



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 207/2015

In the matter between:

TAFADSWA HASTINGS MASHOZHERA**APPLICANT**

And

**THE CHAIRPERSON OF THE IMMIGRATION
SELECTION BOARD****FIRST RESPONDENT****THE CHIEF OF IMMIGRATION****SECOND RESPONDENT**

Neutral citation: *Mashozhera v The Chairperson of the Immigration Selection Board* (A 207/2015) [2016] NAHCMD 38 (25 February 2016)

Coram: PARKER AJ**Heard:** 20 January 2016**Delivered:** 25 February 2016

Flynote: Immigration – Permanent residence – Requirements for – Applicant averring he satisfied the requirement that he has such qualifications, education and training and experience as are likely to render him efficient in business he intended to pursue – Averment made by applicant's counsel during hearing of matter – Copy of application applicant made to first respondent's Board not placed before court for the court to determine if such information was placed before the Immigration Selection Board – In any case court found that applicant was an illegal immigrant within the meaning of Act 7 of 1993, subsec 1, read with subsec 2 of s 39 – For that

reason Board not competent to authorize issue of permanent resident permit to applicant in terms of Act 7 of 1993 – It will be offensive of the Act as it would defeat the object of the Act and thwart the intention of the Legislature if the Board was ordered to authorize the issue of a permanent resident permit to the applicant – Consequently, the application was dismissed with costs.

Summary: Immigration – Permanent residence – Requirements for – Applicant averring he satisfied the requirement that he has such qualifications, education and training and experience as are likely to render him efficient in business he intended to pursue – Averment made by applicant’s counsel during hearing of matter – Copy of application applicant made to first respondent’s Board not placed before court for the court to determine if such information was placed before the Immigration Selection Board – In any case court found that applicant was an illegal immigrant within the meaning of Act 7 of 1993, subsec 1, read with subsec 2 of s 39 – For that reason Board not competent to authorize issue of permanent resident permit to applicant in terms of Act 7 of 1993 – Applicant failed to place before court the prescribed application he submitted to the first respondent’s Board – Court therefore not in position to determine whether information now placed before the court in counsel’s submission about applicant being likely to earn sufficient means to maintain himself and his family was placed before the Board for the Board’s consideration – Court found that the applicant was an illegal immigrant and was therefore precluded from being issued with any of the permits prescribed by Act 7 of 1993, including permanent residence permit, just as an illegal immigrant could never so long as his or her residence in Namibia remained unlawful acquire citizenship of Namibia – Consequently, application dismissed with costs.

ORDER

The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.

JUDGMENT

PARKER AJ:

[1] This matter concerns an application to review the decision of the Immigration Selection Board ('the Board') to reject the applicant's application for a permanent resident permit ('PR permit') referred to in s 26 of the Immigration Control Act 7 of 1993. The respondents have moved to reject the application.

[2] An earlier such application was similarly rejected. An application to review that decision was not pursued to its conclusion because the dispute between the parties was settled on condition that the Board reconsidered its decision. The Board did so, and in the process invited the applicant to make oral representation to the Board. After reconsidering the application, the Board rejected the application once more. It is that decision which is the subject matter of the instant proceedings.

[3] It is important to note, as will become apparent in due course, that the applicant filed a supplementary affidavit after having sought and obtained further documents in terms of the rules of court.

[4] The decision of the Board is contained in a letter dated 19 May 2015, and reads in material parts as follows:

- '1. After granting applicant an opportunity to be heard, the permanent residence permit was rejected.
2. The applicant has not met the requirements of Section 26(3)(d) of the Immigration Control Act, in that he has not satisfied the Immigration Selection

Board that he has sufficient, or is likely to earn sufficient means of sustenance. Applicant's only source of income is the salary he gets from NAMFISA while on a temporary residence permit viz employment permit. Should the salary from NAMFISA cease, he will have no income; NAMFISA has not offered applicant any permanent position.'

[5] Thus, the applicant's challenge to the Board's decision is based solely on the following, according to Mr Tjombe, counsel for the applicant: Section 26(3)(d) of Act 7 of 1993 prescribes three alternative requirements which an applicant for a PR permit must satisfy. I agree. They are that the applicant must establish (a) that he or she has sufficient means to maintain himself or herself and his or her spouse and dependent children, if any ('requirement 1'); or (b) that he or she is likely to earn sufficient means to maintain himself or herself and his or her spouse and dependent children, if any ('requirement 2'), or (c) 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 ('requirement 3').

[6] According to Mr Tjombe, the Board rejected the applicant's application solely on the ground that he had failed to satisfy requirement 1, without the Board considering any of the other two alternative requirements. In this regard, counsel submits that the applicant did place information before the Board tending to show that he was 'a competent auditor, in possession with (of) the required qualifications, education, training and experience', and the applicant 'would (be) likely (to) be efficient in his employment or profession which he intends to pursue in Namibia (requirement 3)'. Counsel submits further that 'the Immigration Selection Board failed to consider that Mr Mashozhera (applicant) is likely to earn sufficient means to maintain himself and his family (requirement 2)'.

[7] The respondents' opposition to the instant application is based on a number of grounds. As I see them, they are based on the interpretation and application of the relevant provisions of Act 7 of 1993. The grounds were articulated by Mr Namandje,

counsel for the respondents. They are as follows: (a) 'The applicant failed to allege and prove that he has, in a prescribed application, satisfied the Board that he has fulfilled the requirements under s 26(3) of Act 7 of 1993. The second ground is this: 'The applicant by virtue of the provisions of section 39(1) and (2)(h) of the Act had since become a prohibited immigrant when his last work permit expired on 31 October 2015'. 'In such circumstances', so submits Mr Namandje, 'the first respondents' board will be precluded from authorizing the issuance of the permanent residence permit to him by virtue of provisions of section 25(5)(b)(iii) of the Act'.

[8] Looking at the object of Act 7 of 1993, as spelt out in the long title and the intention of the Legislature as can be gathered from the Act itself, I am prepared to hold that a person who is an illegal immigrant in Namibia, within the meaning of subsec 1, read with subsec 2, of s 39 of Act 7 of 1993, is precluded from being issued with any of the immigration permits prescribed by that Act, that is, an employment permit, and a permanent residence permit, just as an illegal immigrant could never, so long as his or her residence in Namibia remained unlawful acquire citizenship of Namibia (See *Minister of Home Affairs v Dickson and Another* 2008 (2) NR 665 (SC) at 683F.) It follows that an illegal immigrant is precluded from being issued with any of those permits. Thus, in the instant case, if I found that the applicant is a prohibited immigrant, as Mr Namandje submitted, then the Board is not competent to authorize the issue of a PR permit to the applicant.

[9] It is not disputed that the applicant's last work permit expired on 31 October 2015. The applicant bears the onus of placing sufficient and relevant evidence before the court in order to succeed in his application. For instance, it is critical for the applicant to establish that he is not a prohibited immigrant in Namibia. It must be remembered that the applicant has been aware since 14 January 2016, when he received the respondents' legal representatives' heads of argument, that this is one of the legal contentions that the respondents would make during the hearing. Nothing prevented the applicant from applying to the court to file further affidavits to counter the respondent's legal contentions.

[10] I allowed the making of the legal contentions because they arise from the facts alleged on the papers (*Swissborough Diamond Mines v Government of the Republic of South Africa* 1998 (2) SA 279 (T) at 324H-I). And it has been held, 'Any party is entitled to make any oral legal contention open to him on the facts as they appear on the affidavits'. (*The Municipality of Walvis Bay v The Occupiers of the Caravan Sites at the Long Beach Caravan Park Walvis Bay Republic of Namibia* 2005 NR 207 (HC) at 208H-209A). If the respondents were entitled to make their legal contention orally arising from the facts, they are even more entitled to make such legal contention in writing in the heads of argument of their legal representative which was filed and was received by applicant's legal representative some six days before the hearing. In that event, it can be said that the applicant was given sufficient notice and ample time to take the necessary steps to counter the respondents' legal contention. But he did nothing to challenge that contention.

[11] Thus, in the absence of any challenge to the respondents' legal contention that the applicant is an illegal immigrant in terms of Act 7 of 1993 and none is readily apparent on the papers, I must accept the respondents' legal contention and find – as I do – that the applicant is an illegal immigrant in Namibia, according to Act 7 of 1993.

[12] According to s 39(1) of that Act –

'(1) any of the persons referred to in subsection (2) who enters or has entered Namibia or is in Namibia, shall be a prohibited immigrant in respect of Namibia.'

[13] It follows that the applicant is a prohibited immigrant in Namibia on the basis that the applicant is not 'entitled to be or to remain in Namibia' in terms of Act 7 of 1993. On the basis that his employment permit expired as at 1 November 2015. And there is nothing on the papers tending to show that the applicant was on any other permit allowing him to be or to remain in Namibia lawfully in terms of Act 7 of 1993. It will, therefore, be offensive of the Act as it would defeat the object of the Act and

thwart the intention of the Legislature if the Board was ordered to authorize the issue of a PR permit to the applicant – an illegal immigrant.

[14] Having so concluded, the application must be dismissed without any further enquiry into whether the decision of the Board rejecting the applicant's application is correct or wrong. In any case, on the issue as to whether the applicant satisfied any of the three requirements prescribed by s 26(3)(d) of Act 7 of 1993, as Mr Namandje submitted, the application on a prescribed form in terms of Act 7 of 1993 that the applicant says he submitted to the respondents (or a copy of it) is not before the court; and so, the court would not be in a position to determine what information the applicant had placed before the Board. In the absence of the application, it would be unjustified and unjudicial for the court to assume that the applicant placed before the Board the information relating to requirements 2 and 3 (see para 5 of this judgment), which is now canvassed by Mr Tjombe during the present proceedings.

[15] Based on all these reasons, I refuse to grant any of the relief set out in the notice of motion. It follows inexorably that the application fails; whereupon, I make the following order:

The application is dismissed with costs, including costs of one instructing counsel and one instructed counsel.

C Parker
Acting Judge

APPEARANCES

APPLICANT: N Tjombe
Of Tjombe-Elago Inc., Windhoek

RESPONDENTS: S Namandje
Instructed by Government Attorney, Windhoek