CASE NO.: SA 5/2001

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA APPELLANT

And

NGEVE RAPHAEL SIKUNDA RESPONDENT

CORAM: Strydom, C.J.; O'Linn, A.J.A. *et* Chomba, A.J.A.

HEARD ON: 03/10/2001

DELIVERED ON: 21/02/2002

APPEAL JUDGMENT

O'LINN, A.J.A.:

SECTION A:

INTRODUCTION

This is an appeal by the Government of the Republic of Namibia against the whole of a judgment by a full bench of the High Court of Namibia (Mainga and Hoff, J.J.) in which the said High Court made the following order on an application by one Ngeve Raphael Sikunda:

> "1. The decision of the Minister of Home Affairs dated 16 October 2000 ordering the removal of José Domingo

Sikunda from Namibia and declaring the aforementioned person *persona non grata* is set aside.

2. The Respondent's Minister of Home Affairs and/or his officials are restrained from unlawfully detaining and harassing José Domingo Sikunda.

3. The Minister of Home Affairs is ordered to pay costs of this application on an attorney and own client scale.

4. The release of José Domingo Sikunda has been complied with and that part of the *rule nisi* is discharged."

The applicant in the Court *a quo* is now the respondent in this appeal and the respondent in the Court *a quo* is now the appellant in this appeal. This is confusing. I will consequently hereinafter refer to the parties as they were referred to in the Court *a quo.* The applicant's father will be referred to as "Sikunda Snr.". Adv. Smuts, assisted by Adv. Cohrssen, appeared for the applicant in the Court *a quo* in arguing the main application as well as the application in the Contempt of Court proceedings whereas Frank, S.C., argued the case for the Government.

In this appeal, Smuts, assisted by Cohrssen, continued to appear for the applicant, whilst Adv. Maleka, appeared for the Government.

The applicant, Ngeve Raphael Sikunda, the son of José Domingo Sikunda, brought an urgent application on motion before Manyarara, A.J., ON 24TH October 2000 for the release of Sikunda Snr., from detention, the setting aside of the minister's order for his removal from Namibia and certain ancillary relief.

The Minister's order for detention and removal from Namibia of Sikunda Snr., was purportedly made in terms of section 49(1) of the Immigration Control Act No. 7 of 1993.

After hearing argument from Mr. Cohrssen for applicant and Mr. Asino for the respondent, Manyarara, A.J., issued the following order:

"It is ordered

1. That applicant's non-compliance with the provisions of rule 6(12) of the rules of this Honourable Court is condoned and leave is granted to the applicant to bring this application on an urgent basis.

2. That a rule *nisi* do hereby issue calling upon the Respondent to show cause, if any, to this Court of Friday 10 November 2000 at 10h00 why:

   2.1 The decision of the Minister of Home Affairs dated 16 October 2000 ordering the removal of José Domingo Sikunda from Namibia and declaring the aforementioned person *persona non grata* should not be set aside.

   2.2 The person of José Domingo Sikunda shall not be immediately released from custody pending the final determination of this application.

   2.3 The respondent's Minister of Home Affairs and or his officials should not be retrained from unlawfully detaining and harassing José Domingo Sikunda further.

   2.4 The Minister of Home Affairs, the Honourable Mr. Jerry Ekandjo, shall not be ordered to pay the costs of this application *de bonis propriis*, alternatively pays the costs of this application on an attorney and own client scale.

3. That prayers 2.1 to 2.3 above shall operate as an interim interdict."

The interim interdict consisted of three parts, being firstly the setting aside of the order of removal of Sikunda, Snr., from Namibia, and declaring him *persona non grata*, secondly that Sikunda, Snr., be immediately released from custody and thirdly that the Minister of Home Affairs and his officials are restrained from unlawfully detaining and harassing Sikunda further.

The first and third parts of the interim interdict were prohibitory or restrictive in nature in that it ordered the respondent to refrain from doing something, whereas the second part constituted a mandatory injunction, in that it ordered the respondent to do something.

Although, Mr. Asino from the Office of the Government Attorney appeared in Court when the interim order was heard and granted and addressed the Court, he appeared in response to a written notice of set down and a telephone message from applicant's attorneys of the intended application to the Court later that afternoon. When Asino appeared in Court, the written application had not yet been served on the respondent. The application in writing was only served on the office of the Minister of Home Affairs, together with the interim order on the 25th of October at 13h50, the day after the application was already heard and the aforesaid order issued during the evening of the previous day, i.e. on the 24th October 2000.

The record of the proceedings relating to the granting of the *rule nisi* and that relating to the respondent's attempt to anticipate the return date of the *rule nisi*, was however placed before this Court by consent.

It appears from the record of the granting of the *rule nisi,* that the respondent had no reasonable opportunity to be heard before the granting of the *rule nisi*. That in itself creates no problem when a *rule nisi* is applied for in an urgent application, but may become problematical when an interim interdict is granted in the nature of a mandamus (i.e. an order or writ issued by a Court commanding that an act be performed), without a reasonable opportunity for a respondent to put his/her or its case. This caution should receive even greater attention when security interests of the country is a relevant issue in the case.

Particularly worrying is the fact that when the learned presiding judge asked Mr. Asino whether he had any objection to the Court hearing the argument of Mr. Cohrssen, Mr. Asino replied “Yes, indeed.”.

This was apparently misunderstood by the presiding judge or alternatively brushed aside. The Court then forthwith allowed Mr. Cohrssen to argue his case. Cohrssen presumed that this meant that the Court had now condoned the applicant’s non-compliance with the rules. He proceeded with his argument on the merits. When he had concluded his argument, Mr. Asino told the Court that he first wanted to address the Court on the question of urgency. Mr. Asino indicated that he first wished to see the “papers” and “see why they say the matter is so urgent”. Asino was then asked whether he “would like five, ten or fifteen minutes” and Asino said: “Fifteen minutes would be safe”. After the adjournment Asino said: “Your Lordship, I have just managed to peruse at the document or the affidavit of the applicant although it is very difficult for me to just jump in and to, I will try my best”.

Asino then dealt with the question of urgency as well as the merits as best he could.

In the course of the argument Asino also agreed to an interim interdict incorporating an undertaking by the Minister, that the detainee would not be removed to Angola pending the return date of the *rule nisi*. Mr. Asino however, argued that the Court should not order the detainee's release in the interim.

Mr. Cohrssen however, refused to consent to such an order and insisted on an interim interdict including an order for the immediate release of the detainee. Mr. Asino in turn, was unable to agree to this.

The Court then confirmed to the respondent in the clearest terms that the Government has the remedy to anticipate the return date on 24 hours notice.

Asino once again stated that he has no objection to an interim interdict interdicting the respondent from removing the detainee in the interim.

The Court nevertheless granted the order as drafted by the legal representatives of the applicant. It is clear that when the Court granted the order as prayed, it did so assuming that the respondent would have the right to anticipate the return date on 24 hours notice and granted the order after having given the assurance to respondent's attorney in Court, without any indication by Mr. Cohrssen that respondent would not be so entitled.

It can consequently be reliably inferred that the learned presiding judge would probably not have issued the mandatory injunction, if he did not proceed on the aforesaid assumption and assurance to respondent.

As will be seen later, however, when the respondent attempted to anticipate the return day, Mr. Smuts who now strengthened the applicant's legal team, argued before Levy, A.J., that respondent was not entitled to do so, because Mr. Asino on its behalf had appeared in Court for respondent when the applicant's application for a *rule nisi* and certain interim relief was heard. The crisp point argued by Mr. Smuts was that the respondent could not anticipate the return date, because the rule only allows such a proceeding when the original relief was granted *ex parte* and the appearance of Mr. Asino for the Government in Court, meant that the order granted was not granted *"ex parte"*.

I do not think that this is the correct approach. The rule aforesaid regarding anticipation of the return date was intended to avoid and/or mitigate the prejudice to a litigant who is faced with an interim order, which may be in the form of an interim interdict, even in the form of a mandatory injunction as in this case, without having had a reasonable hearing. To give the attorney for such litigant telephonic advance notice of an urgent application an hour or two later, without the application being properly served on the respondent and then expecting the respondent and/or his attorney to make a proper and sufficient response, is an abrogation of the *audi alteram partem* principle, which in my view, underlies Rule 6(8) of the Rules of the

High Court and which principle has been described by the Appellate Division of the South African Supreme Court as "sacred".[1]

The applicant's counsel indicated that applicant's application was in essence a "*habeus corpus*" application. But even in such an application, the respondent is called upon not only to produce the person detained, but to show cause why he/she should not be released. (My emphasis added.)

This is an important remedy for persons illegally deprived of their freedom. But part of it is the opportunity for the person called upon, to show cause. The problem the Minister and the Chief of Police had in releasing the detainee without a proper opportunity to state their case, was that the released detainee could abscond or flee and so irreparably frustrate the proper finalization of the proceedings and even prejudice state security as seen by the respondent.

Although no fault can be found with the *rule nisi* and the interim interdict prohibiting the removal of the detainee to Angola, the granting of the mandatory injunction for the immediate release of Sikunda, should in the circumstances, not have been granted without first having given the respondent a fair opportunity to reply. This could have been done by allowing the respondent 1 – 3 days to prepare a replying affidavit and proper argument after service of the application on it, before deciding on the aforesaid mandatory injunction.

---

[1] See: The Law & Practice of Interdicts by Prest 223 and the cases there quoted. See also: Von Moltke v Costa Areaso Pty Ltd, 1975(1) SA 255© at 257A.

In this manner, the interests of justice would have been better served by balancing the fundamental rights and freedoms of Sikunda, Snr., with the security interests of the State as represented by the Minister of Home Affairs and Chief of Police.

I mention this because the conduct of the respondent, as will be seen later, is used by the applicant to justify a punitive cost order against the Government not only in the Court *a quo*, but also in regard to the appeal proceedings. That being so, the Minister's conduct must be seen in context and perspective.

Furthermore it is opportune and even necessary to emphasize that the granting of an interdict in the form of a mandatory injunction without a fair hearing to the party against whom it is issued, is not a proper judicial practice and may cause unnecessary tension between the Courts and those institutions and members of the public who find themselves at the receiving end of such orders in a particular case. Courts should approach such applications with greater circumspection, particularly in those cases where the respondent government claims that the security interests of the State are at stake.

The application for committal of the Minister for Contempt of Court was decided prior to argument and decision on whether or not the *rule nisi* in the main application should be confirmed. The Minister was convicted of Contempt of Court at the hearing of the Contempt of Court proceedings and reprimanded. The Contempt of Court proceedings were not placed before this Court and has only been referred to in regard to the application for a

special costs order in this appeal. It is however, not necessary to refer to the contempt proceedings in any detail because the order in that proceeding is not on appeal and only the fact of the conviction and the reason for it is of some relevance.

The Government Attorney gave notice already on 26th October, i.e. the day after the granting of the aforesaid *rule nisi*, interdict and mandamus, of an application to anticipate the return day of the *rule nisi* from 10th November to the 31st of October.

However, by the time respondent's legal representatives appeared in Court on 31st October, the applicant's counsel applied for the setting aside of respondent's notice to anticipate. By then the applicant's legal representatives had also launched an application for the committal of the Minister and/or the Inspector-General of the Namibian Police for Contempt of Court for not having released the detainee Sikunda to date.

During argument, before Levy, A.J., Mr. Smuts contended that the notice was irregular in that the original application was not "*ex parte*" because Mr. Asino was in Court. Mr. Frank, for respondent, did not agree with this argument but agreed that the matter should be heard on the original return date of the *rule nisi*. Levy, A.J., indicated that he also had difficulty with the argument of Smuts. The learned Judge also raised the issue of the release of a detained person in the position of Sikunda without having given the Minister an opportunity to be heard in the matter.

Levy, A.J., eventually ordered the respondent's notice for the anticipation of the return date to be set aside, but on the basis that both parties had now agreed in Court that the original return date of the 10th November should remain the return date of the *rule nisi*.

Levy, however, also ordered that "respondent permits access to José Domingo Sikunda by his legal representatives and if necessary to transport him to Windhoek for the purpose of preparing and filing affidavits". This part of the order appears to be inconsistent with the mandamus granted on 24th October by Manyarara, A.J., that Sikunda should be immediately released from detention. It is difficult to reconcile the order of the 31st with the order of the 24th in this regard. It could even be argued that the order of the 31st by implication set aside the order of the 24th in so far as the order of the 24th ordered the immediate release of Sikunda Snr. Levy, A.J., however confirmed another part of the order of the 24th October, by ordering that the respondent "refrains from deporting the said José Domingo Sikunda to any place whatsoever until this matter is finally adjudicated upon, which shall include final adjudication on appeal".

The Minister of Home Affairs only released Sikunda Snr., on 9th February 2001. The matter was not heard on the return date on 10th November but after several postponements and extensions of the return date, only heard on 16/02/2001.

Mainga, J., who wrote the judgment in the Court *a quo*, on the main application, first set out the background facts before dealing with the merits.

It is convenient to repeat those facts for the purpose of this appeal as contained in the aforesaid judgment:

> "The background.
>
> On 19 September 2000, the minister of Home Affairs addressed a letter, bearing the Minister's date stamp of 20 September 2000 to the chairperson of the Security Commission, Mr. Ithana and apparently another letter on 14 September 2000 which letter was not filed with the documents before us. The letter of the 19th September 2000 reads as follows:
>
> > 'Dear Mr. Ithana
> >
> > SUBJECT REMOVAL OF FOREIGN NATIONAL CONSIDERED SECURITY THREAT TO THE REPUBLIC OF NAMIBIA
> >
> > 1. I have the pleasure of bringing to your attention the above stated subject matter.
> >
> > 2. Our security forces have identified a number of UNITA activists, sympathizers and soldiers as well as foreign nationals from Rwanda and Burundi who are considered to be a security threat to the Republic of Namibia. These foreign nationals are involved in terrorist activities in Namibia, furthering the interests of UNITA and that of their respective countries to the detriment of Namibia. According to our records, none of them hold refugee status but have different status to stay in Namibia. There are also those recorded to be illegally in Namibia.
> >
> > 3. As their presence endangers the security of the state, I implore the Security Commission to recommend to me to declare them *persona non grata* and their removal from the Republic of Namibia.
> >
> > 4. This is to be carried out in terms of Section 49(1) of the Immigration Control Act of 1993, Act No. 7 of 1993 which states:
> >
> > > "Notwithstanding anything to the contrary in this Act or any other law contained, the Minister may, on the recommendation of the Security Commission established under Articles 114 of the Namibian Constitution, forthwith remove or cause to be removed from Namibia by warrant issued under his or

her hand any person who enters or has entered or is found in Namibia and whose activities endanger or are calculated to endanger the security of the State, whether or not such person is prohibited immigrant in respect of Namibia.

(2) An immigration officer may:

(a) if a person referred to in subsection (1) is not in custody, arrest such person or cause him or her to be arrested without a warrant, and

(b) pending his or her removal from Namibia under that subsection, detain such person in the manner and at the place determined by the Minister.

(3) No appeal shall lie against any decision of the Minister under subsection (1).”

5. Furthermore, Namibia being a member state of the UN Security Council and committed to making sure that the UN Security Council resolutions 1127 (1997) 1135 (1997) imposing sanctions on UNITA are observed, should not be seen to be accommodating elements who are furthering the cause of UNITA and other clandestine organizations in violation of UN Security Council Resolutions as mentioned above. The UN Security Council further requests Member States to take action on the said resolution.

6. In addition the Government of the Republic of Angola has circulated information on the 21 October 1997 at the United Nations providing the names of countries hosting UNITA representatives, Namibia included.

7. It is against this background that I am requesting you to call a meeting of the Security Commission to recommend the removal of persons as listed in Annexure “A”.

8. I wish to take this opportunity to thank you in anticipation for your usual co-operation and prompt response.

Yours sincerely
Jerry Ekandjo, MP
Minister.’

The four-member Security Commission in its letter titled 'secret' dated 03 October 2000 responded positively in the following terms:

'SECRET
DECISION OF THE SECURITY COMMISSION
ORIGIN : THE HON. MINISTER OF HOME AFFAIRS
SUBJECT : REMOVAL OF FOREIGN NATIONALS CONSIDERED SECURITY THREAT TO THE REPUBLIC OF NAMIBIA
DECISION: : The Security Commission at its Second Meeting held on October 3, 2000, deliberated on the two correspondence from the Honourable Minister of Home Affairs dated 14th and 19th September 2000, in which the Hon. Minister requested the Security Commission to recommend the removal of 98 foreign nationals who are considered security threat to the Republic of Namibia.

The Security Commission recommends in terms of Section 49(1) of the Immigration Control Act, 1993 (Act No. 7 of 1993), that these foreign nationals be removed from Namibia on the grounds that they are considered security threat to the Republic of Namibia.

The initialized list containing names of the implicated foreign nationals are attached.'

On 10 October 2000, the Minister of Home Affairs addressed a letter, bearing the Minister's date stamp of 16 October 2000, to the father of the applicant, José Domingo Sikunda, which reads as follows:

> '10th October 2000
> Mr. Josef Domingos Sikunda
> Rundu
> Dear Mr. Josef
> RE: REMOVAL FROM THE REPUBLIC OF NAMIBIA: YOURSELF
>
> 1. It has been established that your activities and presence in the Republic of Namibia endanger the security of the state.
>
> 2. Therefore, in terms of powers vested in me under Part VI; Section 49(1) of the Immigration Control Act (Act 7 of 1993) and on the recommendation of the Security Commission established in terms of Article 114 of the Namibian Constitution, I order your removal from the Republic of Namibia and henceforth declare you a prohibited immigrant (*Persona Non-Grata)* in respect of the Republic of Namibia.

3. Your attention is further drawn to section 49(2) and (b) of the same Act.

4. I count on your co-operation.'

On 16 October 2000 a warrant of detention bearing the head letter of the Minister of Home Affairs and the date stamp of 24 October 2000 of the Inspector General was issued.

'WARRANT OF DETENTION
(SECTION 42)

TO : The Officer in Charge (1) Police — The Chief of Immigration

---

Whereas the person named hereunder
SURNAME : SIKUNDA
FIRST NAMES : JOE DOMINGO
DATE OF BIRTH : 62 YEARS

has been found in Namibia and is suspected on reasonable grounds to be a prohibited/illegal immigrant in terms of this Act:

> NOW THEREFORE, you are under the provisions of Section 42(1)(a)(b) requested to receive and detain such person in the prison cell/police cell [pending investigations] [for the period of 14 days] for which this shall be your warrant.'

I should mention from the documents filed, the applicant states that his father was removed on 17 October 2000 from his home in Rundu. That assertion should be correct as it is not disputed. That will mean the applicant's father was arrested and detained before a warrant of detention was issued as it bears the dates of 18 October 2000 of the issuing officer and that of the Inspector-General dated 24 October 2000. Nevertheless Sikunda Snr. was detained until his release on 9 February 2001.

On 7 October 2000, the Minister of Home Affairs addressed a letter, carrying a date stamp of 24 October 2000, to the Snr. Liaison Officer at the United Nations High Commission for Refugees in Windhoek requesting that office to settle elsewhere, other than Namibia persons declared *persona non grata* by the Government of the Republic of Namibia. In this letter he categorized such persons in two groups. The first group on the list marked "A" were eighty (80) foreign nationals arrested as soldiers of UNITA involved in subversive and terrorist activities in Namibia and that these eighty persons have so confessed.

The second group, in which José Domingo Sikunda is listed as number 11 the Minister in his own words described that group as follows:

> 'The second category, Annexure "B", is UNITA activists, sympathizers and soldiers as well as foreign nationals from Angola, Rwanda and Burundi who are considered to be a security threat to the Republic of Namibia. These foreign nationals are involved in terrorist activities in Namibia, furthering the interests of UNITA and that of their respective countries to the detriment of Namibia. According to our records, none of them hold a refugee status but have different status to stay in Namibia. There are also those recorded to be illegally in Namibia.'

He quoted the provisions of Section 49(1) of the Immigration Control Act, 1993 (Act 7 of 1993) in its entirety and continued in paragraph 4 and 5 of his letter to state as follows:

> 'Furthermore, Namibia being a member state of the UN Security Council and committed to making sure that the UN Security Council resolutions 1127 (1997) 1135 (1997) imposing sanctions on UNITA are observed, should not be seen to be accommodating elements who are furthering the cause of UNITA and other clandestine organizations in violation of UN Security Council Resolutions as mentioned above. The UN Security Council further requests Member States to take action on the said resolution.
>
> In addition the Government of the Republic of Angola has circulated information on the 21 October 1997 at the United Nations providing the names of countries hosting UNITA representatives, Namibia included.' "

SECTION B: THE MERITS

The Court *a quo* identified the following three issues in its judgment namely:

"1. Whether José Domingo Sikunda is a citizen and/or domiciled in Namibia;

2. Whether the decision of the Minister to declare Sikunda *persona non grata* without affording him an opportunity to make representation, is valid;

3. Whether the four member Security Commission was properly constituted."

The Court pointed out that if the Court finds that Sikunda Snr. was a citizen of, or domiciled in Namibia, the Minister could not act in terms of section 49(1) of the Immigration Control Act of 1993 (Act 7 of 1993).

The Court furthermore stated that the parties are *ad idem* on this point. On appeal before us, Mr. Maleka could not and did not deny that counsel for the respondent had made that concession when the matter was argued in the Court *a quo* but now tried to withdraw that concession made by Frank, S.C., on behalf of respondent.

Notwithstanding the view that a finding that Sikunda Snr. was either a citizen of or domiciled in Namibia, would make the Minister's order invalid, and obviously be fatal to the Government's case, the Court chose not to decide the issue of citizenship and/or domicile.

The Court explained its approach as follows:

> "The rule can be confirmed or discharged on the single question of whether the decision taken by the respondent pursuant to section 49 is consistent with the principle of natural justice and in particular of the respondent's failure and/or the Security

> Commission to afford the applicant's father the right to be heard as it is embodied in the *maxim audi alteram partem*."

This approach notwithstanding, the Court went on to also decide the issue whether or not the Security Commission was properly constituted when it made its recommendation to remove from Namibia 89 alleged foreign nationals, including Sikunda Snr. and following from this, whether its recommendation was nevertheless valid and met the requirements of section 49(1) for a valid decision by the Minister.

All three the aforesaid issues were fully argued by counsel in the Court *a quo* as well as in this Court on appeal.

The first issue, namely domicile and/or citizenship and the legal implications thereof on the Minister's power to issue an order as he had done purportedly in terms of section 49(1), would not only be decisive of the question whether or not the Minister's present order is invalid and a nullity, but whether or not the Minister would be empowered in future to make a similar order against Sikunda Snr..

In the case of the second and third issues however, a decision in favour of the applicant and against the respondent would result in the setting aside of the Minister's order in the present case, but would not prevent the Minister from making a similar order in future, if a constitutionally fair procedure is followed and if the Security Commission is properly constituted.

1. THE ISSUE WHETHER OR NOT JOSé DOMINGO SIKUNDA IS A CITIZEN OF AND/OR DOMICILED IN NAMIBIA AND IF SO, WHETHER THE MINISTER IS EMPOWERED AGAINST HIM IN TERMS OF SECTION 49(1) OF THE IMMIGRATION CONTROL ACT

1.1 The first leg of the enquiry is whether or not the Minister is legally empowered to act against a person in terms of section 49(1), if that person is either a Namibian citizen, or domiciled in Namibia.

As I have already indicated *supra*, counsel for both parties in the Court *a quo* agreed that the powers given to the Minister under section 49(1) could not legally be used against a Namibian citizen or a person legally domiciled in Namibia.

Mr. Maleka on appeal, sought to distance himself from the concession made by his predecessor Frank, S.C., in the Court *a quo*. Mr. Smuts and Cohrssen, for applicant, persisted in their original argument in the Court *a quo*.

Mr. Maleka now argued that the issue of citizenship and/or domicile is misconceived, because “the provisions of section 49(1) of the Act override anything to the contrary contained in the Act or any other law, for that matter, the overriding effect of the provisions of section 49(1) is fortified by the opening words of that section”.

It seems that this was also the approach of the Honourable Minister as well as that of the Security Commission. I have no doubt whatsoever that Mr. Maleka's argument in this regard is without any substance whatever. It is best to begin by quoting section 49(1) in full:

> "Notwithstanding anything to the contrary in this Act or any other law contained, the Minister may, on the recommendation of the Security Commission established under Article 114 of the Namibian Constitution, forthwith remove or cause to be removed from Namibia by warrant issued under his or her hand any person who enters or has entered or is found in Namibia and whose activities endanger or are calculated to endanger the security of the State, whether or not such person is a prohibited immigrant in respect of Namibia."
> (My emphasis added.)

Section 2 of the said Act deals with the applicability of certain parts of the Act to certain persons and situations. In the margin opposite section 2 the following words appear: "Application of Act".

The relevant part of section 2(1) then reads:

> "Subject to the provisions of subsection (2), the provisions of PART V, except sections 30, 31 and 32 thereof, and Part VI of this Act shall not apply to –
>
> (a) a Namibian citizen;
>
> (b) any person domiciled in Namibia who is not a person referred to in par (a) or (f) of section 39(2) …"
>
> (My emphasis added.)

Section 49(1) is contained in PART VI of the Act which contains sections 39 – 52 under the heading:

> "PROHIBITED IMMIGRANTS – ARREST DETENTION AND REMOVAL OF PROHIBITED IMMIGRANTS"
>
> No provision of Chapter VI is consequently applicable to the persons dealt with in subsection (1) which include citizens and persons domiciled in Namibia, except as provided in subsection (2) of section 2.
>
> Subsection (2) applies to "any person appearing before an immigration officer at any port of entry with the intention to enter and remain in Namibia unless such person satisfied such immigration officer that he or she is a person referred to in that subsection."
>
> Sikunda Snr. is not a person as described in subsection (2). Consequently it does not affect the provisions of subsection (1) in so far as it related to Sikunda Snr..
>
> Section 49(1) vests draconian powers in the minister. It is obvious that it was never intended to apply to a citizen of Namibia because it would remove with a stroke of the pen all

the rights and freedoms to which any person, is entitled to in terms of the Namibian Constitution. To remove a citizen in accordance with section 49(1) would also be an absurdity because such citizen would not be entitled to stay in any other country except if he is granted political asylum. If the Legislature really intended by enacting section 49(1) to grant such powers to a Minister in regard to citizens, such provision would certainly be unconstitutional and null and void.

Although a person domiciled in Namibia is not for all purposes in Namibian law in as strong a position as a citizen, no distinction is made between citizen and a person so domiciled in subsection (1) of section 2 of the Immigration Control Act.

I consequently find that the Minister is not empowered to act in terms of subsection (1) of section 49 of the Immigration Control Act against a Namibian citizen or a person domiciled in Namibia. Any such purported action is null and void *ab initio*.

1.2 The second leg of the enquiry is whether or not Sikunda Snr. is either a citizen or a person <u>domiciled in Namibia.</u>

It is not necessary for the purposes of this appeal to decide whether or not Sikunda Snr. is a citizen of Namibia. It seems to me however, that when an office bearer wishes to exercise a statutory jurisdiction bestowed upon him/her, the onus, or burden of proof would be on such office bearer to prove the

jurisdictional fact entitling him/her to act against a particular person. In other words the office bearer must, in the case of a dispute, prove that the person against whom he acts falls within the ambit of his/her powers. Such proof need only be on a balance of probabilities. The respondent in this case tried to prove that Sikunda Snr. was neither citizen nor legally domiciled in Namibia. Respondent succeeded in my view to prove on a balance of probabilities that Sikunda Snr. was not a citizen of Namibia at the relevant time, i.e. when the Minister made his order, but failed to prove that he was not domiciled in Namibia at all relevant times.

Even if I am wrong in holding that there is an onus on the Minister, it seems to me that the applicant has proved on a balance of probabilities that his father was legally domiciled in Namibia at the relevant time. I say this *inter alia* for the following reasons:

(i) Domicile for the purposes of the issue before us, is the domicile as defined for the purposes of the Immigration Control Act, in the said Act itself.

It is defined in section 1 of the Act as follows:

> "'Domicile' subject to the provisions of Part IV, means the place where a person has his 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."

As it stands domicile can consist of either or:

(a) the place where a person has his home; or

(b) permanent residence; or

(c) the place to which such person returns as his or her permanent abode, and not merely for a special or temporary purpose.

The above requirements are qualified in PART IV of the Act, which provides that

"(1) No person shall have a domicile in Namibia unless such person-

(a) is a Namibian citizen;

(b) is entitled to reside in Namibia and so resides therein, whether before or after the commencement of this Act, in terms of the provisions of section 7(2)(a) of the Namibian Citizenship Act, 1990 (Act 14 of 1990);

(c) is ordinarily resident in Namibia, 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;

(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) is or was confined in a prison, reformatory or mental institution or other place of detention established by or under any law;

(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) involuntarily resided or remained in Namibia;

(d) has entered or resided in Namibia through error, oversight, misrepresentation or in contravention of the provisions of this Act or any other law; or

(e) resided in Namibia in accordance with the provisions of paragraph (d), (e), (f) or (g) of section 2(1),

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

In view of the exclusion of citizenship for the purposes of argument, the only requirement in subsection (1) of section 22 under which Sikunda Snr. can qualify is the provisions of

subparagraph (d) of subsection (1), read with the definition of "domicile" in section 1.

Sikunda Snr was thus not prevented from acquiring a domicile in Namibia as defined in section 1 of the Act quoted *supra,* if "he … 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".

None of the qualifications for such period of residence stated in subsection (2) of section 22 is applicable to Sikunda Snr.

(ii) It is common cause between the parties, also conceded by respondent's counsel on appeal, that Sikunda Snr. was at the relevant time legally resident in Namibia for a continuous period of at least two years before or after the Immigration Act entering into force.

(iii) That being so, all that remains is to enquire whether or not he was domiciled in Namibia in accordance with the elements of the definition of domicile set out *supra*, i.e. whether or not he had his home or permanent residence in Namibia or whether that is the place to which he returns as his or her permanent abode and not merely for a special or temporary purpose.

In this regard the following facts listed by applicant's counsel in the heads of argument as common cause or not in dispute, supports the above conclusion:

(a) Sikunda Snr. is not a prohibited immigrant and was not a prohibited immigrant at the time of the Minister's order or thereafter in terms of section 39(2)(a) and (f) of the Immigration Control Act.

(b) He has been continuously resident in Namibia since 1976 and has the fixed intention to remain permanently in Namibia in future.

(c) He has family roots in Namibia, as is evident by the fact that three of his children were born in Namibia.

(d) He occupies property on a long-term basis and has business interests in Rundu.

(e) Upon arrival of his family and himself in Namibia in 1976, he requested and applied for citizenship, whereafter the Southwest Africa Identity document was issued to him.

(f) In 1986 he was issued with an exemption certificate, exempting him from other provisions relating to permanent residence.

Mr. Maleka however, argued that this “exemption permit was issued in terms of section 7 *bis* of the Aliens Act and was thus deemed to be a temporary permit in terms of section 5 of the Act.”.

This cannot be correct. It is common cause that the said certificate issued in 1986 clearly states in its heading that it exempts its holder from the provisions of section 2 of the Aliens Act No. 1 of 1937.

The said section 2 placed a number of restrictions on aliens: The exemption clearly meant that these restrictions do not apply to the holder.

Counsel for the applicant contends that it must have been issued under sections 12(1) of the Aliens Act which exempted a person who has lawfully acquired domicile in South West Africa from the restrictions of section 2. It also purports to recognize that the holder has lawfully acquired domicile in South West Africa. It could however also have been issued under section 7 *bis* which also provides for the granting of “Exemptions from the provisions of the Act”.

Be that as it may, the exemption certificate proves at least legal residence and is also a strong indicator of the recognition by the authorities that Sikunda Snr. was regarded as being lawfully domiciled in South West Africa at the time.

The said exemption did not lose its meaning and effect when the new Immigration Control Act was enacted in 1993.

Section 60(3) of the 1993 Act provides *inter alia* that any exemption under a law repealed, “shall be deemed to have been made, granted, issued, given or done under the corresponding or allied provision of this Act”.

Section 35 of the Immigration Control Act in turn provides for exemptions to any person or category of persons from provisions of the Act.

The exemption given to Sikunda in 1986 consequently remains valid in accordance with section 35 of the present Act, read with section 60(3).

In conclusion on this issue I hold that the Government had failed to prove that Sikunda Snr. was not legally domiciled in Namibia. Alternatively, that the applicant has proved that Sikunda Snr. was legally domiciled in Namibia at all relevant times and that as a consequence, the Honourable Minister of Home Affairs had no legal jurisdiction to act against Sikunda Snr. in terms of section 49(2). As a further consequence, the order for the detention and removal of Sikunda Snr. was void *ab initio.*

It follows that the appeal by the Government must fail on this ground alone.

There are however, at least two reasons why the remaining issues should be dealt with however, briefly. These are: Counsel for applicant have asked not only for confirmation on appeal of the special cost order granted by the Court *a quo*, but also for a further special cost order in regard to the appeal proceedings. In support of this submission, counsel has argued that "the Procedures were extensively and fundamentally tainted by illegality and manifold irregularities, compounded by the flagrant contempt of Court for failing to release respondent's father after the High Court of Namibia had ordered his release". The second reason is that the issue in question will probably arise frequently in future and some guidance by the Supreme Court on the main issues argued before it as well as in the Court *a quo*, is appropriate and justified in the circumstances.

2. THE ISSUE WHETHER OR NOT THE SECURITY COMMISSION WAS PROPERLY CONSTITUTED WHEN IT MADE ITS RECOMMENDATION AND IF NOT – HOW DOES THAT AFFECT THE LEGALITY OF THE MINISTER'S DECISION

The Minister's power to "forthwith remove or cause to be removed from Namibia by warrant under his hand any person, who enters or has entered or is found in Namibia and whose activities endanger or are calculated to endanger the Security of the State, whether or not such person is a prohibited immigrant in respect of Namibia", is subject to the recommendation of the Security Commission. Without a positive recommendation of the Security Commission in the particular instance, the Minister's purported exercise of his power would be invalid and null and void. To put it another way: The aforesaid positive recommendation is a

jurisdictional requirement, without which, the Minister has no jurisdiction to act and the purported exercise of his power would be null and void, *ab initio*, i.e. without any legal force and effect from the beginning.

It is obvious that the onus, i.e. the burden of proof will, in the case of dispute, be on the Minister to establish that he in fact acted on such a valid recommendation by the Security Commission.

The Court *a quo*, in its well-reasoned judgment, found that the Security Commission was not properly constituted at the time, because there were only 4 members instead of six when it took the decision to make the recommendation and when it in fact made the recommendation. Consequently it found that the decision of the Minister was also invalid on this ground.

This finding was attacked by Mr. Maleka on appeal on several grounds, being:

(i) At issue was whether or not the Security Commission which made the decision was properly constituted. However, the Court below found that "There was no Security Commission in existence at the time … the Commission made the recommendation".

What the Court *a quo* probably meant was that at the time of the decision to recommend, the Commission was not properly constituted. Whether or not that means that the Commission "was

not in existence" at the time does not take the matter any further and is not necessary to decide.

I must point out however: This is not a case where the Tribunal was properly composed, but some members were merely absent. The present case is worse. The Commission was no longer properly constituted, and this situation continued for a considerable period.

It is obvious that the Commission could not come into existence, unless 6 members were appointed, because in such a case the tribunal lacked the essentials for its coming into existence. Similarly, if for a considerable period, there are only four (4) members instead of six (6) because vacancies were never filled, the Commission lost the essentials for its continued legal existence.

But as I have already pointed out, it is not necessary for the purpose of this decision to decide whether or not the Commission, as contemplated by Art. 114 of the Constitution, was no longer in existence. It suffices for present purposes to decide the validity of the decision to recommend, on the ground that the Commission was not properly constituted at the time for the taking of a valid decision.

The general rule was stated by Innes, C.J., in Schierhout v Union Government[2] already in 1919. The learned Chief Justice stated:

[2] 1919, AD, 33 at 44

> "We were referred to a number of authorities in support of a principle which is clear and undisputed. When several persons are appointed to exercise judicial powers, then in the absence of provision to the contrary, they must all act together, there can only be one adjudication, and that must be the adjudication of the entire body (Billings v Prinn, 2 W. Bl., p. 1017). And the same rule would apply whenever a number of individuals were empowered by Statute to deal with any matter as one body; the action taken would have to be the joint action of all of them (see Cook v Ward, 2 C.P.D. 255; Darcy v Tamar Railway Co., L.R. 3 Exch., p. 158, etc.) for otherwise they would not be acting in accordance with the provisions of the Statute. It is those provisions which in each instance must be regarded; and the question here turns upon the construction of section 2(6) of Act 29, 1912."

As the Court *a quo* correctly points out, the case of S v Naude[3], relied on by Frank, S.C., in the Court *a quo*, can clearly be distinguished from a case such as the present.

Article 114 of the Namibian Constitution provides for the establishment of a Security Commission. The section reads:

> (1) There shall be a Security Commission which shall have the function of making recommendations to the President on the appointment of the Chief of the Defence Force, the Inspector-General of Police and the Commissioner of Prisons and such other functions as may be assigned to it by Act of Parliament.
> (2) The Security Commission shall consist of the Chairperson of the Public Service Commission, the Chief of the Defence Force, the Inspector-General of Police, the Commissioner of Prisons and two (2) members of the National Assembly, appointed by the President on the recommendation of the National Assembly."

[3] 1975(1) SA 681 A

(ii) Mr. Maleka contends that the effect of the finding is that "the provisions of section 49(1) may not be invoked or applied by the Minister against any person, because the legitimate constitutional organ established to make recommendations to the Minister was found not to exist. The whole statutory scheme of section 49(1) of the Act which is intended to protect or promote the security of the State is effectively dislocated".

This argument is indeed tenuous. The Court was only doing its duty as laid down by the constitution. If there is a "dislocation" – the blame must certainly be sought elsewhere. Mr. Maleka, when questioned by the Court was unable to say why the two vacancies to be filled from members of the National Assembly, appointed by the President on the recommendation of the National Assembly, was not in fact filled after a long period of time.

(iii) Mr. Maleka also took the point that the finding of the Court affected the Security Commission and that the Commission had a direct and substantial interest and thus had to be joined as a party in the proceedings before the Court *a quo*.

This point also has no substance in the circumstances of this case. The Government has been cited as the respondent. The chairman of the Commission is a witness for respondent in the proceedings. Respondent had to prove that its Minister had the

necessary authority to act and that necessitated proof that the Security Commission had recommended the Minister's action.

(iv) The main contention put forward by Mr. Maleka was that the Security Commission remained a Security Commission as envisaged by Art. 114 of the Constitution, even if it consisted of only four members instead of the six (6) prescribed by the Namibian Constitution. Furthermore, it was sufficient for the proper functioning of the Commission if, when it took decisions required by section 49(1) of the Immigration Control Act, it consisted of only four members or if only four members participated in the consideration and making of the recommendation. He submitted that the four members "all fall within the designated categories specified in subsection (2) of Art. 114, namely Chairperson of the Public Service Commission, the Chief of the Defence Force, the Inspector-General of the Police and the two members of the National Assembly, who did not fall within the designated categories. They did not therefore possess the kind of expertise or experience ordinarily expected from members falling within the designated categories. Their absence from the meeting of the Security Commission which considered and made the relevant recommendation did not deprive it of the of the expertise such as that falling within the designated categories".

This is a spurious argument.

I say so for the following reasons:

(a) Art. 114(2) is peremptory in so far as it prescribes the composition of the Security Commission. That it shall consist of six members as defined, is beyond any doubt.

The said article contains no exceptions or qualifications whatever.

(b) It takes little imagination to understand why the representatives of the Namibian people in the Constituent Assembly regarded it as necessary to include two members selected from the National Assembly, and appointed by the President on the recommendation of the National Assembly.

It is obvious that the said Constituent Assembly wanted to make the Security Commission as representative as possible and to make a wider expertise available to the Commission in executing its very onerous functions. One of the members of the Security Commission who had vacated his office was the Attorney General, whose legal expertise and independent state of mind could be of great assistance when matters of legal procedure and the protection of fundamental human rights and freedoms had to be considered. The other member was

the then leader of the opposition in the National Assembly.

In view of the letter and spirit of the Namibian Constitution, security concerns have to be addressed with due regard for fundamental rights, and freedoms. The two members drawn from the National Assembly would probably also possess common sense and this would be helpful to the representatives from so-called “designated categories”.

I make bold to say that if the Security Commission was composed as provided for by the Constitution, then the recommendation in question may never have been made and the Minister may never have taken the decision he took.

(c) Article 114 does not allow any Minister or other official to decide on a composition of the Security Commission as they deem fit.

(d) The Legislature enacting the Immigration Control Act did also not attempt to supplement Article 114 of the Namibian Constitution by providing for a different composition for certain purposes. There was also no attempt to provide for a quorum of less than six in certain circumstances. There was also no need to

provide for or attempt to provide for such a quorum because the so-called "members from designated categories" would always be available – because those posts would or could always be filled in due course or alternatively, may probably be substituted by their deputies, acting for them, or temporary appointments. As far as vacancies in the case of the two members of parliament are concerned – those could also always be filled without delay, provided those responsible to ensure that any vacancies are filled, do their job.

(e) The Immigration Control Act itself provides an example of the nature of the necessary provisions when the Legislature deems a quorum of less than the full complement of members, desirable or necessary. Section 43(6)(a) deals with Immigration Tribunals and provides:

> The decision of the majority of the members of the Tribunal, and in the event of an equality of votes, the Chairman shall have a casting vote in addition to his or her deliberative vote."

(f) If section 49(1) of the Immigration Control Act, read with Art. 114 of the Constitution, created some obstacles to summary and arbitrary decisions relating to the Government's security concerns, it must be kept in mind that if there really are reasonable grounds for believing

> that any person, even a citizen, is engaged in murder, assault, robbery, theft, terrorist activity or conspiring with the enemy to commit such act, then charges can be laid against such person or persons and the matter be resolved in Court.

I conclude therefore that the Security Commission was not properly constituted when it purported to consider the Minister's request and made its recommendation. It consequently could not make a valid decision for the purpose of section 49(1) of the Immigration Control Act. A precondition for a valid decision by the Minister was not fulfilled. The Minister consequently did not have the jurisdiction to make the order in question.

In the result the Minister's aforesaid order is void *ab initio*, i.e. of no force and effect from the beginning.

This finding is in itself fatal to the respondent's appeal.

3. THE ISSUE WHETHER THE DECISION OF THE MINISTER TO DECLARE SIKUNDA SNR., *PERSONA NON GRATA* IS VALID, NOTWITHSTANDING THE FACT THAT NEITHER THE SECURITY COMMISSION NOR THE MINISTER, HAD APPLIED THE *AUDI ALTERAM PARTEM* RULE, (I.E. THE RIGHT OF AND OPPORTUNITY TO SIKUNDA TO BE HEARD)

The Court *a quo* based its decision on this point. It found that this principle was not complied with and that the decision of the Minister must therefore be set aside.

It was common cause that neither the Commission nor the Minister had afforded Sikunda the opportunity to be heard before the decision was taken. Mr. Maleka on appeal did not dispute that Sikunda Snr. had the right to be heard but he made the following two basic submissions:

(i) The Security Commission need not apply the *audi alteram partem* rule because its recommendation is not a decision which has a final effect in that the Minister can accept or reject it. The decision of the Commission is therefore not reviewable.

(ii) Although the Minister is required to observe the *audi alteram partem* maxim, "the application of this maxim in the context of the provisions of section 49(1) is not absolute. This is so because the latter provisions deal with the protection or promotion of the security of the State, particularly where the removal of the targeted individual is on the ground that his activities endanger or are calculated to endanger the security of the State. In this connection it has been recognized in early and recent times that the repository of power, (the Minister *in casu*) can act on confidential information and would be entitled not to disclose such information to the affected person".

I will now deal briefly with these contentions.

Ad(i) Mr. Maleka's submission that the Security Commission need not apply the maxim

I do not agree with this contention *inter alia* for the following reasons:

(a) The recommendation of the Commission is at the same time also a "decision". It is a "decision" to recommend or not to recommend. Before the Commission can make a recommendation as envisaged by section 49(1) or refuse to make such a recommendation – it in essence has to decide whether or not to make a recommendation. If I understand Mr. Maleka's argument correctly, he does not contend that the Commission does not make or take a decision.

(b) Although the Minister cannot make an order against a person in terms of section 49(1) without a positive recommendation by the Commission to this effect, the Minister may decline to issue an order, against a person, notwithstanding a positive recommendation from the Commission, recommending that he acts.

In such a case, the person who was targeted by the Commission will have no right of review of the Commission's decision. However, when the Minister

decides to make an order in terms of section 49(1), he can only do so if he has the prior recommendation/decision of the Security Commission. If the Minister acts on this recommendation/decision the party who is targeted by his/her decision is prejudiced, not only by the decision of the Minister, but by the preceding decision of the Commission.

In such a case the Minister's decision as well as the Commission's decision can be reviewed in one composite review as was done in the instant case.

Mr. Maleka relies on the Australian decision in Australian Broadcasting Tribunal v Bank and Others,[4] where the Mason, C.J. *inter alia* said:

> "...That answer is that a reviewable 'decision' is one for which provision is made by or under a statute. That will generally, but not always, entail a decision which is final or operative and determinative, at least in a practical sense, of the issue of fact falling for consideration. A conclusion reached as a step along the way in a course of reasoning leading to ultimate decision would not ordinarily lead to a reviewable decision, unless the statute providing for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under enactment. Another essential quality of a reviewable decision is that it be a substantive determination..."

[4] Australian Law Reports, 11(HCA) at 23

How this decision can be of assistance to the Government's case, is difficult to fathom, because:

There is no separate and independent review of the Commission's decision, but only a composite review, where the Commission's decision-making and decision is attacked because it was an integral and essential part of the Minister's decision. Furthermore it was a "decision", and "one for which provision is made for or under a statute"; "the statute provided for the making of a finding or ruling on that point so that the decision, though an intermediate decision, might accurately be described as a decision under an enactment"; it is also "a substantive determination".

(c) The Security Commission is so structured that it is in an ideal position to apply the *audi alteram partem* maxim.

(d) The Security Commission has a heavy responsibility. It is inconceivable that it can reach a fair decision without hearing the person or persons targeted. Even if its decisions cannot be taken on review separately and independently, that does not mean that it has no duty to apply the *audi alteram partem* rule.

(e) The Commission is certainly an "administrative body" and its members "administrative officials" as

contemplated by section 18 of the Namibian Constitution and consequently has to act fairly and reasonably.

The impact and requirements of this article was set out in the recent judgment of Strydom, C.J., in the case of Chairperson of the Immigrating Selection Board v Frank and Another[5]

> "'18 Administrative Justice
>
> Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

> Article 18 is part of Chapter 3 of the Constitution which deals with Fundamental human rights and freedoms. The provisions of the Chapter clearly distinguishes which of these provisions apply to citizens only (e.g. Art. 17), and which to non-citizens (e.g. Art. 11(4) and (5)). Where such distinction is not drawn, e.g. where the Article refers to persons or all persons, it includes in my opinion citizens as well as non-citizens. The Article draws no distinction between *quasi* judicial and administrative acts and administrative justice whether *quasi* judicial or administrative in nature "requires not only reasonable and fair decisions, based on reasonable grounds, but inherent in that requirement fair procedures which are transparent" (*Aonin Fishing v Minister of Fisheries and Marine Resources*, 1998 NR 147 (HC).) Article 18 further entrenches the

[5] SA 8/1999 of 5 March 2001 (NmS) at 22 of the minority judgment.

> common law pertaining to administrative justice and in so far as it is not in conflict with the Constitution."

The following further dicta from the same judgment are also applicable to the present case, *mutates mutandis*:

> "This rule embodies various principles, the application of which is flexible depending on the circumstances of each case and the statutory requirements for the exercise of a particular discretion. (See *Baxter: Administrative Law* p. 535 ff and *Wiechers: Administrative Law* p. 208 ff.)
>
> In the context of the Act, the process for the application of a permit was set in motion by the submission of a written application by the first respondent. If on such information before it, the application is not granted, and provided the Board acted reasonably, that would be the end of the matter. However, there may well be instances where the Board acts on information they are privy to or information given to them by the Chief of Immigration (see sec. 26(2)). If such information is potentially prejudicial to an applicant, it must be communicated to him or her in order to enable such person to deal therewith and to rebut it if possible. (See *Loxton v Kendhardt Liquor Licensing Board*, 1942 AD 275 and *Administrator SWA v Jooste Lithicum Myne (Edms) Bpk,* 1955(1) SA 557(A)."...[6]
>
> "In the absence of any prescription by the Act, the appellant is at liberty to determine its own procedure, provided of course that it is fair and does not defeat the purpose of the Act. (Baxter, *op. cit.* P. 545). Consequently the Board need not in each instance give an applicant an oral hearing, but may give an applicant an opportunity to deal with the matter in writing.
>
> Furthermore, it seems to me that it is implicit in the provisions of Article 18 of the

[6] Ibid, pp 28 – 30 of the minority judgment;

> Constitution that an administrative organ exercising a discretion is obliged to give reasons for its decision. There can be little hope for transparency if an administrative organ is allowed to keep the reasons for its decision secret. The Article requires administrative bodies and officials to act fairly and reasonably. Whether these requirements were complied with can, more often than not, only be determined once reasons have been provided. This also bears relation to the specific right accorded by Articles 18 to persons to seek redress before a competent Court or Tribunal where they are aggrieved by the exercise of such acts or decisions. Article 18 is part of the Constitution's Chapter on fundamental rights and freedoms and should be interpreted "... broadly, liberally and purposively..." to give to the article a construction which is "... most beneficial to the widest possible amplitude". (*Government of the Republic of Namibia v Cultura 2000,* 1993 NR 328 at 340 B - D.) There is therefore no basis to interpret the Article in such a way that those who want to redress administrative unfairness and unreasonableness should start off on an unfair basis because the administrative organ refuses to divulge reasons for its decision. Where there is a legitimate reason for refusing, such as State security, that option would still be open."[7]

I must point out that although the aforesaid approach was set out in the judgment of Strydom, C.J., in his dissenting judgment, the majority of O'Linn, A.J.A. and Teek, A.J.A. agreed with the approach as set out by Strydom C.J.

I must also draw attention to the last sentence in the above quotation which reads: "Where there is a

[7] IBID, pp. 29 –30 of the majority judgment.

legitimate reason for refusing, such as State Security, that option would still be open".

To this remark the majority added the following rider:

> "It should be noted however, that such reasons, if not given prior to an application to a Court for a review of the administrative decision, must at least be given in the course of a review application."[8]

It follows that an administrative tribunal, which deals with and decides on a matter affecting the fundamental rights of a person as well as state security and refuses to provide the reasons for its decision to the person targeted on the ground of "State Security", must give explicit reasons for its refusal. Nevertheless, the administrative tribunal cannot avoid to give reasons for its decision altogether and in my respectful view, such a principle was not intended by the Chief Justice in the sentence from his judgment abovementioned relating to "State Security". Reasons for the decision must be given, not necessarily in great detail but at least in substance.

The Tribunal may delay giving the reasons to the targeted person, but cannot avoid providing the reasons, at least in substance, in the course of a judicial review.

[8] IBID, p. 3 of the majority judgment. Compare also: Du Preez & An v Truth and Reconciliation Commission, 1997(3) SA 204 (SCA) 231a – 232d.

The withholding of reasons for the decision must be distinguished from withholding information of a confidential nature, such as information given by informers, although the decision is often based on the information. Information, the disclosure of which may jeopardize state security, may be withheld more readily than reasons for the decision, but again, there would seldom be sufficient justification for withholding the substance of the information on which the decision is based. If this is not so, the fundamental rights of the targeted person to be heard and to put his/her case, would be prejudiced to such an extent that his right would become ephemeral.[9]

(f) Art. 12 of the Namibian Constitution is more explicit and goes much further than Article 18.

Sub-article (1)(a) provides:

> "In the determination of their civil rights and obligations or any criminal charges against them, all persons shall be entitled to a fair and public hearing by an independent, impartial and competent Court or Tribunal established by law: provided that such Court or Tribunal may exclude the press and/or the public from all or any part of the trial for reasons of morals, the public order or

[9] Administrator, Transvaal & Others v Traub and Others, 1989(4) SA 731(A)
Du Preez & An v Truth and Reconciliation Commission, 1997(3) SA 204 (SCA) at 231G – 232D.

> national security, as is necessary in a democratic society."

The right to remain domiciled in Namibia and not to be removed arbitrarily to another country, can be regarded as a person's "civil right". A good case can probably be made out for saying that the Security Commission, being a Tribunal, must also act in accordance with article 12(1)(a) when it decides whether or not to make a recommendation for the removal of a person from Namibia.

But this issue need not be decided finally at this juncture. Suffice to say that even if the letter of Art. 12(1)(a) is not applicable, at least the spirit thereof underlines and is supportive of what has been said above about the effect of Art. 18 and the application of the rules of natural justice – including the *audi alteram* rule and the requirement that the decision will be considered and made by an independent, impartial and competent Court or Tribunal.

Lastly it must be emphasized that even if there is justification for not disclosing to the targeted person confidential information, such as the identity of the informer or for not disclosing the details of the reasons for the decision or even the substance thereof at the

initial stage, the right of the targeted person to be heard in a meaningful and fair manner before the decision is taken, alternatively, and only in exceptional cases, after the decision is taken, cannot be doubted.

(g) At the initial stage of the action against Sikunda Snr., the Minister even purported to declare Sikunda a "prohibited immigrant". This is a further indication of how the Honourable Minister either misconceived his function under section 49(1) or for some other unknown reason, misapplied his powers under the provisions of the Immigration Control Act.

Mr. Nilo Taapopi, the permanent secretary in the employ of the Ministry of Home Affairs even protested in reply to the affidavit of applicant that the Minister "did not 'purportedly' declare the detainee a prohibited immigrant in terms of Part VI of the Immigration Control Act. He in fact did declare him as such".

Nevertheless it was neither argued in the Court *a quo* nor in the appeal before us that Sikunda Snr., was a prohibited immigrant in terms of section 39(2) of the Act or properly declared as such at any stage.

At any event sections 43 – 48 of the Act, provides for elaborate procedure for the establishment and

functioning of Tribunals "for the hearing and determination of applications for the removal of persons from Namibia in terms of this Act or any other law." Application for such removal in terms of section 43 – 48 must be made to such a Tribunal. The procedure in such Tribunal provides extensively for application of the *audi alteram partem* principle and it seems, complies not only with the requirements of Art. 18 of the Namibian Constitution, but even Art. 12(1)(a).

Such a procedure was never applied to Sikunda Snr. Section 49(1) does not provide expressly for such a procedure, but on the other hand provided for a decision by the Security Commission, as a precondition for the Minister's decision to remove a person from Namibia.

(h) If the Legislature in section 49(1) of the Immigration Control Act or for that matter in any other law, purported to abolish or diminish from the provision of Art. 18 and 12 of the Namibian Constitution, such provision would be unconstitutional and invalid.

(i) The failure by the Commission to apply the *audi alteram partem* rule is compounded by the failure of the Minister to apply the rule.

Whether or not the Minister's decision could have been saved if he at least applied the rule is debatable. Because of the importance of the Commission's decision, as a precondition for the Minister's order, it can strongly be argued that the Commission's failure to apply the rule cannot be remedied even if the Minister applied the rule before making the order against Sikunda Snr..

It can even be argued that if the Commission had applied the rule properly and there is a proper record of its proceedings, the Minister can have regard to such proceedings and may not be required to again apply the *audi alteram partem*. But this is not necessary to decide, because in this case, both the Commission and the Minister had failed to apply the rule.

I must however, point out at this junction the shocking fact that the Commission, according to the respondent's reply to a Rule 35(12) notice, apparently kept no record of its proceedings. And as far as the Minister is concerned, he apparently did not care. What he was interested in, was to receive the "recommendation" which he had "implored" the Commission to make. In this regard I need only refer to the Rule 35(12) notice by applicant requesting *inter alia* the record of the meeting of the Security Commission and the respondent's reply to this notice which read:

> "The annexures to the said documents and the record of the Security Commission, if one exists, are privileged and will not be disclosed, on grounds of national security and public interest."
> (My emphasis added.)

Ad(ii) Mr. Maleka's submission that the right to be heard could be exercised after the decision was taken and that there was in fact such an opportunity given to Sikunda Snr.

(a) It is correct that the opportunity for the right to be heard can be given after the decision is taken, but such a course would only be justified in exceptional circumstances. This position is adequately set out in the following two decisions referred to by counsel for the applicant:

In the decision of the Appellate Division of the Supreme Court of South Africa in Administrator Transvaal & Ors v Traub and Ors., Corbett, C.J., stated:

> "Generally speaking, in my view, the audi principle requires the hearing to be given before the decision is taken by the official or body concerned, that is, while he or it still has an open mind on the matter. In this way one avoids the natural human inclination to adhere to a decision once taken (see Blom's case, *supra,* at 668C – E, Omar's case, *supra* at 906F;

> Momoniat v Minister of Law and Order and Others; Naidoo and Others v Minister of Law and Order and Others, 1986(2) SA 264(W) at 274B – D). Exceptionally, however, the dictates of natural justice may be satisfied by affording the individual concerned a hearing after the prejudicial decision had been taken (see Omar's case, *supra*, at 906F – H; Chikane's case, *supra* at 379G; Momoniat's case, *supra*, at 274E – 275C). This may be so, for instance, in cases where the party making the decision is necessarily required to act with expedition, or where for some other reason it is not feasible to give a hearing before the decision is taken. But the present is, in my opinion, not such a case. There is no suggestion that the decision whether or not to appoint the respondents to the posts applied for by them had to be taken in a hurry: in fact all the indications are to the contrary. Nor is there any basis for concluding that for some other reason a hearing prior to the decision was not feasible."

Corbett, C.J., further stressed that this right to be heard would also presuppose being apprised of adverse material to the person exercising that right.[10]

In Mamabolo v Rustenburg Regional Local Council, the test was reaffirmed in the following terms:

> "The importance to be accorded to the *audi* principle in the present context is compounded by the far reaching import of the decision itself and the

[10] 1989(4) SA 731(A) at 750C-F and 750I.

> deprivation of further remedies to an affected person by section 49.[11]

Mr. Smuts, on behalf of applicant, made the following points:

> "It is submitted that the exceptional circumstances referred to in the authorities do not apply to the circumstances of this matter given the fact that Mr. Sikunda's name appeared in the list some three years prior to the purported decision. There was ample opportunity to provide him with the right to be heard. There was also absolutely no attempt to afford him the right to be heard immediately upon his seizure and detention – even in the most attenuated form. Even after the respondent was alerted to the *audi* principle on 8 November 2000, there was still then no attempt to provide the applicant's father with the right to be heard until nearly 3 months later and at a time when the applicant's father had been detained without trial for more than 3 months – despite a court order directing his release. We also point out that the Minister's decision taken in terms of section 49 under review was not in any sense of a provisional nature. It was distinctly final. Steps were also in fact taken by the Minister to implement it – by causing the arrest of Mr. Sikunda and addressing a letter to the UNHCR to give effect to the removal of Mr. Sikunda from the Republic of Namibia.
>
> It is submitted that this offer so belatedly made in the Minister's affidavit on 1 February 2001 is thus not in good faith in the strict legal sense and in any event would and does not comply with the dictates of the *audi* principle in the circumstances

[11] 2001(1) SA 135(SCA) at 144 C – D.

of the present matter. Had there been any genuine attempt to entertain representation, this would have occurred at a far earlier stage and not some 4 months after the purported decision was taken and more than 3 months after Mr. Sikunda's detention – and after more than 3 months of contempt of court on the part of the Minister.

Furthermore, it is submitted that there would be no prospects of the Minister having an open mind in the matter, having "implored" the Security Commission to make the recommendation he desired and after he had deposed to two affidavits spanning some considerable time in which he was insistent upon the correctness of his decision. This is further compounded by the Minister's persistence for more than 3 months in acting in contempt of the Court order (for which he has been convicted) in refusing to release the detainee. The Minister's subsequent conviction for contempt yet further compounds the matter.

Clearly the Minister would not be capable of making a decision – nor could this decision be made – without bias or at least a reasonable suspicion of bias in those circumstances. The Minister's own predilection to persisting in his decision was in fact demonstrated already in his earlier correspondence and his letter of 19 September 2000 in which he "implored" the Security Commission to make their recommendation. The Minister's subsequent persistence to sticking to his decision is further demonstrated by his 2 affidavits and his flagrant contempt. This aspect is further referred to below where the relevant authorities are also cited in relation to impermissible bias, predetermination and the failure to have the required "open mind" to make a decision, stressed by Corbett, C.J., in the Traub-matter. The much

> belated attempt to cure the failure to comply with the *audi* principle must fail."

I must point out that the offer made by the Honourable Minister was made on 1st February 2001, included in an additional affidavit filed on behalf of the respondent. It seems to me that there is considerable substance in the above submissions by counsel for applicant.

In view of the fact that the Minister now had the whole case of Sikunda Snr., on affidavit before him, he had a golden opportunity, to demonstrate his *bona fides* and bring an end to the matter, by indicating that he was now willing to agree to the setting aside of his previous order. What confidence can one have in the Minister's objectivity and *bona fides,* if he at this late stage merely offered to receive representations by or on behalf of Sikunda Snr.

It is also necessary to stress that quite apart from the three basic points dealt with in this judgment, the procedure followed by the Commission and the Minister, as well as their decisions on the merits, were severely criticized on many other points by the Counsel for applicants as well as by

the Court *a quo* and much of this criticism appears to be well-founded. It would however, prolong this judgment unnecessarily, to deal with all these points and I therefore decline to do so.

What should be mentioned however, is that there is no indication whatever that either the Minister or the Security Commission considered whether or not Sikunda Snr. was a citizen of or domiciled in Namibia. The reason for this was possibly that they had not realized that the power under section 49(1) could not be exercised against a person who is either a citizen of or domiciled in Namibia. That would mean that both decisions should also be set aside on the ground that the Minister as well as the Commission had also misconceived its power to act in this regard. The decisions taken are also null and void for this reason.

No wonder that the applicant and Sikunda Snr., declined the belated offer of the Minister to consider further representations from the applicant and Sikunda Snr. In the circumstances the said offer by the Honourable Minister cannot be regarded as a proper and sufficient compliance with the rules of fairness, including the *audi alteram partem* rule.

For the same reason there is no justification for setting aside the orders made by the Court *a quo* in its well-reasoned judgment and substitute it with an order – setting aside the Minister's order as it stands and referring it back to him for reconsideration and decision, after complying with the *audi alteram partem* rule.

In any event, even if this Court was inclined to refer the matter back to the Minister as suggested, that course would be an exercise in futility because of the finding of this Court that Sikunda Snr., was legally domiciled in Namibia and that the Minister had no jurisdiction whatever to act against him under section 49(1). Furthermore, the finding that the Security Commission was not properly composed at the time when it made the recommendation aforesaid, would remain a fatal impediment to such a course for as long as it was not properly composed.

There is also no reason for interfering on appeal with the special order of costs granted against the respondent in the Court *a quo*.

What remains, is whether or not a special order of costs should be made on appeal in regard to the appeal proceedings.

There is considerable merit in the argument for an order of costs against the Government on an attorney and own client basis. On the other hand, the following factors must also be considered by this Court:

> The Government has already been penalized for the conduct on which the applicant relies by a punitive costs order in the Court *a quo* and an humiliating order against the Minister for Contempt of Court, against which he has not appealed. Furthermore I am not convinced that the rule *nisi* granted initially by Manyarara, A.J., should have included an interim interdict against the Minister and Chief of Police in the form of a mandatory injunction, ordering the release of Sikunda Snr., without a proper hearing first being afforded the Minister. As I have indicated earlier in this judgment, an interim interdict prohibiting the Minister from removing Sikunda Snr., was necessary, but the order for the immediate release of Sikunda Snr., without a proper opportunity for the said Minister and Chief of Police to put their case was not justified, particularly not when the legal representative of the Minister at the outset offered to consent to an interim order to the effect that Sikunda Snr., may not be removed from the country and the applicant rejected this offer.

> This part of the interim order probably caused some frustration on the side of the Government, leading to the refusal and/or failure of the Minister to comply with the Court order until after the conviction for Contempt of Court. The Government attempted to get finality in the legal proceedings at the earliest possible date. First it attempted to anticipate the return date from the 10th November to the 26th October but it was frustrated in that attempt by the legal representatives of the applicant. The long delay which ensued before the matter could be argued on 16th February 2001, was caused by an unforeseeable course when the Judge who had to hear the matter, first postponed it and when the postponed date arrived, he recused himself from the hearing, causing another postponement. Neither the Minister nor the Chief of Police was to blame for this long delay. The Minister's conduct in this regard was not justified, but it was to some extent mitigated.

The decisive factor however, is that the procedures used by the appellant to detain and continue to detain Sikunda Snr. were indeed tainted to such an extent by irregularity and illegality and was such a grave infringement of his fundamental rights, that the applicant must not only succeed, but should not be out of pocket by granting an ordinary order of costs.

There is also an application before us for the condonation of Respondent's non-compliance with the Rules of Court relating to the preparation of the record of appeal. Respondent's counsel did not object to the granting of

condonation. There is also no good reason why condonation should be withheld.

In the result the following order is made:

1. Condonation is granted for Respondent's failure to prepare the appeal record properly.

2. The appeal is dismissed.

3. The appellant is ordered to pay the costs of the appeal on the basis of attorney and own client.

(signed) O'LINN, A.J.A.

I agree.

(signed) STRYDOM, C.J.

I agree.

(signed) CHOMBA, A.J.A.

/mv

COUNSEL ON BEHALF OF THE APPELLANT:		Adv. I.V. Maleka
ASSISTED BY	:	Adv. V. Erenstein ya Toivo
ON BEHALF OF	:	Government Attorney

COUNSEL ON BEHALF OF THE RESPONDENT:		Adv. D.F. Smuts
ASSISTED BY	:	Adv. R.D. Cohrssen
ON BEHALF OF	:	Theunissen, Louw and Partners