REPUBLIC OF NAMIBIA REPORTABLE

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case no: A 149/2015

In the matter between:

CYNTHIA PETRONELLA VILJOEN **APPLICANT**

and

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

CHIEF OF IMMIGRATION **SECOND RESPONDENT**

Neutral citation: *Viljoen v Chairperson of the Immigration Selection Board* (A 149/2015) [2017] NAHCMD 13 (26 January 2017)

Coram: PARKER AJ

Heard: **9 November 2016**

Delivered: **26 January 2017**

Flynote: Administrative law – Judicial review – Court held that error of law by administrative bodies and officials is reviewable on the basis that by misinterpreting a statutory provision the administrative body or official will not be complying with the requirements of the relevant legislation in violation of art 18 of the Namibian Constitution – The result is that the decision taken based on the misinterpretation of the relevant provisions of the legislation in question is unlawful and invalid and should be set aside.

Summary: Administrative law – Judicial review – Court held that error of law by administrative bodies and officials is reviewable on the basis that by misinterpreting a statutory provision the administrative body or official will not be complying with the requirements of the relevant legislation in violation of art 18 of the Namibian Constitution – The result is that the decision taken based on the misinterpretation of the relevant provisions of the legislation in question is unlawful and invalid and should be set aside – Applicant applied for permanent residence permit in terms of the Immigration Control Act 7 of 1993, s 26 – Application based on applicant's daughter's immigration status as a domicile in Namibia – Respondents' interpreted 'a person permanently resident in Namibia' in s 26(3)*(g)* of Act No. 7 of 1993 as a person who has been issued with a permanent residence permit – Court found that respondents' misinterpreted the provisions in s 26(3)*(g)* if regard is had to the definition of 'domicile' in s 1 of Act 7 of 1993 – Court found that the decision of the Board of first respondent was based on the misinterpretation of the word 'domicile' in s 1 and the words 'a person permanently resident in' in s 26(3)*(g)* of Act 7 of 1993 and there has been error of law – Consequently, the impugned decision is reviewed and set aside – On the facts and in the circumstances of the case court ordered respondents to issue a permanent resident permit to applicant.

ORDER

(a) The application succeeds.

(b) The Board of the first respondent must on or before 10 February 2017 issue to the applicant Ms Cynthia Petronella Viljoen in terms of the Immigration Control Act No. 7 of 1993 a permanent residence permit.

(c) I make no order as to costs.

JUDGMENT

PARKER AJ:

[1] We are here presented with three nice questions: (a) Is a person who has his or her domicile in Namibia 'permanently resident in Namibia', within the meaning of s 26(3)*(g)* of the Immigration Control Act 7 of 1993 ('the Act')? (b) Is applicant's daughter Heather Cynthia Bosho 'permanently resident in Namibia' within the meaning of s 26(3)*(g)* of the Act? (c) What does s 26(3)*(g)* require of the person permanently resident in Namibia to show in the clause 'who is able and undertakes in writing to maintain him or her (ie the applicant for permanent residence permit')?

[2] These questions represent a factorization of the requirements prescribed in s 26(3)*(g)* which an applicant for permanent residence permit must satisfy. As Mr Tjombe correctly submitted, para (g) is disjunctive from paras (a), (b), (c), (d), (e) and (f) of subsec (3) of s 26 of the Act.

[3] For our present purposes and on the facts of the case, therefore, the requirements which are relevant are that the applicant is -

(1) an aged parent of a person who is permanently resident in Namibia (requirement 1).

(2) the 'person who is permanently resident in Namibia -

(a) should be able to maintain the applicant, and

(b) should undertake in writing to maintain the applicant. (requirement 2).

[4] I now proceed to consider questions (a), (b) and (c) set out in para 1 of this judgment. In doing so, I also keep in my view the requirements set out in para 3 of this judgment.

Question (a)

[5] Counsel for the respondents, Ms Malambo-Ilunga, with respect, misreads the phrase ‘permanently resident in Namibia’. The phrase can never, *pace* Ms Malambo-Ilunga, mean a person to whom a permanent residence permit has been issued in terms of the Act. If that was the case, the Legislature would have said so expressly. All that s 26(3)*(g)* says – and it says it clearly and unambiguously – is that the person must be ‘permanently resident in Namibia’; that is, that such person must be lawfully ‘permanently resident in Namibia’.

[6] It is not within the province of counsel to add ‘by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in context. See Rally for *Democracy and Progress v Electoral Commission* 2009 (2) NR 793 (HC), para 7. As I have said, the words ‘permanently resident in Namibia’ is ‘clear, plain and unambiguous and so they should be given their literal and grammatical meaning in context, and, in my opinion, that will not lead to any manifest absurdity, inconsistency, hardship or a result that is contrary to the legislative intent’. (*Rally for Democracy and Progress*, para 8)

[7] As I said in *Namibian Association of Medical Aid Funds v Namibian Competition Commission* (A 348/2014) [2016] NAHCMD 80 (17 March 2016), paras 12 et seq., the intention of the Legislature can be gathered from the words of the statute only. In the instant case, the intention of the Legislature is to use the phrase ‘a person permanently resident in Namibia’ not the clause ‘a person to whom a permanent residence permit has been issued’. ‘I do not think it is desirable for any court (or tribunal) to do that which the Legislature has abstained from doing’, that is, introduce words into some statutory provision’. (See *Namibian Association of Medical Aid Funds*)

[8] What Ms Malambo-Ilunga has done is to add by implication words to the clear and unambiguous words of s 26(3)*(g)* and has interpreted and applied the embellished paragraph (g) in a way that is self-serving and fallacious. In words of one syllable; the words ‘a person permanently resident in Namibia’ is not equivalent

to, and is not the same as, 'a person to whom a permanent residence permit has been issued'.

[9] From the foregoing it emerges irrefragably that a requirement in s 26(3)*(g)* is that the applicant's daughter should be 'a person permanently resident in Namibia'. I should say, with the greatest deference to Ms Malambo-Ilunga, that counsel misreads the *ratio decidendi* in *M W v Minister of Home Affairs* 2014 (4) NR 2014 (HC). It was never enunciated there that 'a person permanently resident in Namibia' is a person who has been issued with a permanent residence permit. In that regard I should repeat what I said in *Katjivena v Prime Minister of the Republic of Namibia* (A 265/2014) [2016] NAHCMD 146 (18 May 2016), para 7:

> '[7] As respects the attitude taken by Mr Kashindi for the respondents; I should say that it is trite that in our law no two cases are the same; and so, one wishing to rely on a principle of law in a case, must always also consider the particular facts and circumstances of the case he or she seeks to rely on in order to see if the principle there would be of assistance on the point under consideration in the instant proceedings. In the instant case Mr Kashindi did not follow this trite and reasonable counsel and has stumbled as a result.'

[10] It is of critical importance to signalise the point that in *M W v Minister of Home Affairs*, the issue was about the interpretation and application of the phrase 'ordinarily resident in Namibia', within the meaning of art 4(4) of the Namibian Constitution, for purposes of an application for registration as citizen; and what is more, it was not the case of the parents (ie applicant's parents) that they were *domiciled* in Namibia. (Italicised for emphasis)

[11] It is common cause between the parties that the applicant's daughter Heather Cynthia Bosho, on whom the applicant relies for her application for a permanent residence permit, is domiciled in Namibia in terms of the Act. And according to s 1 of the Act, 'domicile', 'subject to the provisions of Part IV, means the place where a person has his or her home or *permanent residence* or to which such a person returns as his or her permanent abode, and not merely for a special or temporary purpose; …' (Italicised for emphasis) It follows inexorably and irrefragably that a person who is domiciled in Namibia is 'a person permanently resident in Namibia', within the meaning of s 26(3)*(g)* of the Act. And as mentioned previously, such a

person, on the authority of *Swartz v Minister of Home Affairs, Namibia*, 'was not required to perform any positive act'; the applicant acquired *ex lege* a domicile, and so, a person who is domiciled in Namibia is squarely 'a person permanently resident in Namibia'. And as Mr Tjombe submitted, such a person is exempted from having to obtain a permanent residence permit' in virtue of s 2(1)*(b)* of the Act. (See *Swartz* at 277D.) This conclusion makes Ms Malambo-Ilunga's reliance on *M W v Minister of Home Affairs* to argue that the daughter Heather Cynthia Bosho can be 'a person permanently resident in Namibia' only if she had been issued with a permanent residence permit misplaced. The argument, with respect, has no merit. In any case, I have found previously that counsel misreads the *ratio decidendi* in *M W v Minister of Home Affairs* where the kernel of the issue was the interpretation and application of the words '*ordinarily resident* in Namibia'. (Italicised for emphasis)

[12] Doubtless, the impugned decision of the Board of the first respondent is based on the misinterpretation of the word 'domicile' in s 1, read with the words 'a person permanently resident in Namibia' in s 26(3)*(g)*, of the Act. The interpretation of the statutory provisions constitutes an error of law which is reviewable on the authority of *Chairperson, Council of the Municipality of Windhoek and Others v Roland and Others* 2014 (1) NR 247 (SC) and on the basis that the respondents have not complied with requirements imposed on respondents by the relevant legislation being Act 7 of 1993 and therefore in violation of art 18 of the Namibia Constitution.

Question (b)

[13] Thus, on a true interpretation of the definition of 'domicile' and on its application to the facts of this case – which I should reiterate is common cause – daughter Heather Cynthia Bosho who is domiciled in Namibia is permanently resident in Namibia, and she does not need to apply for and obtain a permanent residence permit before she qualifies as 'a person permanently resident in Namibia', within the meaning of s 26(3)*(g)* of the Act. I therefore accept submission by Mr Tjombe that daughter Heather Cynthia who is domiciled in Namibia is 'a person permanently resident in Namibia' within the meaning of s 26(3)*(g)* of the Act. I now pass to consider question (c).

[14] For the foregoing reasoning and conclusions I am satisfied that applicant has satisfied requirement 1 (see para 3 of this judgment). I now proceed to consider question (c).

Question (c)

[15] I accept respondents' contention that an applicant is required to establish two items, namely, (1) that the person permanently resident in Namibia is 'able' to maintain the applicant, and (2) that the person permanently resident in Namibia 'undertakes' to maintain the applicant.

[16] On the papers, including the respondent's admission, I am satisfied that applicant has satisfied requirement 2*(b)* (see para 3 of this judgment). What is in contention is requirement 2*(a)*; and so, it is to requirement 2*(a)* that I now direct the enquiry.

[17] As I have intimated earlier, the respondents admit that while the applicant has satisfied the requirement on undertaking, she has not satisfied the requirements of 'able', that is ability to maintain. The respondents' contention are captured clearly in Ms Malambo-Ilunga's submission:

'25. No evidence or other demonstration was made by the applicant's daughter of her purported ability to maintain the applicant. As is customary, the applicant should have attached bank statements in support of her daughters undertaking but the only documentation provided to the Board was the applicant's retirement annuity as well as a letter signed by Hendrick Boshoff the applicant's son-in-law stating that they (he and his wife) are financially independent and are able to take care of the applicant. Mr Boshoff in his letter never detailed how much he earned or how such earning would be sufficient to maintain the applicant. It is only in the applicant's heads of argument that they have now sought to elaborate on the issue, this information was never placed before the Board. The applicant thus appears to try to make out a case why she should have been granted the permit in these proceedings when she had remarkably failed to make out such a case before the Board.'

[18] There is a lot to be said about counsel's submission. First, s 26(3)*(g)* does not provide that there must be proof of ability to maintain. Such provision would have presented an intractable difficulty as to what degree of proof was expected – would it be prima facie proof, proof beyond a reasonable doubt or proof on the preponderance of probabilities. Taking the proviso in the chapeau in subsec (3) together with the relevant text in para (g) of subsec (3) of s 26 of the Act, I hold that all that is expected of the Board is, on the papers and information placed before it, to be satisfied that the 'person permanently resident in Namibia' 'is able … to maintain' an applicant for permanent residence permit.

[19] In being so satisfied, the Board exercises discretion; and in exercising the discretion the Board must 'act fairly and reasonably and comply with requirements imposed on' the Board 'by common law' in terms of art 18 of the Namibia Constitution. The 'common law' requires the Board to give *audi* to the applicant before deciding and to apply its mind to the question at hand.

[20] *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 at 773 tells us that –

> 'Discretion means when it is said that something is to be done within the discretion of the authorities that the something is to be done within the rules of reason and justice and not according to private opinion; according to law and not humour. It is to be not arbitrary, vague or fanciful, but legal and regular.'

(My emphasis added.) (See *Van Aswegen* at 71D-E.)

And improper exercise of discretion amounts to an abuse of power.

[21] The Board did not exercise its discretion properly when it did not take into account relevant matters which it ought to have taken into account, namely, the uncontradicted evidence that applicant on her own has adequate flow of funds at her disposal, as reiterated in para 25 below, considering the purpose of the requirement 'able to maintain', which in my view, is that an applicant who is granted a permanent residence permit should not become a destitute in Namibia and a burden on the

State. I, therefore, find that there has been an abuse of discretion on the part of the Board.

[22] South African courts have recognised three heads of abuse of power by an administrative authority. Professor Etienne Mureneik wrote:

'Our (South African) courts are fond of expressing the answer (to the question as to what are the recognized heads of abuse of discretion) in the form of a trilogy: bad faith, ulterior purpose; and a failure on the part of the repository of the discretion to apply his mind to the question before him, or, to translate the last part from lawyerese to English, a failure to consider the question. ('Administrative Law in South Africa', (1988) 103 *SALJ* 65 at 628) A similar proposition of law is enunciated in Namibia in *Federal Convention of Namibia v Speaker National Assembly of Namibia and Others* 1991 NR 69 (HC).'

[23] A failure on the part of an administrative body or official invested with power to apply its, his or her mind is established where the body or official takes into account matters which it ought not to take into account, or conversely, has refused to take into account matters which it ought to take into account. Levy J put it this succinct way:

'Without in any way derogating from the statement by Innes CJ it is clear that, where there is a statutory duty on a public officer and, in giving his decision or ruling in pursuance thereof, he acts *mala fide* or fails to apply his mind or takes into account irrelevant or extraneous facts or is prompted or influenced by improper or incorrect information or motives, the High Court of Namibia has inherent jurisdiction (see art 78(4) of the Constitution of Namibia) to review the decision or ruling, to set it aside and to return the matter to the public officer or simply to correct it. *The Free Press of Namibia (Pty) Ltd v Cabinet of the Interim Government of South West Africa* 1987 (1) SA 614 (SW) at 625A-D, 626B-I; *Shifidi v Administrator-General for South West Africa and Others* 1989 (4) SA 631 (SWA) at 646, 647-8; *Mweuhanga v Cabinet for the Interim Government of South West Africa* 1989 (1) SA 976 (SWA) at 990D-E; *Cabinet for the Interim Government of South West Africa v Bessinger and Others* 1989 (1) SA 618 (SWA) at 627.'

[24] It follows inevitably that where there has been an abuse of discretion failure to act fairly and reasonably is proved. Levy J held in *Frank and Another v Immigration Selection Board* 1999 NR 257 (HC) at 265D-E that an administrative body or official

may arrive at a decision in a fair manner but its decision may nevertheless be unreasonable. And an unreasonable decision would always be unfair.

[25] With these principles in my mind's eye I come to the following conclusions on the facts of this case. The Board had before it uncontradicted evidence of the existence of funds at the disposal of the applicant and therefore her being a destitute and a burden on the State could not be indicated. The Board failed or refused to take into account this relevant fact. I hold that the Board failed to apply its mind to the question before it which was this: Will daughter Bosho be able to maintain applicant? As I have said previously, the unchallenged evidence is that the applicant on her own has access to sufficient funds to sustain her for at least 20 years; and so, applicant will not rely completely on financial support of daughter Bosho and her spouse. For these reasons alone the application should succeed.

[26] The application should on the following grounds, too. What worries me is that the Board behaved like an examination body of a University, not as an administrative body amenable to the requirements of art 18 of the Namibian Constitution. In the University if student X writes an exam, the answers X has given are final. X will not be called to appear before the examiners to add to and explain the answers X wrote down when X took the exam.

[27] We have here a case where the Board, an administrative body, was of the view that in order to exercise its discretion properly – and I flag 'properly' – it was 'customary' for applicant to 'have attached bank statements' indicating 'how much they (Mr and Mrs Bosho) earned or how such earning would be sufficient to maintain the applicant'. This submission is seeped in great difficulty. The Board expected applicant to have presented information which, in my view though, would at best be speculative and at worse worthless. What kind of information – true information – can any human being produce to indicate truly what amount of money would be sufficient to maintain another human being over a period of time. Forget about predictions by economists about such matters. Their predictions are mere theorizing and suppositions: they are *ex ante* essentially. Even if, for arguments sake, what the Board sought was not speculative and worthless information. What could have prevented the Board to give a hearing to (Mr and Mrs Bosho) and request them to

produce within a time limit proof of their earnings? This is what any reasonable administrative body which is minded to act fairly and reasonably and minded to apply its mind to the question at hand would do. On this score the Board did not act reasonably.

[28] I have already held that the Board misinterpreted s 26(3)*(g)* of the Act on a crucial provision on the definition of 'domicile', leading to the Board of the first respondent acting in violation of art 18 of the Namibian Constitution.

[29] Based on the foregoing reasons, the conclusion is inescapable that the Board failed to act fairly and reasonably, and failed to comply with requirements imposed by the common law and failed to comply with requirements imposed by legislation, that is, Act 7 of 1993. The result is that the decision is unlawful and invalid.

Exhaustion of statutory domestic remedies

[30] The respondents have a second string to their bow. The respondents say that 'the applicant has yet to exhaust all the remedies available to her in terms of the Act'. On a challenge based on the doctrine of exhaustion of statutory domestic remedies, I said the following in *Gurirab v Minister of Home Affairs and Immigration* (A 323/2014) [2015] NAHCMD 262 (5 November 2015), para 5:

'[14] This finding leads me to the next level of the enquiry. It concerns the principle of exhausting domestic remedies. It is that the right to seek judicial review of the act of an administrative body or administrative official may be suspended or deferred until the complainant has exhausted domestic remedies which, as is in the present case, might have been created by statute expressly or by necessary implication. In the instant case, such remedy is created by s 9(2) of the Act.

[15] In *Namibia Competition Commission v Wal-Mart Stores* 2012 (1) NR 69 (SC) the Supreme Court proposed certain considerations that a court ought to take into account in determining the issue of exhausting domestic or internal remedies. (a) The first consideration is the wording of the relevant statutory provision; and (b) the second is whether the internal remedy would be sufficient to afford practical relief in the circumstances. I hasten to add the caveat that the list is exhaustive; neither was it meant to be exhaustive; and neither should

the considerations be applied mechanically as if they were immutable prescriptions to be applied without due regard to the circumstances of the particular case.

[16] And Lawrence Baxter writes in his work *Administrative Law*, 3rd Imp (1991), p 721:

> "Two considerations appear to be paramount: first, are the domestic remedies capable of providing effective redress in respect of the complaint?; and, secondly, has the alleged unlawfulness undermined the domestic remedies themselves."

[17] To the *Wal-Mart* considerations and the *Baxter* considerations should be added this crucial qualification proposed by Mokgone J in *Koyabe and Others v Minister of Home Affairs and Others* 2010 (4) SA 327 (CC), para 35:

> "Internal remedies are designed to provide immediate and cost effective relief, rectifying irregularities first, before aggrieved parties resort to litigation. Although courts play a vital role in providing litigant's access to justice (ie court justice), the importance of more readily available and cost effective internal remedies cannot be gainsaid."

Paragraphs 14 and 17 contain what may be called the *Wal-Mart Stores* requisites, and para 16 the *Baxter* requisites.'

[31] I have applied the *Wal-Mart* requisites and the *Baxter* requisites to the facts of this case. I have also taken into consideration the conclusions I have reached on the decision of the Board which I have held to be unlawful and invalid. There is authority that judicial review process should not be allowed to supplant the normal statutory appeal procedure unless there are exceptional circumstances. (*Preston v IRC* [1985] 2 All ER 327 (HL) at 337j-338a). As I said in *Three Four Five Development Companies (Pty) Ltd* exceptional circumstances will be found to exist where the statutory domestic remedies do not satisfy substantially the *Wal-Mart Stores* requisites and the *Baxter* requisites. In the instant case, I have already found that the Board misconstrued s 26(3)*(g)* of the Act leading to unlawfulness of the decision. And I find that the unlawfulness is gravely material and it has 'undermined the domestic remedies themselves' (see the *Baxter* requisites). For this reason I find that

exceptional circumstances exist to supplant the statutory domestic remedies with judicial review (see *Preston v IRC*). Consequently, I reject the respondents point on the doctrine of exhausting statutory domestic remedies.

[32] On the authorities, eg *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC); *Waterberg Big Game Hunting Lodge Otjahewita (Pty) Ltd v Minister of Environment* 2010 (1) NR 1 (SC); and *Immigration Selection Board v Frank* 2001 NR 107 (SC), I hold that where a court has set aside the impugned administrative action, the court may in its discretion grant any one of the following orders:

(a) an order setting aside the impugned decision or act;

(b) an order as in para (a), together with an order referring the matter back to the administrative body or official concerned to reconsider the matter and decide afresh, with directions or without directions;

(c) an order as in para (a), together with an order directing the administrative body or official concerned to grant, within a time limit, that which the applicant had sought from it, him or her;

(d) an order as in para (a), together with an order correcting the impugned act or decision.

[33] On the facts and in the circumstances of the instant case where, as Mr Tjombe submitted, the core issue is the interpretation of some legislative provisions, it would be in accordance with due administration of justice and it would be fair to act as the Supreme Court did in *Minister of Health and Social Services v Lisse* 2006 (2) NR 739 (SC); whereupon, I order as follows:

(a) The application succeeds.

(b) The Board of the first respondent must on or before 10 February 2017 issue to the applicant Ms Cynthia Petronella Viljoen in terms of the Immigration Control Act No. 7 of 1993 a permanent residence permit.

(c) I make no order as to costs.

C Parker

Acting Judge

APPEARANCES

APPLICANT:	N Tjombe Of Tjombe-Elago Inc., Windhoek
RESPONDENTS:	M M Malambo-Ilunga Of Government Attorney, Windhoek