] There is a cardinal presumption in the Roman-Dutch law that the legislature does not intend to alter the existing law more than is necessary. In his book titled *"Interpretation of Statutes***"**, author G.E. Devenish deals with that presumption. He states the following in the 1996 second impression of his 1992 edition at page 159:

> **"The Legislature does not intend to alter the existing law more than is necessary.**
> 21 The common law
> This is a seminal presumption which has been applied in innumerable cases. It is the most fundamental of the presumptions since many of the others are merely axiomatic extrapolations of it…"

He then goes on at pages 160 to 161 and states:

> "…The courts have to a lesser or greater degree endeavoured to provide, in effect, a common law bill of rights… Thus in terms of this presumption a Court will require a directive in clear language, either by express or necessary implication, before ruling that the legislature intended a significant departure from the common law. Therefore, statutes should, as far as possible, be construed 'in conformity with the common law rather than against it' and it cannot be assumed that merely because the statute creates a new obligation and prescribes a means of enforcing that obligation, the ordinary remedies are excluded. However, if it is categorically clear from both the language and the import of the statute that it is designed to alter the common law, then full effect will be given to this object. Alteration of the common law by a statute must either expressly say that it is the intention of the legislature to alter the common law, or the inference…must be such that we come

> to no other conclusion. Our courts require clear and unequivocal language to effect a change to common law." (Emphasis supplied).

[33] In a number of cases judges have made similar references to the same presumption. Froneman AJA had the following to say in the case *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) at page 66:

> "The judge in the Court below characterised the issue to be decided in broad and general terms as 'whether or not the ordinary civil courts, having regard to the LRA, retained their jurisdiction to adjudicate common-law contractual breaches of agreements of employment.' From what I have already stated it should be clear that I consider the issue to be much narrower and more specific. He also set store by the fact that there was no express exclusion in the Act of the common-law claim to damages and that the presumption against taking away existing rights operated against an interpretation that the Act impliedly did so. In my view, these considerations are misplaced. The Act does not purport to change the pre-constitutional common law by expressly mentioning each and every aspect of it that it wishes to change. It deals with specific issues and states expressly what the law now is in regard to those issues. To determine to what extent the common law was changed one has to compare these express provisions with what the common law was and determine the extent of the changes wrought by the Act. (The underlining is mine).

[34] It is, consequently, also trite law that a statute which is intended by Parliament to change the common law or an existing established principle of law must employ clear, express and unambiguous language in order to achieve that goal. The law goes further and states that an alteration brought about by statute may also be inferred by necessary implication. Furthermore, it provides that the presumption that the legislature does not intend to alter the law more than is

necessary is to be invoked only in the event of ambiguity in the statute. To this end, Trengove, JA made the following pronouncement in *Glen Anil Finance (Pty) Ltd v Joint Liquidators, Glen Anil Development Corporation Ltd (in Liquidation)* 1981 (1) SA 171(A) at pages 181H to 182A-B:

> "'It is a sound rule to construe a statute in conformity with the common law rather than against it, except where or in so far as a statute is plainly intended to alter the course of the common law.' Now it is clear from the authorities that in our law, as in English law, the presumption that a statute alters the common law as little as possible is to be relied on only in the case of ambiguity in the statute and even then it may have to compete with other secondary canons of construction, as Lord SIMON was at pains to point out in the following passage in his dissenting speech in *Maunsell v Olins* (1975) 1 All ER 16 at 28 - 29**:**
>
> > 'Whatever subsisting scope any canon of construction may have, whereby there is a presumption against change of the common law, it is clearly a secondary canon…of assistance to resolve any doubt which remains after the application of 'the first and most elementary rule of construction' that statutory language must always be given presumptively the most natural and ordinary meaning which is appropriate in the circumstances. Moreover, even at the stage when it may be invoked to resolve a doubt, any canon of construction against invasion of the common law may have to compete with other secondary canons. English law has not yet fixed any hierarchy amongst the secondary canons; …'"

[35] It is necessary also to refer to Article 66 of the Namibian Constitution, which provides as follows:

> "**Article 66 Customary Law and Common Law**

(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.

(2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods."

[36]In effect the foregoing constitutional provision cements the fact that the common law and customary law of Namibia existing at the date of Independence continue to be part of the law of Namibia provided that it does not conflict with statute law; and that such common law and customary law may be repealed or amended by statutory law.

[37] As regards domicile, the logical question which must be considered is whether the Immigration Control Act has altered the established common principle of common law which, as we have seen, states that an illegal immigrant can never acquire a domicile of his or her host country as long as his or her residence therein remains unlawful. According to the common law, therefore, the Namibian Parliament can only be said to have changed that established principle if, in enacting the Immigration Control Act, it had employed a clear and unambiguous language to that effect. In other words, did Parliament in fact enact, in clear and unambiguous language or by necessary implication, that an illegal immigrant could, contrary to the provisions of the common law, acquire Namibian domicile while he or she continued to be unlawfully resident in Namibia? Based on the provisions of Article 66, a further question may be asked whether the relevant

common law as, in the context under consideration, in conflict with the Immigration Control Act.

[38] The relevant part of the aforementioned Act is Part IV and it is tilted "DOMICILE IN NAMIBIA". In this Part the provision which deals directly with the matter at issue is to be found in section 22(1)(c) which states as hereunder:

> "22(1) For the purposes of this Act, no person shall have domicile in Namibia, unless such person –
>
> (c) is ordinarily resident in Namibia and so resides therein, whether before or after the commencement of this Act, by virtue of a marriage entered into with a person referred to in paragraph (a) in good faith as contemplated in Article 4(3) of the Namibian Constitution;"

[39] For clarity's sake, I also reproduce hereunder Article 4(3)(a) of the Namibian Constitution. That Article falls under Chapter 2 which contains provisions dealing with citizenship. Again going directly to the pertinent part of it, the Article reads:

> **"Article 4 Acquisition and loss of Citizenship**
>
> (3) The following persons shall be citizens of Namibia by Marriage:
>
> **(a)** those who are not Namibian citizens under Sub-Article (1) or (2) hereof and who:

(aa) in good faith marry a Namibian citizen or, prior to the coming into force of this Constitution, in good faith married a person who would have qualified for Namibian citizenship if this Constitution had been in force; and

(bb) subsequent to such marriage have ordinarily resided in Namibia as the spouse of such person for a period of not less than two (2) years; and

(cc) apply to become citizens of Namibia."

[40] It is indisputable that neither in section 22(1)(c) nor in Article 4(3)(a) is there a clear and unambiguous language capable of being understood as permitting an illegal immigrant who is unlawfully resident in Namibia to acquire citizenship or domicile of this country. Such an intent to alter the common law is untenable even by necessary implication.

[41] Listening to Mr. Tjombe, I was left in no doubt that it was by inferential reasoning that he arrived at the conclusion that the Namibian immigration law did not require that an illegal immigrant should be lawfully resident in this country in order to be eligible for citizenship by marriage. In getting to that position he juxtaposed Sub-Articles (3)(a) and (5)(c) of Article 4 of the Namibian Constitution and compared the language used in them. To that end he invited this Court to note that while both of these Sub-Articles require that an applicant for citizenship should be ordinarily resident in Namibia, only Sub-Article (5)(c), but not (3)(a), requires legality of residence as an additional qualification. Similarly, as regards domicile, Counsel compared the language used in clauses (c) and (d) of section 22(1) of the Immigration Control Act. He noted that in clause (c) the requirement is

for ordinary residence while in clause (d) it was for lawful residence. That to Counsel meant that the persons affected by Sub-Article (3)(a) or by clause (c) of section 22(1), respectively, do not have to be lawfully resident in Namibia because in neither of those two provisions is there any requirement for lawful residence.

[42] Those contentions are sound in logic, but they do not satisfy the principle that a statute intended to override a settled common law principle should express its intent by the use of clear and unambiguous language. I would go further and affirm that a close examination of the provisions which counsel relied on cannot, on a proper interpretation of law, support any suggestion that those provisions would, by necessary implication, amount to an alteration of the common law. This is especially so when one invokes the presumption against invasion of existing common law with abandon.

[43] In coming to the conclusion that neither section 22(1)(c) of the Immigration Control Act nor Article 4(3)(a) of the Namibian Constitution contains clear and unambiguous language suggesting that Parliament intended to override the common law within the context discussed in the preceding paragraphs, it is necessary that I make a further point. It is significant that in the Immigration Control Act Parliament included sub-section (1) of section 42. That sub-section, as is clear from its language, empowers an immigration officer to arrest and detain any person who enters or has entered Namibia or is found within Namibia if, upon reasonable grounds, such person is suspected to be a prohibited immigrant. The language the legislature employed in that subsection quite clearly, in my view, flies in the face of Mr Tjombe's submission. The effect of his submission was that the

legislature gave exemptive treatment to foreigners married to Namibian citizens as regards the requirement for lawful residence. One would have thought that if indeed the legislature had so intended it would have expressly so enacted. That could have been achieved by, for example, tacking a proviso to the subsection having the effect of excluding such persons from its ambit. To the contrary, the language used in that subsection, on a proper interpretation, means that all suspected illegal immigrants, without discrimination, are arrestable and detainable.

[44] Is the said common law exposition in conflict with the Immigration Control Act or Article 4(3)(a) of the Namibian Constitution? In my understanding it is not. It stands to reason, in my view, that since neither section 22(1)(c) nor Article 4(3)(a) has expressly or by necessary implication overridden the common law, any question of conflict cannot arise. In fact subsection (1) of section 42 of the Immigration Control Act underscores the consonance between the Immigration Control Act and the common law posture to the extent that that subsection spells out that prohibited immigrants are not welcome at any time.

[45] The other pillar of Mr. Tjombe's argument was that there was an absence from both Namibian law and decided cases of the definition of the term "ordinarily resident" as used in Article 4(3)(a). Therefore he urged us to adopt the reasoning in the South African case of *Commissioner for Inland Revenue v Kuttel, supra*, in which that term was used in reference "to the place to which a person would return after his travels; a place one would call home." Counsel went on and averred that the first applicant had lived in Namibia for 15 years, that out of that period he had spent 10 years as a person who was married to a Namibian citizen and had

begotten four children in this country. Therefore, he concluded that Namibia was the first applicant's home and consequently that he was ordinarily resident in Namibia. Again, on the basis of logic I would defer to that powerful argument. But this issue is not about logic; we have to apply to it legal principles.

[46] It is a matter of interest to note that even in the Court *a quo* the question whether the term "ordinarily resident" meant lawful resident did arise. This is reflected at pages 114 to 115 of volume 2 of the record of appeal. The following dialogue is recorded there:

> "Court: Yes, but I think one of the requirements that you referred to is also mentioned in Constitution, where you claim citizenship on the basis that you married to a Namibian citizen.
>
> Hancox: Yes, my Lord.
>
> Court: Is that your ordinary residence in Namibia?
>
> Hancox: Yes, My Lord.
>
> Court: Indeed that is one of the requirements that must be met. Now my question is and I think you should, if possible, provide me with further authority in this regard. And that is: whether to be ordinarily resident in a country requires to be so resident lawfully?
>
> Hancox: Yes, My Lord. I don't also at hand have any authority My Lord that I can refer you to. I can of course (intervention)
>
> Court: I will give you the opportunity to find further authority on that specific point.

Hancox: Yes, My Lord. I have made a point of it and I will certainly do so….."

Suffice it to state that the Judge *a quo* eventually delivered his judgment but in it he did not attempt to assign a definition to the moot term, although, equally by inference, he held that the first applicant was ordinarily resident in Namibia.

[47] In the case of *The Government of the Republic of Namibia v Dereje Demise Getachew*, Appeal Case No. SA 21/2006, (unreported) in which judgment was handed down during the March/April, 2008 session of this Court, we did give a definition to the term "ordinarily resident". For the same reason mentioned by Mr. Tjombe, namely the lack of such definition in the local law and precedent, we had, in trying to find the definition of that term, recourse to foreign case law, being fully aware that such law was not binding on this Court, but that it merely has a persuasive impact. In this connection we considered the dictum of Lord Denning in the case *of Regina v Secretary of State for the Home Department, ex parte Margueritte* (1982) 3 WLR 754**,** at page 757B – H. Before reproducing that dictum, it is apt to give a résumé of the facts of that case, because it has a resemblance to the present matter in that, like our case, Margueritte's case concerned immigration law.

[48] Margueritte was a Mauritian who left his homeland when he was a young man. He entered the United Kingdom on an entry permit. However, when the validity of the entry permit expired, he remained in the host country for a prolonged period. Needless to mention that after the expiry of the permit's validity his stay became unlawful. Eventually he got married to a fellow Mauritian but, unlike her

new husband's residence, the wife's residential status was above board; it was at all times lawful. After the prescribed period of such residence she qualified to acquire British citizenship. When she lodged her application for registration as a citizen, hoping to benefit from the wife's eligibility, Margueritte also submitted a similar application. To his dismay, the wife's application was granted, but his was rejected. He applied to the High Court for judicial review of the Home Department's negative decision, but he did not succeed. He then appealed to the Court of Appeal against the High Court decision. In a unanimous judgment the three member court which entertained the proceedings dismissed the appeal. Lord Denning, who presided over the proceedings and delivered the lead judgment, stated the following:

> "When they were first used (i.e. the words 'ordinarily resident') in the Act of 1948, there were no persons in existence such as illegal entrants or 'overstayers.' So I do not think we should construe the words 'ordinarily resident' as at that time in 1948. It was in 1973 that those persons came into being in England. I think those words should be construed in their new setting. They have to be applied in a new setting and should be construed accordingly. In this new setting the Immigration Act, 1971 contains specific provisions as to whether such a person is to be regarded as 'ordinarily resident' here. There is a general provision in section 33(2) of the Immigration Act, 1971 which says:
>
> > 'It is hereby declared that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision of this Act as ordinarily resident in the United Kingdom or any of the islands as at a time when he is there in breach of the immigration laws.'"

His Lordship continued –

> "Although that declaration is itself 'for purposes of this Act', I think it is permissible to have regard to it when considering the new section 5A of the Act of 1948. It is part of the new setting in which the words 'ordinarily resident' have to be construed.
>
> Applying it, I am of the opinion that an 'illegal entrant' or an 'overstayer' is not to be treated as 'ordinarily resident' here at a time when he is in breach of the immigration laws. Furthermore I think the broad principle we stated in this court in *In re Abdul Manan (1971) 1 WLR 859, 861* still applies. I said:
>
> > 'The point turns on the meaning of 'ordinarily resident' in these statutes. If this were an income tax case he would, I expect, be held to be ordinarily resident here. But this is not an income tax case. It is an immigration case. In these statutes 'ordinarily resident' means lawfully ordinarily resident here. The word 'lawfully' is often read into these statutes'."

[49] This Court adopted Lord Denning's dictum and we consequently held that being ordinarily resident in a country meant being lawfully resident therein. As in *Margueritte's* case, Getachew was unlawfully resident in Namibia and, like in *Margueritte's* case, Getachew was a person married to a citizen of his country of choice. It was contended on Getachew's behalf, as was the case in the present case, that he was ordinarily resident in this country. We held that he was not so resident. I feel that we were justified in adopting Lord Denning's definition for the additional reason that our case was also an immigration case. Furthermore, the *Shorter Oxford English Dictionary* has, *inter alia*, the following definitions of the word "ordinary", *viz*: "conformable to order"; "regular". In the context of the Namibian immigration law, unlawful residence in Namibia cannot be said to be conformable to order, nor is it regular. If it were regular or conformable to order the same law would not have empowered immigration officers to arrest and detain

any person who, on reasonable grounds, is suspected of being an illegal immigrant into the country. Since that is the case, how can a person who is unlawfully resident in the country be said to be ordinarily resident there? That is yet another reason why I feel that this Court was on the right footing in adopting Lord Denning's definition of the term "ordinarily resident".

[50] I would also like to highlight the learned Law Lord's allusion to income tax cases when he said effectively that the term "ordinarily resident" would be opportune in relation to an illegal immigrant in income tax cases, but not to an illegal immigrant in immigration cases. It is coincidental that the case of *Commissioner for Income Tax v Kuttel***,** (*supra)*, on which Mr Tjombe relied in submitting that the first applicant was ordinarily resident in Namibia was also an income tax case. That is yet another reason why I still feel persuaded to hold that in immigration cases "ordinarily resident" implies lawful residence.

[51] In the light of all the foregoing considerations relative to issues (1) and (2), I would, without hesitation, reject Mr. Tjombe's contentions despite their being spirited. I hold that the first applicant is not in the category of persons contemplated by Article 4(3)(a) of the Namibian Constitution. I consequently also hold that the first applicant was not, at the time his application for Namibian citizenship was rejected by the Minister of Home Affairs, ordinarily resident in Namibia. For that reason, I feel sure that at the time when he lodged the application for Namibian citizenship by reason of his marriage to a Namibia citizen, he was not eligible for registration as such. I specifically hold that the first applicant was caught by the common law provision which states that an illegal

immigrant cannot, while his residence in a country of choice is unlawful, acquire that country's domicile. It is evident from what I have stated earlier on in this judgment that no statute is presently in existence in Namibia which has, in clear and unambiguous language or by necessary implication, overridden or altered the common law on this point. By parity of reasoning, and especially since residence is the stepping stone to the acquisition of citizenship by marriage, I am reinforced in the view that the first applicant was, and is, not entitled as a matter of law, to be registered as a citizen of Namibia.

[52] The conclusion I have arrived at goes to the very root of this appeal. It is my firm and considered opinion that even if this Court were to find in the applicants' favour on any one or more of the remaining issues, their case would not be advanced any further. Lack of eligibility for registration as a Namibian citizen on the part of the first applicant is, in my view, basic in the present type of case. Consequently it would be otiose to make a finding, for instance, on whether or not the first applicant was denied the right to be heard. Equally, what purpose would it serve to decide whether or not the second applicant's fundamental freedom to reside and/or settle in any part of Namibia was violated? This last question would only be relevant in a deportation case where a spouse of a Namibian citizen has been ordered to leave Namibia.

[53] As I have stated right at the outset of this judgment, this appeal was not anchored on deportation. An examination of the prayers in the originating process, namely the notice of motion, does not, for example, show that any of them raised a deportation issue. Similarly, in the judgment of the Court *a quo* there was no

substantive or other finding that the first applicant was wrongfully or unlawfully ordered to be deported. For that very reason, there is in this appeal no ground of appeal related to such question.

[54] In her written heads of argument Ms Katjipuka-Sibolile, who also represented the respondent in the current appeal, makes a point which is not at all unimportant. In paragraph 6 of those heads she effectively states that one does not need to be a Namibian citizen in order to reside in Namibia. That was a valid point. It was a point actually grounded in law. Section 22(1)(b) to (d) of the Immigration Control Act legalises the residence in Namibia of non-citizens, such as those ordinarily resident in Namibia, initially as citizens of the country but who have later ceased to be citizens; those falling in the category of clause (c) of that section (who have been discussed at length already in this judgment); and those who have ordinarily resided here for a continuous period of at least two years. Holders of permanent residence permits in accordance with section 26 of the Immigration Control Act are also entitled to limitless residence in Namibia as long as they comply with stipulated conditions. All that is necessary for non-citizens to do in order to reside and settle in Namibia indefinitely is to regularise their residential statuses. Needless to mention that all these persons can enter into marriage with Namibians and are entitled as such to privacy and family life.

[55] It is pertinent to add, in conclusion, that a government should have the liberty to choose which ones of the foreigners present in its country should or should not be granted citizenship, subject, of course, to the dictates of the Namibian

Constitution, domestic legislation and fair administrative action. In this regard, I would again agree with that part of ground of appeal number 2.3 which states:

> "Although the learned judge (of the court *a quo*) held that first applicant's unfavourable police report was a factor to be taken into account, the learned judge erred in finding that the respondent placed too much weight on this factor; the learned judge erred in not finding that for this reason alone respondent, under the particular circumstances, was justified in refusing to grant first applicant Namibian citizenship".

[56] The first applicant's conduct after illegally entering Namibia shows quite clearly that he was not satisfied with being only an unlawful resident. As we have seen, he went to the extent of fraudulently procuring a Namibian birth certificate, Namibian identity document and, to crown it all, a Namibian passport. In other words, he flagrantly flouted the law of Namibia. He aptly fitted into the personification exemplified by Forsyth, the author whose book has been referred to earlier on in this judgment, as a person who was hell bent on evading immigration and police authorities whom he knew would be seeking to eject him from Namibia once they discovered his true identity. He can also be likened to the figurative illegal immigrant depicted by Briggs, ACJ, in *Smith v Smith* 1962 (3) SA 930 (FC) as having said to himself – "I will stay in Rhodesia (now Zimbabwe) if I can escape the attention of the authorities whose statutory duty is to deport me and who will at once do so if they learn the true facts about me". In the case of the first applicant, we only have to substitute "Namibia" for "Rhodesia". He only came to think about acquiring Namibian citizenship after the law had caught up with him. It is, therefore, no wonder that the Minister did not think of him as being a fit and

proper person to be granted Namibian citizenship. Having made this observation, however, I must reiterate that the mainstay of my decision in allowing this appeal (which I am about to do) is the fact that the first applicant was not, at the material time, eligible for Namibian citizenship.

[57] Notwithstanding the overwhelming odds against him in the present circumstances, the first applicant has something which I must mention to his credit. He has lived in and served this country for several years. He came here as a young man and has spent the best part of his life in this country. Documentary evidence in the record of appeal shows that he was born in Tanzania in 1964; that he came to Namibia in 1989 when he must have been about 25 years of age; and that he has lived here virtually uninterruptedly since then. At the time this judgment is to be delivered, he will be in his mid-40s by age. It would appear also that he has been a good husband and father to his Namibian wife and children respectively. After his evidently lengthy absence from his native Tanzania, it could well be a great hardship for him to resettle there at this stage. The trauma to his wife and children arising from such relocation might be even worse. It is, therefore, hoped that this adverse judgment notwithstanding, the relevant authorities would accord a sympathetic reception to his possible application, if he cares to make one, for regularising his residence in conformity with the law.

[58] In the final analysis, I would allow this appeal, and in doing so make the following orders:

1. The appeal is allowed.

2. The order of the Court *a quo* is set aside and the following order substituted:

"The application is dismissed."

3. Each party to the appeal shall bear his or her own costs.

_____
CHOMBA, AJA

I concur

_____
SHIVUTE, CJ

I also concur

_____
STRYDOM, AJA

COUNSEL FOR THE APPELLANT	**MS U. KATJIPUKA-SIBOLILE**
INSTRUCTED BY	**GOVERNMENT ATTORNEY**
COUNSEL FOR APPLICANTS	**MR. N. TJOMBE**
INSTRUCTED BY	**LEGAL ASSISTANCE CENTRE**