REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 179/2007

In the matter between:

JACOB ALEXANDER	**APPLICANT**
and	
RUDOLF MBUMBA	**1ST RESPONDENT**
THE INSPECTOR GENERAL OF THE NAMIBIAN POLICE	**2ND RESPONDENT**
THE MINISTER OF JUSTICE	**3RD RESPONDENT**
THE PROSECUTOR-GENERAL	**4TH RESPONDENT**
MAGISTRATE UUATJO UANIVI	**5TH RESPONDENT**

Neutral citation: *Alexander v Mbumba* (A 179/2007) [2012] NAHCMD 69 (19 November 2012)

Coram: HOFF J
Heard: **06 August 2007**
Delivered: **06 August 2007**
Reasons: **19 November 2012**

Flynote: Application for leave to appeal – applicant must show direct and substantial interest in subject matter of litigation and prima facie case or defence – court has discretion to refuse or to allow application to intervene.

Article 18 of Namibia Constitution – administrative acts require reasonable and fair decisions as well as fair procedures which are transparent including *audi alteram partem* principle.

Order for substitution – review court will not as a general rule substitute its own decision for that of functionary – unless exceptional circumstances exist – where end result a foregone conclusion – where delay would cause prejudice – where functionary exhibited bias or incompetence.

Summary: An applicant in an application to intervene must show not only a direct and substantial interest in the subject matter of the litigation but also a prima facie case or defence – The court has a discretion to refuse or to allow such application to intervene – The Minister of Home Affairs has no direct and substantial interest in an application where applicant prays for a review of the decision of the first respondent to refuse the applicant to leave the district of Windhoek and for the amendment of bail conditions.

Article 18 of the Namibian Constitution regulating administrative acts, requires reasonable and fair decisions by administrative bodies and administrative officials as well as fair procedures which are transparent – The *audi alteram partem* rule requires that an individual whose liberty or existing rights may be prejudicially affected by a decision of an official has a right to be heard before the decision is taken – This right to a hearing implies the right to be informed of facts and information which may be detrimental to the interests of the private individual.

The impugned decision of an administrative official may be reviewed and set aside in the absence of a rational basis for such a decision.

ORDER

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1. Full and proper compliance with the rules and the relevant practice directives of this court relating to service and time limits be dispensed with in view of the urgency of the matter.

2. The decision of the first respondent taken on 6 July 2007 to refuse the applicant permission to travel to the Walvis Bay district during the periods 11 – 12 July 2007 and 7 – 8 August 2007 is reviewed and set aside.

3. The applicant is allowed to travel to, and from the Walvis Bay district, and to remain there and in the Swakopmund district for the period 7 – 8 August 2007 subject to the applicant reporting to the Walvis Bay police station between 18h00 and 19h00 on the 7th August 2007 and between 8h00 and 9h00 on the 8th August.

4. The condition of the applicant's bail imposed on 3 October 2006 that the applicant not leave the Windhoek district without the permission of the first respondent is amended to permit the applicant to leave the Windhoek district on 24 hours written notice to the first respondent.

5. The application for leave to intervene by the Minister of Home Affairs is dismissed.

6. The registrar of this court is hereby requested to immediately fax this Court Order to the Station Commander of Walvis Bay.

7. The first, second, third and fourth respondents and the Minister of Home Affairs are ordered to pay the applicant's costs jointly and severally, the one paying the others to be absolved, which costs are to include those attendant upon the employment of one instructing legal practitioner and two instructed counsel.

JUDGMENT

HOFF J:

[1] The applicant approached this court on notice of motion for the following relief:

'**PLEASE TAKE NOTICE** that application will be made on behalf of the abovenamed applicant on **THURSDAY 26 JULY 2007 at 09h30 o**r as soon thereafter as counsel may be heard for an order in the following terms:

1. Dispensing with full and proper compliance with the Rules and relevant practice directives of this Honourable Court relating to service and time limits, by reason of the urgency of the matter.

2.1 Reviewing and setting aside the decision of the first respondent, alternatively, the second respondent taken on 6 July 2007, to refuse the applicant permission to travel to the Walvis Bay district and to remain there and in the Walvis Bay district during the periods 11 to 12 July 2007 and 7 to 8 August 2007.

2.2 Alternatively to 2.1 above, reviewing and setting aside the failure by the first respondent to grant the applicant permission to travel to the Walvis Bay district and to remain in the Walvis Bay district during the periods 11 to 12 July 2007 and 7 – 8 August 2007.

3. Ordering that the applicant be allowed to travel to, and from, the Walvis Bay district, and to remain there and in the Swakopmund district, for the period 7 to 8 August 2007, subject to the applicant reporting to a designated police officer in accordance with his existing bail conditions.

4.1 That the condition of the applicant's bail imposed on 3 October 2006 that the applicant not leave the Windhoek district without the permission of the first respondent be deleted.

4.2 Alternatively to 4.1 above, that the condition of the applicant's bail imposed on 3 October 2006 that the applicant not leave the Windhoek district without the permission of the first respondent, be amended to permit the applicant to leave the Windhoek district on 24 hours notice to the first respondent.

5. That the second respondent, alternatively the first and second respondents and such further respondents as may oppose this application be ordered to pay the costs of this application jointly and severally on an attorney and own client scale.

6. Granting further and/or alternative relief to the applicant.'

[2] Having heard the application on 6 August 2007, this court gave a judgment on the same day in the following terms:

'Having heard Adv. P Hodes SC, assisted by Adv. A Katz for the applicant, and Mr N Marcus, Counsel for the First, Second and Fourth Respondents and the Minister of Home Affairs, and having read the papers filed of record, it is ordered that:

1. Full and proper compliance with the rules and the relevant practice directives of this court relating to service and time limits be dispensed with in view of the urgency of the matter.
2. The decision of the first respondent taken on 6 July 2007 to refuse the applicant permission to travel to the Walvis Bay district during the periods 11 – 12 July 2007 and 7 – 8 August 2007 is reviewed and set aside.
3. The applicant is allowed to travel to, and from the Walvis Bay district, and to remain there and in the Swakopmund district for the period 7 – 8 August 2007 subject to the applicant reporting to the Walvis Bay police station between 18h00 and 19h00 on the 7th August 2007 and between 8h00 and 9h00 on the 8th August.
4. The condition of the applicant's bail imposed on 3 October 2006 that the applicant not leave the Windhoek district without the permission of the first respondent is amended to permit the applicant to leave the Windhoek district on 24 hours written notice to the first respondent.
5. The application for leave to intervene by the Minister of Home Affairs is dismissed.
6. The registrar of this court is hereby requested to immediately fax this Court Order to the Station Commander of Walvis Bay.
7. The first, second, third and fourth respondents and the Minister of Home Affairs are ordered to pay the applicant's costs jointly and severally, the one paying the others to be absolved, which costs are to include those attendant upon the employment of one instructing legal practitioner and two instructed counsel.'

The following are the reasons.

Background

[3] The applicant, an Israeli citizen and who had lived in the United States of America for more than 20 years prior to 26 July 2006, was arrested in terms of the provisions of the Extradition Act 11 of 1996 and subsequently on 3 October 2006 brought before a magistrate (fifth respondent) who granted the applicant bail in the amount of N$10 million pending a formal extradition enquiry.

[4] The fifth respondent found that the fear that the applicant will not stand the extradition proceedings was not supported by evidence. One of the bail conditions was that the applicant does not leave the district of Windhoek without the permission of Inspector Mbumba, the first respondent.

[5] The applicant in his founding affidavit stated that he was the chief executive officer of Comverse Technology, a firm listed on the NASDAQ stock exchange in New York. He voluntarily resigned as CEO with effect from 1 May 2006 and subsequently relocated with his wife and children to Namibia. A work permit was granted to him at the end of August 2006. Applicant stated that he had undertaken to invest substantially in Namibia and had purchased immovable property in Windhoek as well as in Walvis Bay. A total of 130 erven were purchased in Walvis Bay for the purpose of a housing development known as Shalom Park. Architectural plans for this development had been drawn up. The applicant had also purchased a member's interest in a close corporation which owns an erf in Walvis Bay for the purpose of a housing development known as Eyuva village.

[6] On 21 November 2006 the legal practitioners of the applicant forwarded a letter to the first respondent and copied to the fourth respondent requesting permission to attend to his business interests at the coast for the period of 8 December 2006 until 16 December 2006. An address where the applicant would

be residing was provided. A letter dated 22 November 2006 was drafted along similar lines and was addressed to the Inspector General, the second respondent.

[7] On 30 November 2006 the fourth respondent replied that the applicant was unknown at the address provided and was of the opinion that an additional amount of N$5 million bail be paid during 8 to 16 December 2006 due ‘to the increased risk of the accused absconding from Namibia through the harbour town of Walvis Bay during his stay in Walvis Bay’.

[8] On 8 December 2006 the legal practitioners informed the second respondent that the applicant no longer intended to leave the district of Windhoek during the December vacation but would remain in the district of Windhoek.

[9] On 7 February 2007 the legal practitioners of the applicant in a letter addressed to Mr J Truter, a Deputy Prosectur-General, stated that in order to meet applicant’s undertakings towards the Ministry of Home Affairs as well as the obligations and commitments resulting from the Ministry’s issue of a work permit, applicant needed to travel outside the district of Windhoek. It was proposed by the legal practitioners that the applicant pays an additional amount of N$5 million bail and that the bail condition restricting the applicant to the district of Windhoek be deleted. The assurance was given that the applicant was fully committed to remain in Namibia in compliance with his bail conditions and that applicant would attend the extradition enquiry.

[10] On 7 March 2007 Mr Truter replied, by way of a letter, that the fourth respondent did not agree with the proposed amendment of the bail conditions.

[11] On 2 July 2007 the legal representatives addressed a letter to the first respondent requesting his permission that the applicant may leave the district of Windhoek for Walvis Bay for purposes of urgently attending to his business interests. In the letter it was stated that the applicant was informed that a building permit had been issued in respect of the Eyuva housing project and that construction work was

to commence shortly and that the applicant had to attend to several pressing matters in connection therewith. It was stated in the letter that meetings for such purposes were confirmed for 11 and 12 July 2007 and also for 7 and 8 August 2007. It was further stated that the applicant intended to stay at a certain hotel in Walvis Bay. The letter concluded as follows:

'It is clear from the order of the magistrate that the only person with whom the authority vests to grant the relevant permission is you. If you have any concerns prior to reaching a decision, please contact the writer – or in his absence, his partner, Richard Metcalfe – without delay in order that he may allay any such possible concerns.
Kindly let as have your written reply by no later than close of business on Friday 6 July 2007.'

[12] The response came in the form of a letter, dated 6 July 2007, and addressed to the legal practitioners of the applicant containing one sentence:

'This office regret to inform you that permission for your client Mr J Alexander to visit Walvis Bay for business purposes is declined.'

[13] This letter was signed by the Inspector General of the Namibian Police, Lt-Gen. S H Ndeitunga, the second respondent.

[14] It is this decision which was sought to be set aside and in respect of which the relief set forth in the notice of motion was sought.

[15] The applicant in his founding affidavit stated that the matter had become urgent for one or more of the following reasons:

(a) his constitutionally protected rights, including freedom of movement and the freedom to conduct business in Namibia were being infringed and that he was advised that the matter is inherently urgent;

(b) he is obliged to meet his commitments he has towards the Ministry of Home Affairs to meaningfully invest in the Namibian economy. Since this is a long process he only has limited time left before he needs to apply for a renewal of his work permit or have his permanent residence application finalised;

(c) the costs of the two property developments at the coast are more than N$24 million and these projects are at risk of being delayed which in building terms equates to a significant loss of money.

(d) he had been obliged to miss the meetings of 11 and 12 July 2007.

(e) the planning and preparation for the two projects commenced in January 2007. All preliminaries were taken care of by the engineer. The required meetings with and between various role players were attended by his legal representatives. At times the architect, builder, estate agent, and the responsible lawyers had to travel to Windhoek involving considerable and unnecessary costs and that his attendance at the site(s) has now become critical.

[16] In a letter attached to his supporting papers, dated 11 July 2007, the architect of Eyuva project, insisted that the applicant, for the reasons mentioned in the letter, urgently pay a visit to the site in order to meet with all professional parties concerned.

[17] In respect of the relief prayed for the applicant stated inter alia that if he does not invest and conduct business in Namibia it will prejudice his application for permanent residence as well as the renewal of his work permit. The work permit is valid for a period of 24 months.

[18] Applicant stated that if he is not in a position to travel, he might be forced to sell his properties and interests at the coast which would constitute an infringement of his constitutional right to property and that he stands to lose potential buyers of the properties at the coast due to the fact that the projects are stalled.

[19] Applicant stated that it would obviously be inherently risky to 'blindly' authorise further work and that the prevailing situation is fertile ground for possible litigation which can easily be prevented should he be able to travel.

[20] Applicant further stated that he will not be able to obtain substantial redress at a hearing in due course.

[21] On 25 July 2007 a day before the application by the applicant (in the main application) was due to be heard, the Minister of Home Affairs filed a notice of intention to intervene in the main application. In this regard the Permanent Secretary of Home Affairs and chairperson of the Immigration Selection Board Mr Samuel Goagoseb, deposed to a founding affidavit.
I shall first deal with the application to intervene.

Application for leave to intervene

[22] Mr Goagoseb in his founding statement avers that the applicant in the main application is manifestly incorrect, and grossly misrepresented the fact insofar as applications for a work permit and a permanent residence permit are concerned in that the applicant stated in his founding affidavit that he dealt with it openly and without concealment. Similarly, the averments by the applicant in the main application that it was necessary to travel to the coast in compliance with his commitments towards the Ministry of Home Affairs in order to meaningfully invest in the Namibian economy is not entirely correct since for an investor to be allowed to do business in this country a work permit must have been issued validly, and not on the basis of a misrepresentation.

[23] Mr Goagoseb stated that the Minister of Home Affairs has a direct and substantial interest in the main application since:

(a) the Minister of Home Affairs and her officials are responsible for the administration of the Immigration Control Act 7 of 1993 which deals with regulating the entry of foreigners to this country and the issuing of the various permits provided for in the Act;

(b) the Minister of Home Affairs is empowered in terms of the Act to take action against a person who is in possession of a permit that was issued to that person on the basis of a misrepresentation;

(c) an investigation will be made shortly to afford the applicant, in the main application, an opportunity to respond to the claim of misrepresentation. The outcome of such an investigation will affect the relief claimed by the applicant in the main application;

[24] Mr Goagoseb then deals with the application for permanent residence and the alleged misrepresentations contained in such application, stating that had the Board known about the true state of affairs a work permit would never have been granted to the applicant in the main application.

[25] Mr Goagoseb in his motivation why this court should not exercise its discretion in favour of the applicant in the main application mentions that the Minister of Home Affairs has a duty to protect the unsuspecting public and potential investors (ie the business partners of applicant in main application) form engaging with individuals who had obtained their papers through fraud since the public and potential investors stand to lose financially should they commit their finances to the applicant's projects at this stage.

[26] It was submitted that the mere fact that the Ministry of Home Affairs is now looking into the issue of misrepresentation might prompt the applicant to take flight even more so where the applicant in the main application's work permit is cancelled and where he is treated as a prohibited immigrant.

[27] It was further stated that applicant in main application's absondment will put in jeopardy the obligation the Republic of Namibia has in ensuring that the extradition proceedings are carried out and that the risk of applicant in main application fleeing the country increases exponentially if the applicant is already at the coast.

[28] It was pointed out that the Minister of Home Affairs has the power in terms of the Act to cancel a work permit but that considerations of fairness require that an applicant be afforded the opportunity to make presentations prior to a decision being made.

[29] It was suggested that the best option was to have the issue of the work permit resolved before permission can be granted to the applicant in the main application to travel to Walvis Bay or before any amendments to the bail conditions are made.

[30] Mr Markus who appeared on behalf of the Minister of Home Affairs in the application to intervene contended since there are various allegations in the founding affidavit of the applicant in the main application which, if they were left unanswered would create an incorrect picture, that the Minister of Home Affairs has a duty to reveal such incorrect information.

[31] It was further submitted by Mr Markus that a strong case had been out, by the Permanent Secretary Mr Goagoseb, of misrepresentation which had not been explained by the applicant in the main application. Mr Markus reiterated the point that even should this court find that the applicant in the main application has made out a case for interdictory relief it would be fair in the circumstances that the issue of the work permit be resolved first, and that this court may give the Minister of Home Affairs a timeline within which to conclude the enquiry in respect of the issuance of the work permit.

[32] It is a common law principle that an applicant in an application for leave to intervene must satisfy the court firstly, that he or she has a direct and substantial interest in the subject matter of the litigation and that such an applicant could be

prejudiced by the judgment of the court, and secondly that the application is not frivolous, and that the allegations made by the applicant constitute a prima facie case or defence. (See *Minister of Local Government and Land Tenure and Another v Sizwe Development and Others*; *In Re Siswe Development v Flagstaff Municipality* 1991 (1) SA 677 TK; and *Ex parte Sudurhavid (Pty) Ltd*; In Re *Namibia Marine Resources (Pty) Ltd v Ferina (Pty) Ltd* 1992 NR 316).

[33] A court has a discretion to allow or to refuse an application to intervene. Hannah J in *Sudurhavid* quoted with approval Krause J in *Bitcon v City Council of Johannesburg and Arenow Behrman & Co* 1931 WLD 273 where this common law principle was expressed in the following words:

> 'It is a matter entirely within the discretion of the court to allow a party to intervene provided the intervening party can show he is specially concerned in the issue and that the matter is of common interest to himself and the party he desires to join, and that the issues are the same.'

[34] A 'direct and substantial interest' means

> 'an interest in the right which is the subject matter of the litigation and is not merely a financial interest which is only an indirect interest in such litigation.' (See *Henri Viljoen (Pty) Ltd v Awerbuch Brother* 1953 (2) SA 151 (O) at 169 H; *Sizwe* supra at 679B).

[35] The question which may be asked is what direct and substantial interest has the Minister of Home Affairs whether or not the applicant in the main applicant should be allowed to go to Walvis Bay ? It is a bail condition and it is germane to the issue of bail. It is doubtful whether the Minister of Home Affairs can intervene in the main application on the basis to show the untruthfulness alleged in applicant in the main application's founding papers. It is difficult to see what interest the Minister of Home Affairs may have in applicant leaving for Walvis Bay on 7 August 2007 and him returning to Windhoek on 8 August 2007.

[36] Similarly, in respect of the second requirement, what prima facie case or defence has the Minister of Home Affairs in respect of the interdictory relief claimed by the applicant in the main application ? None appears from the founding affidavit filed on behalf of the Minister of Home Affairs. The application to intervene stands therefore to be dismissed.

Urgency

[37] The issue of urgency was disputed by Mr Markus regarding the relief contained in paragraphs 4.1 and 4.2 of the notice of motion ie the variation of the bail conditions. He has not put in issue that the relief contained in prayers 2 and 3 is urgent.

[38] It was submitted by Mr Markus that the urgency was self created in that the applicant having been informed in a letter dated 7 March 2007 that the Prosecutor-General was not amendable to an amendment of bail conditions waited for another four months before deciding to approach this court on an urgent basis to amend the bail conditions.

[39] It must be pointed out that prayer 4 in the notice of motion dealing with the amendment of the bail conditions is linked to prayers 2 and 3 dealing with the interdictory relief. In this regard it was submitted by Mr Hodes, that since the applicant could not get a proper hearing from the first respondent to leave the district of Windhoek there was a need to alter the bail conditions.

[40] In any event the urgency arose after the refusal on 6 July 2007 to travel to Walvis Bay in view of the fact that the applicant had been informed that building plans and a building permit had been approved by the municipality on 21 June 2007.

[41] If the urgency of the interdictory relief is not disputed the logical consequence is that there can be no real dispute regarding the urgency in respect of the ancillary relief claimed having regard to the link between them.

Relief sought in main application

[42] The substantial relief sought consists of

(a) a review of the decision of the first respondent of 6 July 2007 to refuse the applicant to leave the district of Windhoek (prayer 2.1);

alternatively, a review of the failure by the first respondent to grant the applicant permission to travel to Walvis Bay (prayer 2.2);

(b) a mandatory order (prayer 3);

(c) a revisiting of the applicant's bail conditions (prayer 4);

(e) costs (prayer 5).

Review Relief

(a) Failure to apply *audi alteram partem*

[43] The fifth respondent granted bail to the applicant in terms of section 11(8) of the Extradition Act 11 of 1996 on 3 October 2007. One of the bail conditions was that the applicant:

> 'does not leave Windhoek district without Inspector Mbumba's permission.'

[44] The court order granted only the first respondent the power, authority and discretion to grant the requested permission. When exercising that discretion the first respondent was required to observe and apply the *audi alteram partem* principle.

[45] Article 18 of the Namibian Constitution reads as follows:

'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.'

[46] Strydom CJ, in *Immigration Selection Board v Frank and Another* 2001 NR 170 at 170I-171A commented as follows in respect of Article 18:

'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 (Pyt) Ltd v Minister of Fisheries and Marine Resources* 1998 NR 147 (HC). Articles 18 further entrenches the common law pertaining to administrative justice and in so far as it is not in conflict with the Constitution.'

and continues at 171B as follows:

'For purposes of this case it is enough to say that at the very least the rules of natural justice apply such as the audi alteram partem rule . . . .'
(See also *Kaulinge v Minister of Health and Social Services* 2006 (1) NR 377 (HC) at 383).

[47] In the letter dated 2 July 2007 in which permission to leave the district of Windhoek was requested applicant's legal practitioners concluded the letter by stating:

'If you have any concerns prior to reaching a decision, please contact the writer – or in his absence, his partner, Richard Metcalfe – without delay in order that he may allay any such possible concerns.'

[48] It is common cause that on 6 July 2007 without providing the applicant any opportunity to be heard the first respondent, by virtue of a letter signed by the second respondent, refused the requested permission.

[49] In *Yuen v Minister of Home Affairs and Another* 1998 (1) SA 958 CPD at 961 Cleaver J quoted with approval the following comments of Streicher J in the case of Foulds v Minister of Home Affairs and Others 1996 (4) SA 137 (W) at 142A – B:

'In terms of the common law an individual whose liberty or property or existing rights are prejudicially affected by a decision of a public body or of an official empowered by statute to give such a decision . . . before an adverse decision is taken . . . will be given a fair hearing, has a right to be heard before the decision is taken . . . .'

[50] Cleaver J at 965B remarked that 'it must be remembered that the right to a hearing also implies the right to be informed of facts and information which may be detrimental to the interests of the private individual'. (See also *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v The Minister of Environment & Tourism* unreported judgment of the Supreme Court of Namibia in Case no. SC 13/2004 delivered on 23 November 2005 at p. 14 as per O'Linn AJA).

[51] The first respondent in his answering affidavit (para 81) denied that he is obliged in law to afford the applicant a hearing prior to making a decision. It should be evident from the authorities referred to that first respondent was indeed in law obliged to afford the applicant the opportunity to be heard before taking the decision which he did. His failure to afford applicant such an opportunity was a fatal error and falls to be reviewed and set aside for this reason alone.

(b) Justification

[52] It was submitted on behalf of the applicant that quite apart from first respondent's failure to observe the *audi* principle his impugned decision falls to be set aside also because it was irrationally based on a ground which does not hear scrutiny.

[53] The first respondent in his answering affidavit stated that since a person does not need travel documents in order to leave the country and since the Namibian

Police do not have the resources to patrol the Namibian coast line, and since the applicant had made certain misrepresentations in his application for permanent residence permit and work permit which may result in the withdrawal of the work permit, there is a real risk of him absconding.

[54] The applicant in his replying affidavit, which was supported by an affidavit of his legal representative and an affidavit from a travel agent who assisted applicant in the preparation of the relevant application forms, dealt with the allegations of misrepresentation and in effect showed that there was no substance in those allegations.

[55] It is not disputed that the applicant is residing approximately 200 metres from the Eros Airport in Windhoek. If one accepts the argument of the first respondent that one needs no travel document to leave Namibia the question which begs to be answered is why would there be an increase in the risk of applicant fleeing should he be allowed to travel to the coast when applicant may with much less effort and expense flee via the airport?

[56] The applicant knows that if he attempts to flee Namibia he may be arrested due to the red notice issued by Interpol. The applicant has known since 25 July 2007 when the answering papers were served of the threat of deportation, yet is still in Windhoek.

[57] The applicant is about to launch an application in respect of the extradition proceedings. It is unknown when a final result may be obtained in this regard taking into account the possibility of an appeal which may be instituted. The applicant has made and is in the process of making substantial investments in Namibia and he is fighting very hard to remain here.

[58] The magistrate did not regard the applicant as a flight risk and I am similarly of the view it has not been shown that there is a real risk of flight on the part of the applicant. I am not satisfied that the applicant is more likely to abscond should he be

allowed to travel to the coast and therefore that permission should be refused for him to travel to Walvis Bay as requested by the applicant.

[59] The impugned decision falls to be set aside on this ground as well namely, the absence of a rational basis for the decision.

The Mandamus

[60] In prayer 3 the applicant seeks an order which permits him to 'be allowed to travel to, and from the Walvis Bay district, and to remain there and in the Swakopmund district, for the period 7 to 8 August 2007, subject to the applicant reporting to a designated police officer in accordance with his existing bail conditions'.

[61] This is an order for substitution ie an order substituting the impugned decision of the first respondent. A review court will not, as a general rule, substitute its own decision for that of the functionary, unless exceptional circumstances exist, since to do otherwise would be contrary to the doctrine of separation of powers.

[62] It was held in *Waterberg* that 'whether there are exceptional circumstances justifying a court to substitute its own decision for that of the administrative authority is 'in essence a question of fairness to both sides'.

[63] The Supreme Court of Namibia in *Waterberg* supra referred with approval the dictum of Hlope J in *University of Western Cape and Others v Member of Executive Committee for Health and Social Services and Others* 1998 (3) SA 124 (C) at 131D-G where the following was stated regarding the principles pertaining to the substitution of a functionary's decision:

'Where the end result is in any event a foregone conclusion and it would merely be a waste of time to order the tribunal or functionary to reconsider the matter, the courts have not hesitated to substitute their own decision for that of the functionary. The courts have also not hesitated to substitute their own decision for that of a functionary where further delay would cause unjustifiable prejudice to the applicant. Our courts have further recognised that they

will substitute a decision of a functionary where the functionary or tribunal has exhibited bias or incompetence to such a degree that it would be unfair to require the applicant to submit to the same jurisdictional again. It would also seem that our courts are willing to interfere, thereby substituting their own decision for that of a functionary, where the court is in as good as a position to make the decision itself. Of course the mere fact that a court considers itself as qualified to take the decision as the administrator does not per se justify usurping the administrator's powers or functions. In some cases, however, the fairness to the applicant may demand that the court should take such a view.'

[64] In *Namibia Health Clinics v The Minister of Health and Social Services* (an unreported judgment under case no. 261/2001 dated 10 September 2000) Gibson J stated inter alia the following:

'Given its preconceived view, I do not consider it unreasonable to hold that a public official who subscribes to the views spelt out above was bound to pay only a mere lip serve to the processing of the application, and would be far removed from being objective, reasonable, or fair. In the result it is my finding that in these circumstances it would be unjust to return the application to the respondent for his consideration.'

[65] I am of the view that the end result would be a foregone conclusion and would be a waste of time should I order the first respondent to reconsider the applicant's request since it would cause further delay and unjustifiable prejudice to the applicant. Applicant needed to attend meetings the next day and the day thereafter.

[66] In the result prayer 3 in the notice of motion stands to be granted.

Bail conditions

[67] The argument advanced on substitution has equal force and application in respect of the relief sought by the applicant relating to his bail conditions.

[68] Article 21(1)(g) of the Namibian Constitution provides that all persons shall have the right to more freely throughout Namibia. This is a fundamental freedom.

[69] In terms of section 21(2) of the Namibian Constitution a fundamental freedom is exercised subject to the law of Namibia, in so far as such law imposes reasonable restrictions on the exercise of such right and freedom.

[70] In *Dawood and Another v Minister of Home Affairs and Other*s; *Shalabi and Another v Minister of Home Affairs and Others; Thomas and Another v Minister of Home Affairs and Others* 2000 (1) SA 997 (C) 1043I-1044D it was held that it is a well established principle of international law that, as a consequence of its territorial sovereignty, a State has the right to control the entry of aliens into its territory. However, once an alien *has* entered its territory, the State concerned is obliged under international law to respect basis human rights norms in the treatment of such an alien.

[71] The applicant is therefore entitled to the protection of his constitutional rights. The applicant is furthermore in possession of a valid work permit and may engage in the business, profession or occupation stated in the said permit and such a permit may only be cancelled after the applicant has had the opportunity to make representations to the Minister of Home Affairs.

[72] Article 25(2) and (3) clothe this court with the power to make such orders as are necessary where a fundamental right or freedom guaranteed by the Namibian Constitution has been infringed or threatened, and to enforce or protect such right or freedom.

[73] Having regard to the intransigent attitude of the first respondent, this court is in as good a position to make a decision itself, in fairness not only to the respondents but in particular in fairness to the applicant to substitute the relevant bail condition in line with paragraph 4.2 of the notice of motion.

Costs

[74] The applicant has prayed for costs on an attorney own client scale. Courts are reluctant to award costs on this very punitive scale. I am not convinced that the respondents conduct by opposing this application can be characterised as reprehensible, neither that it is necessary for this court as a mark of its disapproval of the conduct of the respondents to award costs on an attorney-client scale. Since the applicant is substantially successful in this application the costs should follow the result and is the applicant entitled to a costs order in his favour.

E P B Hoff

Judge

APPEARANCES

APPLICANT: P Hodes SC (with him A Katz)
Instructed by Metcalfe Legal Practitioners, Windhoek.

RESPONDENTS: N Marcus (with him Ms Katjipuka)
Of Government Attorney