CASE NO. SA 5/96

IN THE SUPREME COURT OF NAMIBIA

In the matter between

MARTINO NEVES CORREIA APPELLANT

and

THE COMMANDING OFFICER,

WINDHOEK PRISON FIRST RESPONDENT

MINISTER OF HOME AFFAIRS SECOND RESPONDENT

CORAM: MAHOMED CJ, et MTAMBANENGWE, AJA, et GIBSON AJA

Heard on: 1997/07/01-02 Delivered on: 1998/02/10

JUDGMENT:

MTAMBANENGWE, AJA.: This is an appeal against the whole of the High Court Judgment (Hannah J). On 15 October 1996 Hannah J sitting with Silungwe A.J. dismissed the application by Appellant for certain relief but made two orders in favour of Appellant, namely, that 'respondents continue to release the applicant from custody', and interdicting and restraining second respondent 'from deporting the applicant'; both pending the determination or decision of the matter by the Immigration Tribunal.

The appellant brought two urgent applications by notice of motion in which he

claimed more or less identical relief. The second application on 5th July 1996 was brought subsequent to the first on 2nd July 1996 apparently because no prayer was made in the first application for achieving immediate release from custody of the Appellant. A rule nisi was granted in respect of each application. The applications were subsequently heard together and dealt with in the judgment of the Court a quo.

On 26 July 1996, before the hearing of the applications leave was granted to amend the notice(s) of motion by the addition of the following prayers:

"1.1. Declaring the provisions of Section 39(2)h, Section 42(l)(a) and/or Section 42(4) of the Immigration Control Act, Act no. 7 of 1993 ("the Act) to be unconstitutional and invalid.

1.2. Setting aside Second Respondent's notice in terms of section 42 (4)(b)(i) of the Act to Applicant dated 22 February 1996, as being in violation of article IS of the Constitution.";

prayer 1.2 on appeal was not persisted in.

The Notice of Motion as amended was later filed with prayers reading as follows:

"2.1. Declaring the Applicant not to be a prohibited immigrant in respect of Namibia.

2.2. Declaring the'provisions of section 39(2)h, section 42(i)(S) and/or

section 42 (4) of the Immigration Control Act, Act No. 7 of 1993 ("the Act"), to be unconstitutional and invalid.

2.3 Setting aside Second Respondent's notice in terms of section 42(4)(b)(i) of the Act to Applicant dated 22 February 1996, as being in violation of article 18 of the constitution.

1. Declaring Applicants detention to be unlawful and invalid,

2. Directing that First and/or Second Respondent release Applicant from custody forthwith and that Second Respondent returns to Applicant her passport forthwith.

2.6. Directing that Second Respondent pay the cost of the application, First Respondent to be so liable only in the event of his opposing the application.

3. Directing that paragraphs 2.1. to 2.3 above, operate as in interim interdict pending the return day of the rule.

4. Granting the Applicant such further relief or alternative relief as the above Honourable Court may deem fit."

No affidavits were filed in support of the Amended Notice of Motion. On 22 July it would appear, respondents had filed a Notice in terms of Rule 6(5)(d)(iii) to the effect

that at the hearing of the application (unamended) respondents intended to raise the following question in law only, namely.

"1. That the Applicant, on his own version of events, is a prohibited immigrant in the Republic of Namibia in terms of Section 39(1)h (apparently 39(2)(h) of the Immigration Control Act, 1993 (Act 7 of 1993).

2. That the Second Respondent was therefore entitled to arrest and detain him in accordance with the provisions of the Act.

5. That the Applicant marriage to Yolande Daphne Zaahl, in the circumstances of this matter cannot be regarded as a bona fide marriage as contemplated by Article 4(3) of the Namibian Constitution.

6. In the alternative, and in any event, that this Honourable Court is not the correct forum to decide whether the marriage between the Applicant and the said Yolande Daphne Zaahl is such a *bona fide* marriage or not.

7. That, in the particular circumstances of this matter, the Applicant has no *locus standi* to bring this application.

6. That the affidavit by Yolande Daphne Correia (born Zaahl) filed on 17 July 1996 should not be permitted as evidence in this matter as it was not filed in accordance with the rules of Court.

7. That the Applicant is not entitled to any of the relief claimed in the Notice of Motion and that the *ride nisi* should therefore be discharged with costs."

As appears from the above and will appear fuller from the facts of the matter, now briefly to be related, the Appellant was at the time this application was launched detained under the Immigration Control Act (the Act). The facts pertaining to this arrest are the following (these appear from correspondence between Appellant's legal practitioner and an immigration officer who arrested and detained him on 12 June 1996, as confirmed by appellant's own affidavits in support of the application.): On 22 February 1996 he entered Namibia without any valid documents. This was in contravention of section 12 of the Act. On the same date he was served with a notice to leave Namibia within 48 hours. This was a notice in terms of section 42(4)(b)(i) of the Act which provides:

"(4) An immigration officer shall-

(a)

(b) in the case of a person referred to in subsection (3), after having made such investigations. As the immigration officer may have deemed necessary, decide whether the person so referred to therein, is or is not a prohibited immigrant, and if the immigration officer decides that such person is a prohibited immigrant, he or she-

(1) shall notify such person in writing of that fact and in such notice inform him or her that application will be made to the Tribunal concerned under section 44 for authorization for his or her removal from Namibia should he or she fail to leave Namibia before a date specified by the immigration officer in the notice which date shall not be a date less than 48 hours from the time such person is served with such notice;"

Appellant complied with the notice and left Namibia within the period specified, but subsequently on an unspecified date but before 12 June 1996 he again entered Namibia, at Oshikango border post. Apparently either before 22 February or on that date he had applied for refugee status which application was refused. Section 40 of the Act provides in subsection (5):

"The Minister may authorise persons outside Namibia to issue to any intending immigrant a certificate that he or she is exempled from the provisions of section 39....."

The appellant had not applied for such certificate; he apparently did not reveal the fact that on 22 February he had been served with the notice to leave Namibia. He was then apparently given a visitors entry permit valid until 30 June 1996.

On 12 June 1996 Appellant was stopped by an immigration officer at Windhoek International Airport and asked for his passport which he did not have on him. He was asked to report to the office of the said immigration officer at 14H00 the same

day, he failed to do so and was subsequently arrested and detained at Windhoek Prison that afternoon.

In the first letter (Annexure MC 2) addressed to the Permanent Secretary Home Affairs, Mr Light, appellant's legal representative, says inter alia:

> "Notwithstanding the fact that our client's girlfriend, (Ms) Yolande Zaahl handed Mr Ernst our clients passport during the evening of the same day at Windhoek Prison. Mr Emst refused to release our client because he had failed to show his passport at 14H00, as requested, and also because he did not sign for his letter of detention. A copy of the letter is attached.
>
> Would you please advise us as a matter of urgency on what basis you consider our client (to) be a prohibited immigrant, bearing in mind that he has a temporary residence permit valid until 30 June 1996. We wish to advise that should you fail to reply to this facsmile by no later than close of business on Friday 21 June 1996 and to release our client, application will be made to the High Court for our client's release without further notice to you. Please treat this matter as urgent."

The reply to the above was a letter by the Under Secretary Home Affairs (Annexure MC3) by stating, inter alia,:

> "I hereby confirm that Mr Martino Neves Correia is a prohibited immigrant under section 39(2)(h) of Immigration Control Act 1993 (Act No. 7 of 1993).

THE JUDGMENT OF THE COURT A QUO

The Court a quo dismissed the application by dealing with the two points in limine raised by respondents. In so doing Hannah J first identified the principal relief sought by Appellant as concerning "whether or not the applicant is a prohibited immigrant" and said

> "This question has to be considered at least initially, having regard not only to the facts of the case but also with regard to the proper construction to be given to certain sections of the Immigration Control Act and only if the construction contended for the applicant is rejected that the constitutional points which the applicants legal representative seeks to raise come into play."

Hannah J also identified as ancillary relief, to the declaration that appellant is not a prohibited immigrant, the declaration that appellant's detention as a prohibited immigrant is (accordingly) unlawful and invalid as well as the order for his release from custody and an interdict restraining second respondent from deporting him from Namibia.

The judgment of the Court a quo was given when, as the Learned Judge remarked, "the last two items of relief (had) in fact already been granted on a temporary basis" by that Court, and in light of the concession by respondents that "at most the (applicant) could have applied for an interim interdict restraining the respondents from deporting him pending the determination of the matter by the tribunal and perhaps for an order for his release from custody pending the tribunal's decision."

Having so identified the relief sought the Court a quo "obviously did not feel it had before it all the facts of the case necessary to enable it to deal with the legal points raised by appellant." That could be the only reason why it did not decide **the** issue as to the legality of appellant's arrest and detention despite the fact that appellant's liberty was involved and the authorities cited by Mr Light in support of the need in such circumstances for the Court to decide the point. In this regard see *Kruger vs Die Landboubank van Suid-Afrika en andere* 1968(1) SA 67(G), the headnote of which reads:

> "The Court should normally not refuse to decide an application on a point of law merely because the applicant did not mention it in the application or he did not expressly rely on it, *provided naturally that the Court is certain that the facts upon which the legal point rests are not in dispute."*

The Court a quo upheld both points raised in limine by respondents. It said of the point that appellant was not entitled to approach the Court for substantive relief (as opposed to interim relief) that:

> "The function of determining whether a person is a prohibited immigrant and whether he should be deported has been entrusted by the Immigration Control Act to the Immigration Tribunal and, in our opinion, that Tribunal is clearly the best forum for determining that question. It may summon witnesses to give evidence and produce documents.....
>
> It would only be in exceptional circumstances, and in our view in the present case there are none, that an application of the instant kind can properly be

brought bypassing the Immigration Tribunal and in effect seeking to have this Court perform the function entrusted by statute to that tribunal."

The point made by Hannah, J was well illustrated at the hearing of this appeal when the Court had to ask a lot of questions to establish whether in fact appellant had **a** permit and what type of permit, and if he had any such permit under what circumstances it was issued; his passport was not available to the Court. In the end Mr Coetzee conceded, a fact which could have but had not been denied by affidavit, that appellant, at the time of his arrest and detention had a visitor's entry permit. Only then, and as a result of that concession, was the Court in a position to say whether appellant's detention at the time was illegal and invalid. I will return to say more about this later.

Hannah J described the constitutional points involved in the second point in limine raised by respondents as points raised by appellant's legal representative because they were not raised by applicant himself in his founding affidavit, but only arose when the notice of motion was amended without any supplementary affidavits being filed.

After detailing what he obviously regarded as fatal ommissions on appellant's papers the learned judge concluded:

"The respondent was thus kept completely in the dark as to what the applicant's case is and light only began to dawn when the heads of argument were delivered a few days before this hearing. And when that light began to dawn it emerged that amongst .the points being *taken was. for example, the*

point that one section of the Immigration Control Act, namely section 39(2) (h), is unreasonable and not necessary in a democratic society. The determination of that point could well depend on facts beyond the common knowledge of the Court'and the respondents may well wish to address such facts in an answering affidavit. By concealing the nature of his case by making no reference to this aspect of his case at all in the founding affidavit the applicant effectively precluded the respondents from dealing with such facts and in my opinion this cannot be allowed."

He then went on to say:

"Mr Light seeks to equate allegations of infringement of Constitutional rights with pure legal argument which, of course, it is unnecessary to set out in a founding affidavit, but it is not always the case that the two can be equated or should be equated and in our opinion this is one such case. In these circumstances I agree with Mr Coetzee that the relief sought in paragraph 2.2. of the Amended Notice of motion that is to say the extended relief, should not be granted on the papers as presently formulated before us."

On appeal Mr Light maintained that this Coun should consider the Constitutional points. He cites many authorities in support of his contentions that the appellant need not have raised the points in the Affidavits; but I find nothing new advanced in his argument to persuade me that the conclusion by Hannah J on this aspect of the case was wrons-

To return to the question of the permit; at the end of their oral submissions we asked . counsel to furnish further written submissions specifically to answer the question:

> "What is the power in the Immigration Control Act given to the immigration authorities to deal with a person as a prohibited immigrant who is in possession of a permit issued to him 'through oversight, misrepresentation or owing to the fact having been undiscovered as such a prohibited immigrant.'"

Because Mr Light, in making such further submissions, went further to maintain that appellant was in fact not a prohibited immigrant under those circumstances, Mr Coetzee, by the same token, felt obliged to maintain, as respondents maintained throughout, that appellant was a prohibited immigrant under those circumstances. He reached the conclusion that, the permit issued under these circumstances *'was in any event null and void ab initio and* that:

> "No permit of whatever nature can lawfully be issued in terms of section 24 of the Act to a prohibited immigrant until such time as he is exempted by the Minister from the provisions of section 39 of the Act in accordance with the provisions of section 40 thereof."

The starting point of the respective contentions seems to be the notice served on appellant on 22 February 1996 in terms of section 42(4)(b)(l), in that it provides for an immigration officer to decide whether or not a person is a prohibited immigrant. This brings a person served with such notice within the ambit of section 39(2)(h). Section 39 in subsection (2) sets out-a list of persons who enter or have entered

Namibia who shall be prohibited immigrants in respect of Namibia. Per paragraph (h) of subsection (2) a person shall be a prohibited immmigrant if-

> "(h) such person, in terms of any other provision of this Act may be dealt with as a prohibited immigrant, or is not in terms of any such provisions otherwise entitled to be or to remain in Namibia."

To answer the question which we asked counsel to address in the further submission it is not necessary, in my opinion, to decide whether or not the appellant was a prohibited immigrant in terms of these provisions or in terms of any other provisions of the Act which Counsel referred to in aid of their respective contentions. The answer seems to be provided by the Act itself in section 36 read with section 41 and section 24 thereof.

First section 41 envisages a situation where a person could be permitted to enter or remain in Namibia through an oversight or as result of misrepresentation; it provides:

> "41 No prohibited immigrant shall be exempted from the provisions of this Act or be permitted to remain in Namibia on the grounds only that such person had not been informed that he or she could not enter or remain in Namibia or that he or she had been permitted to enter or remain in Namibia through oversight, misrepresentation or owing to the fact having been undiscovered as such a prohibited immigrant."

Section 36 deals with cancellation of permits and specifically provides for the

invalidation of the various permits that can be issued in terms of section 24 of the Act. It provides in subsection (1)

> "If any person is in possession of a document purporting to have been issued to him or her in terms of section 24 but which is not a permit in terms of the said section, such person may be dealt with under Part VI as a prohibited immigrant."

The first thing to note is that the word "document" is used whereas the only documents that can be issued in terms of section 24 are:

> (i) a permanent resident permit (s24(a)) (ii) an employment permit (s24(b)(i)) (iii) student permit (s24(b)(ii) (iv) a visitors entry permit (s24(b)(iii)

So it is any of these documents which section 36(1) describes as being not a permit but which can purportedly be issued in terms of section 24.

Subsection(2) of section 36 deals with consequences of breaches of conditions of an employment permit and does not concern us; but subsection 3 deals with documents (ii)(iii) and (iv) above; it provides:

> (3) The Minister may at any time direct by notice in writing addressed to any person in possession of an employment permit issued in terms of section 27 or a student permit issued in terms of section 2S or a visitors entry permit issued in terms of section 29, as the case may be that the permit be cancelled, and

> such person may be dealt with under Part VI as a prohibited immigrant should he or she fail to leave Namibia before a date specified by the Minister in the Notice and upon expiration of the period stated in that notice the permit shall become null and void.

Now the second thing to note is that unlike subsection(2) which specifies circumstances that can lead to the cancellation of a permanent resident permit, no such circumstances are specified for the cancellation of the other permits. One can think of a number of possible reasons why such other permits could be cancelled, including that it is a document 'purporting to have been issued in terms of section 24,' in which case, unless and until it is cancelled, it is not *null and void.* I however express no definite views as to the proper construction to be put on the subsection, because whether a document purports to have been issued under section 24 or not is a matter of fact to be established by evidence. It is such any enquiry that Hannah J, rightly in my view, said the Immigration Tribunal is best suited to make.

For present purposes the concession by Mr Coetzee for the respondents that appellant had a visitor's entry permit at the time he was detained is decisive of the question whether appellant's detention was lawful or not. That concession was not made before Hannah J. Thus to this limited extent we dealt with the appeal on the merits and were able to adopt the approach adopted by Kriegler AJA in Sehume v Attridgeville City Council and .Another 1992 (1) SA 41(A) at 55B-G, but only because of that concession. To that extent the appeal succeeds.

THE COSTS

Appellant was ordered to pay the costs of the application in the Court a quo. On appeal he has succeeded in having his detention at the time declared unlawful. He was entitled to bring the application as he was still detained at the time the application was launched. Respondents chose not to file any affidavits but relied on legal points raised in the form of the points in limine that they took. It is noted that at the time appellant's passport was in the custody of the immigration officer. Had respondents filed affidavits in answer, and we think they should have, the concession made before us would have been made before Hannah J and he would, in my opinion, have been able to decide the legal point in favour of appellant. I think in the circumstances the appellant is entitled to his costs both in respect of the application and the appeal.

In the result, the judgment of the Court a quo is reversed only to the extent that the appellant's detention on 12 June 1996 is declared unlawful, the rest is confirmed.

An order is issued

8. Declaring that applicant's detention on 12 June 1996 is unlawful.

9. Directing the respondent to pay applicant's costs of the application.

10. The respondent is ordered to pay the appellant's costs of appeal.

MTAMBANENGWE, AJA

I agree.

MAHOMED, C

I agree.

GIBSON, A.J.A.

COUNSEL FOR THE APPELLANT: MR. C. LIGHT

Instructed by THE LEGAL ASSISTANCE CENTRE

COUNSEL FOR THE RESPONDENTS: MR. G.S. COETZEE

Instructed by THE GOVERNMENT ATTORNEY