

NOT REPORTABLE

CASE NO.: A 36/2011

IN THE HIGH COURT OF NAMIBIA

In the matter between:

CHRISTIANE PETRA BERKER

APPLICANT

and

**MINISTER OF HOME AFFAIRS & IMMIGRATION
CHIEF OF IMMIGRATION
PERMANENT SECRETARY OF HOME AFFAIRS
& IMMIGRATION
ATTORNEY-GENERAL**

**1st RESPONDENT
2nd RESPONDENT**

**3rd RESPONDENT
4th RESPONDENT**

CORAM: SMUTS, J

Heard on: 29 February 2012
Delivered on: 5 March 2012

JUDGMENT

SMUTS, J.: [1] The applicant is a Namibian citizen by birth and lives in Swakopmund. She is also a German citizen because of an entitlement which arises by virtue of the fact that one of her parents is a German citizen.

[2] On 21 May 2010 on her return from a trip to Germany at Rooikop Airport, Walvis Bay, the applicant accompanied by her ailing mother, handed her own and her mother's German passports to the immigration officer on duty. She also handed her Namibian passport to the immigration official.

[3] The immigration officer made it clear to the applicant that she was not entitled to have two passports under Namibian law. The officer then processed her entry into Namibia in the German passport since this passport was used to enter South Africa en route to Namibia. The officer then proceeded to confiscate her Namibian passport and informed the applicant that it would be forwarded to the Ministry of Home Affairs in Windhoek. The officer also informed the applicant that an entry would be made in that passport to the effect that no new passport should be issued to her. The applicant was then given a visitor's entry permit for 90 days, despite her protestations of being a Namibian citizen and being entitled to stay and remain in Namibia as long as she pleased. The applicant then approached her legal practitioner.

[4] Acting upon advice, she returned her German passport to the German Embassy in Windhoek and applied for the return of her Namibian passport. For several months the Ministry did not respond to correspondence or return the calls of the applicant's legal practitioner. This resulted in this application being brought. The applicant not only sought the return of her passport but also declaratory orders and a special order as to costs. This application was launched on 8 March 2011. On 24 April 2011, the Ministry returned the applicant's passport to her.

[5] The Permanent Secretary of the Ministry deposed an answering affidavit in June 2011. He correctly conceded that the immigration officer acted unlawfully by requiring the applicant as a citizen to enter Namibia on a visitor's permit, given her right to reside in Namibia. He also conceded that the confiscation of her passport, which he referred to as a privilege, would need to meet the requirements of the rules of natural justice as envisaged in Article 18 of the Constitution. He also correctly acknowledged that the Ministry does not dispute the fact that s26 of the Namibian Citizenship Act, 14 of 1990 does not apply to Namibian citizens by birth or descent, given the constitutional rights of those citizens¹. There was however no tender of the applicant's costs in his affidavit and the entitlement to the declaratory relief sought was disputed.

¹ This was also made clear by this court in *Thloro v Minister of Home Affairs* 2008 (1) NR 97 (HC) which was followed in *Le Roux v Minister of Home Affairs and Immigration* 2011(2) NR 606 (HC)

[6] The matter was then referred to case management and came before Swanepoel, J. In the course of case management, the parties agreed to a stated case. By agreement, the following order was also made on 16 November 2011 postponing the matter to 29 February 2012 and with the following further orders being made by agreement:

"1. That second and third respondent are ordered to forthwith return, or cause the return of, the Namibian passport number M0001720 in the name of Christiane Petra Berker to Applicant free of any endorsement to the effect that she is not entitled to a Namibian passport.

2. That Section 26 of the Namibian Citizenship Act, 1990 (Act 14 of 1990) is in breach of Article 4(8) of the Namibian Constitution as far as it is construed and applied to deprive Namibian citizens by birth or descent of their citizenship.

3. That immigration officers act unlawfully when applying the limitation of entry into, and residence in, Namibia in Part V of the Immigration Control Act, 1993 (Act 7 of 1993) (the act) to Namibian citizens.

4. That Article 21(1)(i) of the Namibian Constitution grant Namibian citizens the freedom to leave and return to Namibia without limitation subject to sections 6 and 7 of the Act".

[7] The applicant in the meantime amended the relief sought in the stated case. Apart from seeking costs as between attorney and client, she also sought the following declaratory orders numbered paragraphs 2.2 and 4 respectively:

"2.2 It is declared that immigration officers act unlawfully when confiscating a valid passport in possession of a Namibian citizen for the sole reason that he/she is also in possession of a passport of another country"; and

"4. It is permissible for a Namibia citizen by birth to hold both a Namibian passport and a passport of any other country(ies) of which he/she is a citizen".

[8] The stated case also recorded the factual material I have already referred to. It also recorded that the immigration officer had no reason to take the applicant's Namibian passport, treated her as a visitor and that the Minister and Permanent Secretary of Home Affairs considered that this was wrong. It was also recorded that there was no evidence that the applicant had used her Namibian passport for an unlawful or improper purpose.

[9] Mr Coleman, who appeared for the applicant, argued that the order already made in case management on 16 November 2011 constituted substantial success for the applicant and that she would be entitled to costs until that date. Given the fact that costs had not been tendered then or since, he submitted that the applicant would be entitled to her costs to date. He further contended that a costs on a special scale was warranted in the circumstances, given the total disregard for the applicant's rights exhibited by the immigration officer and subsequently by the Ministry. He further contended that the applicant was put to unnecessary expense by having to bring an application to secure her rights and that the conduct of the immigration officer and officials within the Ministry had been unreasonable, unjustifiable and oppressive from the outset. He referred to authority in which special costs orders are justified when there is a disregard for the rights of the specific party².

[10] Mr Coleman also contended that the applicant was entitled to the declaratory orders given the equivocating response by the Permanent Secretary in his affidavit. He submitted that it was necessary for the applicant to secure her rights by seeking the further declaratory orders contained in the stated case. Mr Chibwana, who appeared for the respondents, contended that the applicant was not entitled to the declaratory relief sought in paragraph 4 of the amended notice of motion (and stated case) as it was particularly wide and would essentially amount to giving an academic or advisory opinion given the lack of specificity. He relied upon applicable authority for this proposition³.

² *Namibia Breweries v Serrao* 2007(1) NR 41 HC at PAR 50 where and the authority collected there.

³ *Mushwena and Others v The Government of the Republic of Namibia and another* 2004(2) NR 94 (HC)
See also *Mahomed v Mahomed and Others* 1976(3) SA 151 T (154) and *Shephard v O-Neil and Others* 2000 (2) SA 1066 (N) at 1068.

[11] He correctly conceded in argument that the granting of a passport can no longer be treated as within the realm of prerogative powers exercised by the State. As was pointed out by Mr Coleman in argument with reference to Hoexter *Administrature of Law in South Africa*,⁴ the exercise of such prerogative powers did not survive the adoption the Namibian Constitution.

[12] Mr Chibwana also submitted that a special costs order was not warranted in the circumstances of the matter and particularly after the concession by the Permanent Secretary that the immigration officer had acted illegally by treating the applicant as a visitor and after the return of the passport. Mr Chibwana correctly acknowledged that the respondents had not tendered costs at any stage and given, the substantial success secured by the applicant on 16 November 2011 already, they should have done so. As to the declaratory relief sought under paragraph 2.2, he correctly submitted that at best for the applicant, it should be confined to apply to her. He suggested wording to that effect which Mr Coleman did not object to and which I find more appropriate than the more general terms of the declaratory relief sought. I am inclined to grant relief to that effect as is reflected in my order below. I agree with Mr Chibwana's submission that the further declaratory sought in paragraph 4 is too wide. When I put this to Mr Coleman he correctly did not press for such an order and I decline to make such an order.

[13] As to the question of costs, it would seem to me that there had been an unacceptable disregard of the applicant's rights on her return to Namibia when her passport was unlawfully confiscated and being treated as a foreigner in her own country. This conduct in my view warrants the mark of disapproval by this Court and would justify a special costs order. I also do not see why the applicant should be out of pocket in having to approach this court for the return of her passport. It would seem to me that after the Permanent Secretary in his answering affidavit had conceded that the immigration officer had acted unlawfully and accepted the entitlement on the part of the applicant to dual citizenship, that the only issues which remained

⁴ P33/34

are those relating to the further declaratory relief sought and costs. In the exercise of my discretion, I am disinclined to grant a special order of costs after these concessions were made and thus after the filing of the answering affidavit.

[13] I accordingly make the following order:

1. It is declared that the immigration officers acted unlawfully when they confiscated a valid Namibian passport in possession of the applicant for the sole reason that she is also in possession of a passport of another country.
2. The respondents are directed to pay the applicant's costs on an attorney and client scale up to and including the receipt of the answering affidavit and thereafter to pay the applicant's costs on a party and party scale. These costs include the costs of one instructed and one instructing counsel throughout.

SMUTS, J

ON BEHALF OF THE APPLICANT:

Instructed by:

MR. COLEMAN

LORENTZ ANGULA INC.

ON BEHALF OF THE RESPONDENTS:

Instructed by:

MR. CHIMBWANA

OFFICE OF THE GOVERNMENT ATTORNEY