REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No A 117/2009

In the matter between:

FERNANDO DA CONCEICAO FERNANDES **APPLICANT**

And

MINISTER OF HOME AFFAIRS AND IMMIGRATION **FIRST RESPONDENT**

THE IMMIGRATION SELECTION BOARD **SECOND RESPONDENT**

Neutral citation: *Fernandes v Minister of Home Affairs* (A117-2009) [2015] NAHCMD 59 (16 March 2015)

Coram: VAN NIEKERK J

Heard: 20 October 2011

Delivered: 16 March 2015

Flynote: **Immigration** - Aliens – Employment permit in terms of section 27 of Immigration Control Act 7 of 1993 – Application for – Refusal of – Review of – Immigration Selection Board bound to reasons originally provided for decision – Reasons provided not indicating misapplication of section 27(2)(b) – Factual basis for decision – Board may by nature of duties and responsibilities and its varied composition acquire relevant knowledge used to make decision – Where such knowledge could not reasonably be expected to be known to applicant the dictates of administrative justice require applicant to be informed of such before decision taken to afford opportunity to controvert – Concept of legitimate expectation discussed – Need not use such in this case to decide basis on which applicant should have been heard.

ORDER

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1. The decision in regard to the applicant's application for renewal of his employment permit taken by the second respondent on 24 February 2009 is hereby reviewed and set aside.

2. The respondents are directed to take all necessary steps to ensure that the second respondent reconsiders the applicant's application for renewal of his employment permit in a lawful and procedurally fair manner within 30 days from date of this order.

3. The second respondent shall consider the applicant's application for a permanent residence permit within 30 days from date of this order.

4. The respondents shall pay the costs of the urgent application and the review application jointly and severally, the one to pay the other to be absolved, such costs to include the costs of one instructing and one instructed counsel.

JUDGMENT

VAN NIEKERK J:

[1] The applicant is a South African citizen who originally entered Namibia in 2000 by virtue of a temporary visitor's visa issued under the provisions of the Immigration Control Act, 1993 (Act 7 of 1993). The second respondent is the Minister of Home Affairs and Immigration, the responsible minister under the Act. The second respondent is the Immigration Selection Board, established in terms of section 25 of the Act and

tasked in terms of section 25(2)(a) with considering all applications for permanent residence permits and employment permits.

[2] The applicant initially sought the following relief as set out in his notice of motion:

> "B1.1 Reviewing and setting aside the decision or resolution by the second respondent taken on or about 24 February 2009 as follows:
>
> *"The application is approved until 31 March 2009, for the applicant to wind up and leave the country, Namibian can take over, is not a field of scarcity."*
>
> B1.2 Declaring the decision and/or resolution as is set out in B1.1 above *ultra vires* and/or unfair and null and void.
>
> B1.3 That the second respondent grant[s] to the applicant a work permit on the terms of the work permit issued to the applicant on 24 February 2009.
>
> B1.4 Reviewing and setting aside the failure by the second respondent to entertain and consider the application by the applicant for permanent residence.
>
> B1.5 That the second respondent entertains and consider[s] the application of the applicant for permanent residence within 30 days from date of this order.
>
> B1.6 That the respondents pay the cost of this application jointly and severally, the one to pay, the other to be absolved.
>
> B1.7 Such further and/or alternative relief as the court may deem fit."

[3] However, at the hearing of this application, the applicant's counsel, Mr *Barnard*, moved only for the relief claimed in prayers B1.1, B1.2, B1.5 and B1.6 of the notice of motion. During the hearing Mr *Khupe*, who appeared on behalf of the respondents, correctly, in my view, conceded that the applicant made out a case for the relief sought in prayer B1.5. As a result of the stances adopted on behalf of both sides, it is not

necessary to deal with all the factual allegations made in the papers or with all the issues of law initially raised.

[4] The following may therefore considered to be the material facts which are either common cause, not disputed or which should be accepted on the basis of the respondents' version. When the applicant came to Namibia during August 2000, he had more than 10 years' experience as a manager in the retail industry gained both in Brazil and South Africa. Although the papers mostly refer to his involvement in the "retail industry" it is apparent that it is specifically in the fresh fruit and vegetable retail and wholesale industry that the applicant's experience lay. At the time he was employed by Mr Fruit and Veg CC, a South African enterprise which did business as a fruit and vegetable wholesaler and retailer. It decided to also do business in Namibia and first opened a store in Walvis Bay. About 6 months later it opened another store in Windhoek, which it intended to use as it head office while planning to expand further in Windhoek and the North. In October 2000 the management in South Africa motivated the applicant's first application for a temporary work permit to manage the Windhoek branch and to train Namibians in his field of expertise. The application was lodged about 6 November 2000.

[5] At first the applicant was granted temporary visitor's visas. His family joined him in Namibia during December 2000 as they were granted temporary residence visas. At some stage he was granted renewable provisional 3 month employment visas until his application for a temporary residence and employment permit could be considered.

[6] On 7 September 2001 the applicant wrote a letter to the then Permanent Secretary of the Ministry of Home Affairs, applying for permanent residence in Namibia on the basis that he was then employed as a warehouse manager for Mr Fruit and Veg CC in Windhoek. It is common cause that the applicant did not complete and submit the proper application forms with all the required documentation. The "application" was therefore considered to be invalid.

[7] At about the same time during 2001 further motivational letters were written by Mr Fruit and Veg CC's management in South Africa in support of the applicant's employment permit. On 6 November 2001 the second respondent considered the applicant's first application for a temporary residence and employment permit. The second respondent refused the application, citing as a reason for the decision that a "Namibian must be employed."

[8] On 8 November 2001 the managing member of Mr Fruit & Veg Windhoek directed an urgent written "appeal" to the second respondent's chairman at the time, requesting that the second respondent re-considers its decision. In the letter the author mentions that the applicant had been out of work for five months because his (temporary) work visa had expired in May 2001. The letter records that the author does "understand and appreciate the concern of the Namibian Authorities that a Namibian citizen would be preferred for this position", but sets out certain reasons why the applicant should nevertheless be granted a work permit "as a matter of urgency to ensure the future operation of our Namibian interests."

[9] Although the Immigration Control Act does not provide for an appeal procedure, the second respondent re-considered the application and on 13 November 2001 granted the applicant a work permit for a period of 12 months until 15 November 2002. The second respondent also granted the applicant's wife a temporary residence permit and their children study permits to be in Namibia during this period.

[10] About 9 October 2002 the applicant applied for a renewal of the temporary residence and employment permit. This, his second application, was rejected on 19 November 2002 because Mr Fruit & Veg CC in Namibia had been liquidated shortly before the application was considered. In the second respondent's letter dated 6 January 2003 the applicant was notified of the decision and he was further notified to leave Namibia within 21 days of receipt of the letter. However, the applicant and his family illegally remained in Namibia. His explanation is that he never received the letter which was posted to his erstwhile employer's postal address.

[11] On 1 January 2003 the applicant purchased a business by the name of Riverside Fruit and Vegetables in Windhoek in which he worked as the sole proprietor in order to make a living for himself and his family. He alleges that he thought that the second temporary residence and work permit application was still pending and that he was allowed to remain in the country pending the outcome. However, it is common cause that he took no steps to inform the second respondent that his employment at Mr Fruit & Veg CC had come to an end because of its demise until about September 2003 when he instructed lawyers to seek an appointment with the Permanent Secretary of Home Affairs to discuss his predicament. After some negotiation between the applicant's lawyers and the Ministry of Home Affairs, officials of the Ministry on 17 December 2003 accepted the applicant's third application for a temporary residence and employment permit to be granted under changed conditions, namely to that of a self-employed business owner.

[12] Due to a failure by the applicant to submit all the relevant documentation the application was considered only on 20 April 2004, when the application was granted for a period of a year until 31 April 2005. The applicant's business was not successful and early in 2005 he started working for Fountain Friendly Supermarket without applying for a change to the conditions upon which the employment permit was issued.

[13] On 17 January 2006 the applicant lodged a proper application for permanent residence, but received no answer or feedback from the second respondent. According to the second respondent there was a long queue of such applications and the file was misplaced on various occasions which resulted therein that the application was never considered.

[14] In September 2006 he made application for a provisional 3 month temporary residence and employment visa pending the outcome of an application (the fourth application – incorrectly referred to in the respondents' answering affidavit as his "third" application) for a 12 month temporary residence and employment permit to be granted subject to changed conditions, namely that he may only work for Fountain Friendly

Supermarket. On 15 September 2006 he was granted a provisional work visa for 3 months and a temporary residence permit was granted in respect of his family.

[15] In April 2007 the applicant made a fifth application for a temporary residence and employment permit (incorrectly referred to in the respondents' answering affidavit as his "fourth" application). In the second respondent's minutes the motivation in respect of the application indicates that the file containing his application for permanent residence and the previous (i.e. the fourth) application for a temporary residence and employment permit had been mislaid on two occasions and that the second respondent apparently did not consider these applications. On 15 May 2007 the second respondent granted the fifth application for a period of 12 months. In its letter of 13 June 2007 to the applicant's employer the second respondent stated that it required the employer to submit a replacement plan in respect of the applicant's employment within the 12 month period.

[16] On 9 May 2008 the applicant submitted his sixth (incorrectly referred to in the respondents' answering affidavit as the "fifth" application) and last application for a temporary residence and employment permit. On 5 November 2008 the employer was reminded in writing to submit the replacement plan. It seems that since the expiry of the previous permit, the applicant remained in the country and continued with his employment. On 2 February 2009 the applicant's employer stated in a letter:

> "We kindly request that an extension on the current visa for Mr Fernandes for another period of twelve months [be granted] while his application for residency is being processed.
>
> We understand that at this time of year all sections of our economy are under pressure as we are all under staffed however we ask you to please help keep our employees within the working law of Namibia with appropriate working visas.
>
> Att[a]ched: Action plan for the understudy for Fernando Fernandes. Mr Rufinus was elected to be Mr Fernandes understudy, but due to personal reason Mr Rufinus resigned and Mr Michael Xoagub was then elected in late 2008. He is now being draw[n] into the new plan that is still being processed.

> Should you require any additional information please do not hesitate to contact me on the above mentioned numbers."

[17] The plan attached purports to be an "Affirmative Action Plan for Period December 2007 to December 2010." It consists of a few words and in my view is not worth the paper on which it is printed.

[18] On 24 February 2009 the second respondent considered the application and refused to grant it. In a letter, signed by the Chairman of the second respondent, and directed at the applicant's employer, the relevant part reads as follows:

> "The application for renewal or employment permit was tabled before the Immigration Selection Board on the 24 February 2009, and resolved as follows:
>
> The application is approved until 31 March 2009, for the applicant to wind up and leave the country, Namibian can take over, is not a field of scarcity."

[19] The letter is dated 26 February 2009, but the envelope in which it was posted bears the Ministry's official stamp dated 16 March 2009. The applicant received the letter only on 25 March 2009.

[20] The short notice provided to the applicant to wind up his affairs and leave the country prompted an urgent application for certain relief pending the outcome of these review proceedings. The urgent application was settled and the interim relief claimed was provided by way of a Court order dated 9 April 2009, in terms of which the applicant and his family were permitted to remain in Namibia while he continued his employment with his employer. However, at a certain stage the second respondent refused to provide a further employment permit because it interpreted the interim Court order in such a way that it concluded that the obligation to do so fell away. It is common cause that at the stage when the review application was heard, the applicant's application for a permanent residence permit was still pending.

[21] The respondents opposed the application for review. Their main answering affidavit is deposed to on their behalf by the person who was the Permanent Secretary of Home

Affairs and Immigration and chairperson of the second respondent during the period about April 2005 to 2 May 2010.

[22] After hearing the review application, judgment was reserved but further interim relief was provided to ensure that the applicant, pending the outcome of the case, was able to continue his employment and to protect him from being deemed to be a prohibited immigrant in terms of section 30 and Part VI of the Immigration Control Act in relation to conduct arising from facts or circumstances which reasonably may fall within the ambit of the dispute in the review application.

The relevant provisions of the Immigration Control Act

[23] Section 26 of the Immigration Control Act provides for applications for permanent residence permits. Section 26(3) provides as follows:

> "(3) The board may authorize the issue of a permit to enter and to be in Namibia for the purpose of permanent residence therein to the applicant and make the authorization subject to any condition the board may deem appropriate: Provided that the board shall not authorize the issue of such a permit unless the applicant satisfies the board that-
>
> (a) he or she is of good character; and
>
> (b) he or she will within a reasonable time after entry into Namibia assimilate with the inhabitants of Namibia and be a desirable inhabitant of Namibia; and
>
> (c) he or she is not likely to be harmful to the welfare of Namibia; and
>
> (d) he or she has sufficient means or is likely to earn sufficient means to maintain himself or herself and his or her spouse and dependent children (if any), or he or she has such qualifications, education and training or experience as are likely to render him or her efficient in the employment, business, profession or occupation he or she intends to pursue in Namibia; and
>
> (e) he or she does not and is not likely to pursue any employment, business, profession or occupation in which a sufficient number of persons are already engaged in Namibia to meet the requirements of the inhabitants of Namibia; and

(f) the issue to him or her of a permanent residence permit would not be in conflict with the other provisions of this Act or any other law; or

(g) he or she is the spouse or dependent child, or a destitute, aged or infirm parent of a person permanently resident in Namibia who is able and undertakes in writing to maintain him or her."

[24] Section 27 deals with applications for employment permits and provides as follows:

"**27 Application for employment permits**

(1) The board may, subject to the provisions of subsection (2), on application of any person made on a prescribed form, authorize the Chief of Immigration to issue to such person an employment permit-

(a) to enter Namibia or any particular part of Namibia and to reside therein;

(b) if he or she is already in Namibia to reside in Namibia or any particular part of Namibia,

for the purpose of entering or continuing in any employment or conducting any business or carrying on any profession or occupation in Namibia during such period and subject to such conditions as the board may impose and stated in the said permit.

(2) The board shall not authorize the issue of an employment permit unless the applicant satisfies the board that-

(a) he or she has such qualifications, education and training or experience as are likely to render him or her efficient in the employment, business, profession or occupation concerned; and

(b) the employment, business, profession or occupation concerned is not or is not likely to be any employment, business, profession or occupation in which a sufficient number of persons are already engaged in Namibia to meet the requirements of the inhabitants of Namibia; and

(c) the issue to him or her of an employment permit would not be in conflict with the other provisions of this Act or any other law.

(3) The board may, with due regard to the provisions of subsection (2), from time to time extend the period for which, or alter the conditions subject to

which, such permit was issued under subsection (1), and a permit so altered shall be deemed to have been issued under that subsection.

(4)(a) If the board intends issuing an employment permit under subsection (1) to a person for that purpose or subject to conditions, he or she may, in order to ensure that the purpose of his or her residence and the conditions under which the permit was issued are observed or complied with, require that person, before issuing the permit to him or her, to deposit with the Chief of Immigration an amount fixed by the board, not exceeding an amount determined by the Minister by notice in the Gazette in general, or to lodge with the Chief of Immigration to his or her satisfaction, in the prescribed form, a guarantee for the amount concerned.

(b) An amount or guarantee deposited or lodged with the Chief of Immigration in terms of paragraph (a) shall, subject to paragraph (c), be refunded to the person concerned or cancelled on his or her departure from Namibia, as the case may be.

(c) If such person acted in conflict with the purpose for which, or failed to comply with a condition subject to which, the employment permit was issued to him or her under subsection (1), the Minister may order that the amount deposited with the Chief of Immigration be forfeited to the State or, if a guarantee was lodged with the Chief of Immigration that the amount payable in terms of the guarantee be recovered for the benefit of the State.

(5) When the board authorizes the issue of such an employment permit to any person under subsection (1), it may authorize in that permit the spouse and dependent child of that person, if the spouse or child accompanies or resides with him or her, to enter and reside in Namibia with that person.

(6) Any person to whom an employment permit was issued under subsection (1) or who was authorized in that permit under subsection (5) to reside with that person, and who remains in Namibia after the expiration of the period or extended period for which, or acts in conflict with the purpose for which, that permit was issued, or contravenes or fails to comply with any condition subject to which it was issued, shall be guilty of an offence and on conviction be liable to a fine not exceeding N$12 000 or to imprisonment for a period not exceeding three years or to both such fine and such imprisonment, and may be dealt with under Part VI as a prohibited immigrant."

The merits of the applicant's applications for an employment permit

[25] The applicant and the respondents devote a considerable proportion of their allegations and counter-allegations in the affidavits to the merits of the applicant's

various applications for employment permits over the years, including the last application which was effectively refused. Presumably the reason for this is because the applicant initially claimed substantive relief in the sense that he wanted the Court to order the second respondent to grant him a work permit on certain terms. However, as the applicant eventually did not move for this relief, the relevance of the merits of these applications fades away. Moreover, the remainder of the relief sought is of such a nature that the merits of his last application for an employment permit need no consideration, except in passing. The allegations in this regard will therefore not be traversed, except where otherwise necessary.

On which reasons must the review application be assessed?

[26] Mr *Barnard* submitted that the reasons provided by the second respondent for its decision to reject the application are "…Namibian can take over, is not a field of scarcity…". In paragraph 56 of the answering affidavit the deponent confirms that the basis for the decision appears from the second respondent's minutes dated 24 February 2009 attached as "SG32". This document contains, *inter alia*, a written motivation drawn up by an official and reads:

> "Abovenamed applicant is still employed by the same shop [Fountain Friendly Supermarket, Baines Centre, Pionierspark]. His permit was granted for 12 months on condt [condition] to submit a replacement strategy. See motivation letter and Affirmative action plan for period Dec. 2007 to Dec. 2010.
>
> RWP [renewal of work permit] is requested.
>
> Your decision pls [please]."

[27] The decision of the second respondent was that the work permit be renewed for one month "to wind up and leave the country, Namibian can take over, is not a field of scarcity." It was further noted that the applicant had to leave the country by 31 March 2009. The second respondent did not use the opportunity provided by rule 53(1)(b) to supplement or correct the very brief reasons noted in the minutes and echoed in the letter of 26 February 2009. However, in the respondents' answering affidavit several

other reasons are cited why the work permit was not renewed, e.g. because the second respondent's requirements for a replacement plan were not sufficiently addressed; and because the second respondent was not satisfied that an adequate search had been made for a Namibian to replace the applicant in his position, for example by advertising in national newspapers. On the face of it, these seem to be cogent reasons, but this does not avail the respondents for the following reasons.

[28] Mr *Barnard* submitted that the second respondent is bound by the reasons initially provided and that the application for review should be evaluated on the basis of those reasons. Mr *Khupe* conceded this point during argument. In *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment & Tourism* 2010 (1) NR 1 (SC) the Supreme Court stated (at 10F-G):

> "It may also be argued persuasively that the implication of rule 53 was that if reasons were given by a decision-maker at the time of notifying the applicant of the decision, the reasons so given by such decision-maker as appears (*sic*) from the record of the decision, should bind the respondent in an application for review."

[29] Bearing this statement in mind, it seems to me that, in the circumstances of this case, Mr *Khupe's* concession is well made. I shall therefore adjudicate the review application on the basis of the reasons provided in the second respondent's letter dated 26 February 2009.

<u>First ground of review: The second respondent's decision is arbitrary and therefore *ultra vires* because it misapplied or misunderstood the provisions of section 27(2)(b)</u>

[30] Counsel for the applicant submitted that the reasons as provided indicate that, while the second respondent appears to have attempted to follow the provisions of section 27(2)(b) of the Immigration Control Act, it did not correctly apply the requirements of the section. The applicant's heads of argument accurately reflect his oral submissions as follows:

> "8. ……

8.1 The question is not whether the position which the applicant seeks to fill is scarce or not. The question is whether there are enough people employed in such a position to meet the needs of the inhabitants of Namibia.

8.2 It is not a requirement that a Namibian should fill a position. The Act does not require this. The question is whether the needs of the inhabitants of Namibia are fulfilled. The officials of the second respondent missed the point.

9. The decision by the second respondent after dealing with the matter by applying the wrong criteria has the result that the officials of the second respondent did not apply their minds to the true issue. The decision was therefore arbitrary."

[31] Mr *Khupe*, on the other hand, submitted that the second respondent acted in accordance with the requirements of section 27(2)(b) when it refused the application and that the second respondent was not satisfied that the requirements of section 27(2)(b) were met.

[32] In dealing with both counsel's submissions it is useful to consider the meaning and purpose of section 27(2). In *Chairperson of the Immigration Selection Board v Frank* 2001 NR 107 (SC) the Supreme Court was concerned with an appeal in a review application concerning an application to the second respondent for a permanent resident permit in terms of section 26 of the Immigration Control Act. Section 26(3) has some similarities with section 27(2) and in certain respects, identical provisions. For purposes of this discussion it suffices to quote certain of sections 26(3)'s provisions again:

> "(3) The board may authorize the issue of a permit to enter and to be in Namibia for the purpose of permanent residence therein to the applicant and make the authorization subject to any condition the board may deem appropriate: Provided

that the board shall not authorize the issue of such a permit unless the applicant satisfies the board that-

(a) – (c) ……; and

(d) he or she has sufficient means or is likely to earn sufficient means to maintain himself or herself and his or her spouse and dependent children (if any), or he or she has such qualifications, education and training or experience as are likely to render him or her efficient in the employment, business, profession or occupation he or she intends to pursue in Namibia; and

(e) he or she does not and is not likely to pursue any employment, business, profession or occupation in which a sufficient number of persons are already engaged in Namibia to meet the requirements of the inhabitants of Namibia; and

(f) – (g)…… ."

[33] Although the majority judgment by O'Linn AJA (in which Teek AJA, as he then was, concurred) indicates certain points of agreement and disagreement with the minority judgment by Strydom CJ, it would appear that on the issues mentioned hereunder, there was no disagreement (cf. majority judgment at p110 and minority judgment at p172E-173F):

[34] The learned Chief Justice stated (at 172E-173F):

"Section 26 makes it clear that the appellant does not have an absolute discretion. Subsections (3)(a), (b), (c), (d), (e) and (f) contain certain requirements which an applicant for a permanent residence permit must satisfy the appellant before a permit may be issued. If the Board is not so satisfied it has no choice but to refuse the application.

In dealing with s 26, the Court *a quo* went one step further. It concluded that where an applicant for a permanent residence permit satisfies the Board as

aforesaid the Board is obliged to grant the permit. At 326 of the judgment the Court *a quo*, referring to the affidavit of Mr Simenda, found as follows:

> 'I firstly draw attention to para 9.2 of his affidavit where he says:
>
> ''9.2 There was also no specific information before the Board that adversely affected the Applicant's application.''
>
> From this it is apparent that there were no grounds whatsoever for refusing the applicant. This statement of Mr Simenda is sufficient to justify this court setting aside the Board's decision without any further ado.'

The Court *a quo* then dealt with the reasons given by the appellant for refusing to grant the permit set out in para 10.1, and 10.2 of Simenda's affidavit. In para 10.2 the appellant stated that even if there was at present a shortage of persons with the qualifications, skills and experience of the first respondent the appellant took into account that more and more Namibian citizens will in the years to come acquire the necessary qualifications etc and that these citizens will have to be accommodated in the limited labour market of Namibia.

Dealing with this statement the learned judge *a quo* found that the appellant, in refusing the application for a permanent residence permit believed that it was acting in terms of s 26(3)(e) of the Act whereas s 26(3)(e) only refers to persons already engaged in Namibia in any employment, business, profession or occupation. Therefore the appellant could not take into consideration what the position may be in the future.

I find myself unable to agree with this interpretation of s 26. There is in my opinion no indication in the section itself which would limit the exercise of a discretion by the appellant to the absence of the requirements set out in ss (3)(a)-(f). In such an instance the appellant would normally exercise no discretion at all. All that would be required of it, is to determine in each instance whether the requirements set out in ss (3)(a)-(f) were complied with or not. If they were complied with, the Board is obliged to issue a permit. If they were not complied with, the Board is obliged to refuse a permit.

Furthermore, the fact that ss (3) begins with the words 'the Board *may authorize the issue of a permit* ...' (my emphasis) is clear indication that the appellant has a

> wide discretion once the circumscribed part, set out in ss (3)(a) to (f), has been satisfied. This interpretation also conforms with the other provisions of the Act. See in this regard s 24 of the Act which prohibits the entry or residence in Namibia of non-citizens, with a view to permanent residence unless such person is in possession of a permanent residence permit. Also in regard to temporary residence no person is allowed to enter or reside in Namibia without being in possession of an employment permit, issued in terms of section 27, or a student's permit, issued in terms of s 28, or a visitor's entry permit, issued in terms of s 29. See further in general ss 6, 7, 8, 9, 10, 11 and 12 of the Act."

[35] Clearly the same remarks may be made in relation to the discretionary nature of the powers vested in the second respondent by section 27.

[36] Furthermore, O'Linn AJA stated as follows (at p112I-J):

> "It is also necessary to emphasize that the function exercised by the Board under s 26(3)(e) as well as under s 27(2)(b), is tied to the objective of serving the inhabitants of Namibia and whether or not the application of an alien is granted is consequently measured not against the interest and requirements of an alien or immigrant, but against the requirements and interests of the inhabitants of Namibia."

[37] In *casu* the reasons provided by the second respondent are very brief and perhaps not elegantly expressed. Nevertheless, they seem to me to convey that the second respondent had the requirements of section 27(2)(b) in mind when it considered and, effectively, refused the application. In considering the formulation and meaning of the second respondent's reasons the following passage in Baxter, *Administrative Law,* (1st ed), p742 should be borne in mind (insertions in square brackets supplied from the footnotes):

> "When reasons are required it is not sufficient to furnish …….. a regurgitation of the empowering clause of the statute. In most instances the courts have not been prepared to tolerate such evasion. As Tindall J put it in *Tala v Village Council of Wolmaransstad* [1927 TPD 425,429]: 'Requiring the reasons for refusal seems to me a different thing from merely requiring the local authority to

> state which of the specified grounds the refusals was based on.' In *Marshall Cavendish Ltd v Publications Control Board* [1969 (4) SA 1 (C)] Diemont J criticized the board for its skimpy reasons, stating that '[i]t is not enough that the words of the statute are recited back to the publisher….".

[38] Having said this, I remind myself that the applicant's complaint is not that the reasons furnished are uninformative or inadequate. It is that the reasons as expressed convey a misunderstanding or misapplication of the requirements of section 27(2)(b).

[39] To sum up, the onus is on the applicant to satisfy the second respondent that his employment is not or is not likely to be any employment in which a sufficient number of persons are already engaged in Namibia to meet the requirements of the inhabitants of Namibia. If he fails to do so, the employment permit may not be granted. However, even if the applicant does satisfy the second respondent in this and all other respects as required by section 27(2), the second respondent still has a wide discretion whether or not to grant the permit.

[40] If a sufficient number of persons are already engaged in a particular field of employment to meet the requirements of the inhabitants of Namibia, I think it would be a reasonable description of this state of affairs to say that there is not a scarcity (or a shortage) of persons or employees engaged in that particular field. To put it differently and perhaps more concisely, one could describe the field of employment as not being a "field of scarcity." I do not think that by using the words "is not a field of scarcity" the second respondent intended to convey anything else. There is no indication that the second respondent was unaware of its task in terms of section 27. The second respondent did not say that the "position" of store manager is not a "scarce position". There is to my mind no reason to assume that what the second respondent had in mind was that the "position" as such "is not a position of scarcity". These are the words of the applicant's counsel, not the words of the second respondent. In any event, clearly the relevant issue is not whether such positions are scarce, but rather whether the number of persons already engaged, or likely to be engaged, in such, or similar, positions, is sufficient or not.

[41] Mr *Barnard* further submitted that section 27(2)(b) does not require that a Namibian should fill the position, but that the question is whether the needs of the inhabitants of the country are being met. Learned counsel is correct, but in my view the second respondent, by stating, “Namibian can take over” only meant to convey, essentially, that there are Namibians available to fill this post. This statement actually conveys a more compelling reason to refuse to renew the applicant’s work permit. The Act merely requires the second respondent to consider whether the applicant has satisfied it that there is not or is not likely to be a sufficient number of “persons”, who need not be Namibians, already engaged in that field of employment to meet the requirements of the country’s inhabitants. Clearly the second respondent in this case was not so satisfied. However, it did not state that the applicant did not satisfy it on the requirement set out in section 27(2)(b) because, for example, there were deficiencies in the applicant’s motivation because, say, the applicant’s employer did not first advertise the position in any national newspaper or, because, say, the services of an employment agency were not utilized to search for possible Namibian candidates or determine the availability of persons in that field of employment. It seems to me that what the second respondent in effect found was that the applicant did not satisfy it on the requirement set out in section 27(2)(b) because the second respondent was of the view that there were indeed Namibians available to fill the applicant’s position. It made a statement of fact, alternatively, came to the conclusion, namely that the field of employment is not a field of scarcity and a Namibian can take over. Provided that this statement or conclusion were justified, it seems to me that the second respondent’s application of section 27(2)(b) is in order.

[42] In conclusion, having considered the submissions advanced on behalf of the applicant, I am not persuaded that the reasons as formulated by the second respondent convey the lack of understanding of the requirements of section 27(2)(b) contended for.

<u>The second ground of review: The factual basis for the decision</u>

[43] Mr *Barnard* had another string to his bow. He submitted that the record shows that the second respondent made no factual enquiry; that there are no facts minuted on

record upon which the decision could have been reached; and that there are no facts underlying or supporting the decision of the second respondent. As such, he submitted, the decision was null and void. Counsel relied on the following passage in *Kaulinge v Minister of Health & Social Services* 2006 (1) NR 377 (HC) 384B-D where Mainga, J (as he then was) stated:

> "In *Standard Bank of Bophuthatswana Ltd v Reynolds NO and Others* 1995 (3) SA 74 (BG) (1995 (3) BCLR 305) Friedman JP, referring to *W C Greyling & Erasmus (Pty) Ltd v Johannesburg Local Road Transportation Board and Others* 1982 (4) SA 427 (A); and *SA Freight Consolidators (Pty) Ltd v Chairman, National Transport Commission and Another* 1988 (3) SA 485 (W), said at 89E:
>
> > '(O)ur courts have held where a decision-maker takes a decision unsupported by any evidence or by some evidence which is insufficient reasonably to justify the decision arrived at, or where the decision maker ignores uncontroverted evidence which he was obliged to reflect on, the decisions arrived at will be null and void.' "

[44] I do not understand Mr *Khupe* to have any quarrel with the authority on which is relied. However, he submitted that there were adequate facts before the second respondent at the relevant time to properly make the decision against the renewal of the employment permit. Counsel did not, however, elaborate to state what these facts were.

[45] When one confines the analysis of the facts to the reasons advanced in the second respondent's letter dated 24 February 2009, the answering papers do not mention specific facts (except what is referred to as "notorious" facts, with which I shall deal below). All that is stated is that the second respondent allegedly rejected the application for the last employment permit "as a result of the applicant's failure to satisfy the 2nd respondent that the employment concerned was not one in which a sufficient number of persons were already engaged in Namibia to meet the requirements of the inhabitants of Namibia as required by Section 27 (2) (b) of the Immigration Act." (at paragraph 57). Clearly these allegations do not provide evidence of any facts. In my view Mr *Khupe's* main submission can therefore not be upheld.

[46] In the alternative, counsel for the second respondent placed reliance on what the second respondent alleged, were notorious facts. It is convenient to consider the respondents' allegations in this regard by setting out the relevant allegations and counter allegations in full.

[47] In paragraph 9 of the founding affidavit the applicant states: "The allegation by the second respondent that my position is not a field of scarcity it totally wrong. Indeed, somebody able to fulfil my functions is very scarce……..". In paragraph 68.6 of its answering affidavit the second respondent states in response that –

> "[i]t was and still is a notorious fact that the job of manager of a retail store in Namibia in 2009 to this date is not a scarce skill employment-wise. This was and is still a clear fact to the second respondent hence the decision refusing to renew the applicant's permit. ……. A sufficient number of Namibian nationals simply have the necessary academic qualifications and relevant experience to fill vacancies of that nature whenever (wherever) they occur."

[48] In support of the view expressed in paragraph 68.6 the second respondent relies on an affidavit by Mr Usiku, Namibia's Equity Commissioner appointed in terms of section 6(1) of the Affirmative Action (Employment) Act, 1998 (Act 29 of 1998). This affidavit is dated 6 August 2010 which means that it was obtained after the last application for an employment permit was rejected. The second respondent submitted that this affidavit is *ex post facto* confirmation of the facts considered by the second respondent to be notorious. Of course, if there is an evidential basis for these facts, reliance need not be based on the principle that the Court may take judicial notice of facts which are notorious. For purposes of this discussion on notorious facts, I shall therefore ignore Mr Usiku's affidavit, but return to it later.

[49] In paragraph 90 the respondents answer to paragraphs 6 and 7 of the applicant's supplementary affidavit in which he stated:

> "6. I must stress that the assumption by the Honourable Permanent Secretary in his letter dated 26 February 2009 that *"… Namibian can take over, is not a field of scarcity"* is totally incorrect and unfounded. I have

perused the record and cannot find any facts upon which such a conclusion can possibly be based. The truth is, the factual position has not changed since I first came to Namibia in 2000. There are of course many more retail stores and in fact the need for people of my experience has become greater.

7. If there are facts available to the respondents in coming to their decision that the position I fulfil is not a field of scarcity, I am not aware of these facts and no such facts were made available to me in order that I could respond to it and refute it."

[50] In paragraph 90 of the answering affidavit the respondent state as follows:

"90.

90.1 The rehashed allegations on the scarcity of the applicant's job are disputed.

90.2 The respondents will rely on the supporting affidavit of Vildard Thomas Usiku attached hereto to refute the applicant's scarcity allegations. Moreover the Board by its very constitution is made out of persons aware of notorious facts on the Namibian labour market. From my long period as the chairperson of the 2nd respondent my Board members consisted among others, of an official from the Ministry of Labour and Social Welfare, the Ministry of Trade and Industry, the Ministry of Education and the Ministry of Justice.

90.3 The second respondent is still currently similarly constituted and consequently is capable of properly undertaking its functions in terms of the Namibian law, in particular Section 27 of the Immigration Act."

[51] In this regard counsel further submitted that the second respondent, by its very constitution, is in a position to have knowledge of such facts and to take them into account when considering applications for employment permits. Counsel relied on what was stated in *Chairperson of the Immigration Selection Board v Frank, supra*, where

O'Linn AJA, writing for the majority, stated (at p117C-118B)(the insertions between square brackets are supplied):

> "The Board, by the very nature of its duties and responsibilities, acquire in the course of time certain knowledge eg regarding the number of volunteers coming into Namibia through organizations rendering development aid to Namibia, and requiring temporary work permits for that purpose. It is also a notorious fact that there is a University of Namibia and various Technicons turning out people who acquire degrees and certificates. It is also not inconceivable that individual members of the Board have acquired certain knowledge through their own training and/or experience. Furthermore, the Board is not a Court. The Board may certainly make use of hearsay, even hearsay in the form of a letter or statement by Mr Wakolele [the then Permanent Secretary of Information and Broadcasting] or Mr Mbumba [the then Minister of Finance]. There is no doubt that the Board also had to consider the information and recommendations contained in such letters. It could not arbitrarily ignore it or reject it.
>
> Administrative authorities are entitled to rely upon their own expertise and local knowledge in reaching decisions. *Loxton v Kenhardt Liquor Licensing Board* 1942 AD 275 at 291-292; *Clairwood Motor Transport Co Ltd v Pillai and Others* 1958 (1) SA 245 (N) at 253G-254A.
>
> It must also be obvious that such bodies can take notice of facts which are notorious. So for example the Board and a considerable percentage of the public, will know that Namibia has a university which has for years, prior to independence as well as thereafter, turned out graduates with BA degrees. Similarly it is general knowledge that there have been teachers training colleges before Namibian independence as well as thereafter, turning out qualified teachers; and technical colleges, turning out academically qualified persons in many fields. And as far as the allegations of Simenda in para 10.2 of his affidavit are concerned, the assumption made about the 'next few years' is certainly a reasonable assumption based on wellknown and even notorious facts.
>
> Furthermore, administrative tribunals can rely on hearsay, to a much greater extent than Courts of law. But, in a case where such knowledge or hearsay could

> not reasonably be expected to be known to an applicant, the dictates of administrative justice may make it necessary to apprize the applicant for a work and/or residence permit of such knowledge or information to enable such applicant to controvert it. (*Foulds v Minister of Home Affairs and Others* 1996 (4) SA 137 (W) at 147B-149F.)
>
> On the other hand it is trite law that administrative bodies irrespective of whether their powers are 'quasi-judicial' or 'purely administrative', need not notify an applicant beforehand of every possible reason for coming to a particular conclusion. (*Minister of the Interior and Another v Sundarjee Investments (Pty) Ltd* 1960 (3) SA 348 (T) at 351.)"

[52] In my view it is clear from the passages quoted that if reliance is placed on notorious facts, these should be facts which are notorious in the sense that they are generally well known to any reasonably informed person, which includes the second respondent and the Court. Facts which have become known to the second respondent by virtue of its composition and work may not necessarily be notorious in the sense that the Court may take judicial notice of them. While I think that it may very well be notorious that there are many retail stores in Namibia which are managed by Namibians, and that there are institutions of learning which educate and train Namibians to perform managerial functions in the retail business, I do not think it is necessarily notorious that there are a sufficient number of Namibians available to manage supermarkets in the country or that there is no shortage of such persons to fill all vacancies in this field of employment.

[53] Having said this, I do accept that the second respondent may, by the very nature of its duties and responsibilities and its varied composition, in the course of time acquire knowledge about the Namibian labour market, as the second respondent alleged. I think it is reasonable to assume that this knowledge would extend to retail business in Namibia, even specifically the fresh produce and supermarket business, as well as its employment requirements at a managerial level.

[54] However, as was stated above in the *Frank* case with reference to *Foulds v Minister of Home Affairs and Others* 1996 (4) SA 137 (W) at 147B-149F (at 117I - 118A) in a case where such knowledge could not reasonably be expected to be known to an applicant, the dictates of administrative justice may make it necessary to apprize the applicant for a work permit of such knowledge or information to enable such applicant to controvert it. It is to this next issue that I now turn.

[55] Although the applicant alleges boldly that he is able to refute the statement or conclusion of the second respondent that his employment is not in a field of scarcity and that a Namibian can take over and although the applicant has been in that field of employment for some time and thereby might have gained some applicable knowledge relevant to that field of employment, I do not think that it can be reasonably expected of the applicant to have the same knowledge as the combined members of the second respondent who represent different ministries and deal with numerous applications for work permits on a regular basis. If it was indeed well known to the second respondent that there are sufficient Namibians available to fill the applicant's position, it should be able to mention more specific facts or information upon which this knowledge is based. It would seem that the second respondent based its conclusion on unmentioned facts or assumptions which are based on the knowledge gained by its members over time and by virtue of their work. I think it is incumbent upon them inform the applicant of such facts, assumptions and knowledge to afford him the opportunity to controvert it (see *Chairperson of the Immigration Selection Board v Frank, supra*, at 175F – 176A). I think the applicant should have been given the opportunity to make representations regarding this conclusion before the final decision was made.

[56] In this regard it cannot be ignored that the applicant over the years made six applications for employment permits. Although the first was initially rejected, because the second respondent was of the view that "a Namibian must be appointed" it was granted "on appeal" a week later after the applicant's employer provided what is, in my view, slightly more substantial motivation than it did at first.

The second application was rejected, not because the applicant failed to comply with the requirements of section 27(2)(b), but because the business of the employer was liquidated. The third application to work in and manage his own business was granted. The fourth application to change the condition of the previous permit to enable him to work for someone else, was mislaid. The fifth application for the same employment permit was granted without any condition, other than that he was permitted to work only for that employer. As far as the employer was concerned, it was required to submit a replacement plan within the period of validity of the permit. On numerous occasions the second respondent was willing to regularise the applicant's status. Numerous provisional 3 month work visas were granted on various occasions. I take note thereof that these visas were usually granted pending consideration of the long term employment permit applications and that this was done for the convenience of all relevant parties. I shall assume, without deciding, in favour of the respondents that different considerations apply to the granting of these visas. However, what is clear is that the second respondent must have been satisfied on the various motivations provided by the applicant and/or his employers that he was not or was not likely to be in any employment in which a sufficient number of persons are already engaged to meet the requirements of the inhabitants of Namibia, otherwise the granting of all those permits was illegal. This the second respondent did not concede and I am certainly not prepared on the available facts to assume that it was so.

[57] In this regard I digress for the moment to take note of Mr *Khupe's* submissions that the motivations provided by the applicant and his employers over the years did not meet the requirements set by section 27(2)(b). While I agree that the motivations do generally appear weak on the face of it, it should be remembered that the decisions to grant the previous permits were never motivated or placed under scrutiny as in the case of the last refusal. Had this been done it might very well have become evident why the motivations, weak as they appear to be, were considered to be persuasive. It is also relevant to note that the deponent of the main answering affidavit was not the chairperson of the second respondent at the time these two

applications were granted and as there appear to be no detailed minutes setting out the second respondent's reasoning or discussion at the time, there is no actual evidence of what the relevant considerations were. There might have been many cogent considerations, including the economic climate at the time, which could have given rise to an approach by the second respondent that it required very little motivation or evidence to be persuaded that the statutory requirements have been met. Reasonable considerations which come to mind are e.g. the fact that the applicant's first employer was a foreign entity investing in Namibia and providing jobs to Namibians; that the employer was seeking to expand in a major way; and that it was planning to transfer skills to locals. In regard to the employment permit to be self-employed in his own business, it might very well have been a consideration that the applicant had invested his own capital in acquiring a business.

[58] In regard to the employment permit granted in relation to Fountain Friendly (at a time when the deponent was the chairperson of the second respondent) the motivation by the employer was particularly weak. All this employer stated was that a temporary work permit was requested for the applicant "as he is a great asset to the business". Nevertheless the second respondent granted the permit for 12 months. Again it seems that the second respondent was prepared to be easily persuaded that the statutory requirements were met because it appears to have been a weighty consideration that the applicant would be involved in executing the replacement plan required of the employer. This follows from what the second respondent states in paragraph 89.2 of the answering affidavit, namely that "the replacement plan was an important requirement designed to ensure transfer of skills possessed by foreign employment permit holders."

[59] I also take note of Mr *Khupe's* submissions concerning the statements in the answering affidavit to the effect that the applicant makes bald allegations about the "so-called" scarcity of his skills and experience and about the doom and gloom which will descend on his employer's business should he not fill the position of store manager. My overall impression of the applicant's allegations in this regard is that

this aspect of his case is thin in substance and padded by puffery. However, as I said before, the merits of the applicant's employment application is not in issue as substantive relief was no longer claimed during argument and as the relevant review grounds are not directly concerned with the merits.

[60] In conclusion, I agree with Mr *Barnard* that something must have changed for the second respondent to refuse the permit on the last occasion. In my view fair administrative action as contemplated in Article 18 of the Constitution on the part of the second respondent required that the applicant be informed of this change in order for him to deal with it. Even if this change is something like the second respondent having raised the threshold at which it is satisfied that the requirements of section 27(2)(b) have been met when compared to earlier applications, the second respondent should convey what is required in advance (e.g. proof of advertisements by the employer in national newspapers, information about the number and nationality of any other applicants for the position and why they were considered unsuitable, etc), or it should at least give the applicant a chance to refute its conclusion that that threshold has not been crossed.

[61] Mr *Barnard* went further and submitted that the fact that the decision on the application for permanent residence was pending and the fact that previous work permits had been granted created a legitimate expectation with the applicant that the work permit will be granted and not refused unless he was afforded an opportunity to be heard.

[62] I do not think it is necessary to use the concept of a legitimate expectation to decide on the submission that the applicant should have been heard. The Supreme Court in *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC) (at 771B-D) distinguished between two situations which it considered "clear examples" of the common law review ground which arises when "a decision-maker failed to apply the *audi alteram* rule, when in certain situations reason and/or practice dictates that the rule should apply." These two situations are:

"(i) Where the decision-maker is privy to certain relevant information of which the applicant is ignorant and the said information is used against the applicant, the applicant must be informed by or on behalf of the decision-maker of such information. *Chairperson of the Immigration Selection Board v Frank and Another* 2001 NR 107 (SC).

(ii) When circumstances are such that the applicant would have a reasonable expectation or legitimate expectation of succeeding in the application, the *audi alteram partem* rule must be applied."

[63] O'Linn AJA then states (at 771D-772):

"I agree with the manner in which Mainga J set out the law relating to this principle, part of which I repeat:

> 'In *Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 756E - 757C Corbett CJ said the following concerning legitimate expectation:
>
> > "The concept of a legitimate expectation, as giving a basis for challenging the validity of the decision of a public body on the ground of its failure to observe the rules of natural justice was given the stamp of approval by the House of Lords in *O'Reilly v Mackman and Others and other cases* [1982] 3 All ER 1124 (HL) at 1126j - 1127a."
>
> It is clear from these cases that in this context "legitimate expectations" are capable of including expectations which go beyond enforceable legal rights. Provided they have some reasonable basis (*Attorney General of Hong Kong* case *supra* at 350c). The nature of such a legitimate expectation and the circumstances under which it may arise were discussed at length in the Council of Civil Service Unions case supra. The following extracts from the speeches of Lord Fraser and Lord Roskill are of particular relevance:
>
> > "But even where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and, if so, the Courts will protect his expectation by judicial review as a matter of public law . . . Legitimate or reasonable expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue."

Per Lord Fraser at 943J - 944A.

"The particular manifestation of the duty to act fairly which is presently involved is that part of the recent evolution of our administrative law which may enable an aggrieved party to evoke judicial review if he can show that he had 'a reasonable expectation' of some occurrence or action preceding the decision complained of and that that 'reasonable expectation' was not in the event fulfilled." I

Per Lord Roskill at 954e.

After indicating that the phrases "reasonable expectation" and "legitimate expectation" were to be equated and having expressed a preference for the latter. Lord Roskill continued (at 954g):

"The principle may now be said to be firmly entrenched in this branch of the law. As the cases show, the practice is closely connected with 'a right to be heard'. Such an expectation may take many forms. One may be an expectation of prior consultation. Another may be an expectation of being allowed time to make representations."

See also *Tettey and Another v Minister of Home Affairs and Another* 1999 (3) SA 715 (D) at 726C - D.'"

[64] O'Linn AJA then continued to analyse the provisions of Article 18 of the Constitution and concluded (at 773B-E) that it did not confine itself to procedurally fair administrative action,-

"but provided generally that -

'Administrative bodies and administrative officials *shall act fairly and reasonably* . . . and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a competent Court or Tribunal.'

[26] The general principle of a duty to act fairly and reasonably supplements the common law and any relevant statute, but obviously any common law or statute in conflict with this provision will be unconstitutional.

[27] The principle of legitimate or reasonable expectation has been overtaken by the aforesaid general principle in art 18, but remains a specific concept which can and should be used as a tool in the implementation of the aforesaid wide and undefined principle of acting fairly and reasonably. The same applies to the

> principle of the common law discussed above, that the *audi alteram partem* rule should be applied when an administrative tribunal or official is privy to information of which an applicant would probably not have knowledge. The concept also applies when the administrative institution or official adopts a new policy of which the applicant is unaware.
>
> [28] Article 18 makes no difference, as did the common law, between quasi-judicial and purely administrative decisions."

[65] In *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment & Tourism* 2010 (1) NR 1 (SC), the Supreme Court stated in similar vein (at p12A-D):

> "The ratio of this 'doctrine of legitimate expectation' is consistent with the thinking and principles contained in art 18 of the Namibian Constitution. The said doctrine, as well as art 18, is based on reason and justice in the exercise of administrative discretion. The doctrine was overtaken by the later incorporation of art 18 into the Namibian Constitution. Nevertheless, the doctrine can serve a useful purpose in supplying some specifics to the broad and general norms set out in art 18 and be used as a tool for the implementation of art 18. As such it should be applied by our courts in conjunction with art 18.
>
> Although neither art 18 nor the decisions of the High Court and Supreme Court of Namibia require the application of the *audi alteram partem* rule in every case of the numerous routine administrative decisions that must be made by officials from day to day, the rule must be applied to ensure administrative justice where, for example, facts adverse to an applicant are relied on by the decision-maker not known to the applicant and where the doctrine of 'reasonable expectation' applies."

[66] In *Chairperson of the Immigration Selection Board v Frank, supra*, Strydom CJ stated (at p171C) that the right of the first respondent in that case to be treated fairly and reasonably was not based on a legitimate expectation but on the Constitution itself.

[67] In my view there are sufficient grounds to conclude as I already have, that the first of the two "clear examples" mentioned in the *Lisse* matter applies in this case. It is important to bear in mind that a legitimate expectation in the sense being discussed ordinarily arises "either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue" (*Administrator, Transvaal and Others v Traub and Others* 1989 (4) SA 731 (A) at 756I; *Minister of Health and Social Services v Lisse (supra)* 771G-H). In this matter there is no express promise from which such a legitimate expectation can arise. While it is so that the second respondent has, as set out above, granted several of the applicant's applications for employment permits over the years, I am not convinced that it can necessarily be said that by doing so in the circumstances of this case, it can said that there was a regular practice which the applicant reasonably could expect to continue. I prefer not to make a definite finding on this issue, but to confine my decision to the first of the two "clear examples."

Mr Usiku's affidavit

[68] In the affidavit Mr Usiku *inter alia* states that Namibian retail stores employing more than 25 employees are obliged to provide statistics which are kept as official records. Records reflecting the composition of employees at senior and middle management level in Namibian retail stores for the years 2008 and 2009 reflected that 62 Namibian nationals were employed at the senior management level of seven retail stores, which, it is sufficiently notorious for the Court to take judicial notice, operate supermarkets. Five non-Namibians were employed at this level. A total of 139 Namibians were employed at middle management level, whilst only three non-Namibians were employed.

[69] While the low proportion of non-Namibians does tend to indicate, in my view, that there is a high level of engagement of Namibians in this field of employment, I agree with Mr *Barnard* that it does not indicate whether the requirements of the inhabitants of Namibia were being met. An indication of whether there were unfilled vacancies at these stores, how long they have been vacant and whether there had been applications

to fill them with foreigners would have been useful. I also note that the applicant's employer's supermarkets are not among the stores mentioned.

[70] Quite apart from this, the affidavit can only serve to confirm *ex post facto* that to some extent that the second respondent may have been correct in its conclusion that the employment field was not one of scarcity in the sense discussed. However the second respondent never stated that it relied on this information and Mr Usiku clearly stated that he was only approached to provide this information for the first time during February/March 2010. As such I do not think the second respondent can rely on the affidavit for purposes of the issues arising from this case.

Costs

[71] Mr *Barnard* moved for costs against the respondents not only in the review application, but also in the urgent application. There is no express prayer for costs in Part A of the notice of motion in respect of the urgent application. This application was settled, resulting in an interim order on the terms claimed by the applicant. No order regarding costs was made. In the replying affidavit the applicant deals for the first time with the issue of costs of the urgent application. He states that the respondents made out no case that the urgent application was unwarranted and that, irrespective of the outcome of the review proceedings, an order for costs should be granted for the urgent application.

[72] Counsel for the respondents submitted in the respondents' main heads of argument that costs was never an issue between the parties as it was never claimed and that the urgent application was settled without the issue of entitlement to costs having arisen.

[73] The failure to pray for costs in a defended matter is not sufficient reason to deprive a successful litigant of his costs. (See Herbstein and Van Winsen, *The Civil Practice of the Supreme Court of South Africa,* (4th ed) 752 and the cases cited in footnote 458). Although the applicant only notified the respondent in reply of its intention to move for costs in the urgent application, I do not think they were ultimately prejudiced as notice was given and argument was heard on the merits of the claim for costs.

[74] I agree with the applicant's counsel that the respondents did not make out a case that the urgent application was unwarranted. What is more, it is as a result of delays in notifying the applicant of the second respondent's decision that the need for urgent interim relief arose. In the result I am inclined to grant the applicant's claim for cost in the urgent application.

[75] As far as the review application is concerned, costs should follow the result.

The result

[76] In the result the following order is made:

1. The decision in regard to the applicant's application for renewal of his employment permit taken by the second respondent on 24 February 2009 is hereby reviewed and set aside.

2. The respondents are directed to take all necessary steps to ensure that the second respondent reconsiders the applicant's application for renewal of his employment permit in a lawful and procedurally fair manner within 30 days from date of this order.

3. The second respondent shall consider the applicant's application for a permanent residence permit within 30 days from date of this order.

4. The respondents shall pay the costs of the urgent application and the review application jointly and severally, the one to pay the other to be absolved, such costs to include the costs of one instructing and one instructed counsel.

[77] It is further prudent to remind the parties of the terms of paragraphs 2.1 and 2.2 of the Court's order dated 20 October 2011.

_____(Signed on original)_____

K van Niekerk

Judge

APPEARANCE:

For the applicant: Adv P C I Barnard

Instr. by Koep & Partners

For the respondents: Mr M Khupe

Office of the Government Attorney