REPUBLIC OF NAMIBIA

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No.: HC-MD-CIV-GEN-2016/00251 & 2016/00268

In the matter between:

COENRAAD PROLLIUS	**APPLICANT**

and

MINISTER OF HOME AFFAIRS AND IMMIGRATION	**FIRST RESPONDENT**
CHAIRPERSON OF THE IMMIGRATION SELECTION BOARD	**SECOND RESPONDENT**
THE IMMIGRATION SELECTION BOARD	**THIRD RESPONDENT**
THE IMMIGRATION TRIBUNAL	**FOURTH RESPONDENT**
IMMANUEL ERISHI CHRISTIAN M ZU	**FIFTH RESPONDENT**
HOHENLOHE LANGENBURG	**SIXTH RESPONDENT**

Case No.: HC-MD-CIV-GEN-2016/00347

RALPH HOLTMANN	**FIRST APPLICANT**
SUSANNE HOLTMANN	**SECOND APPLICANT**

and

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

SELECTION BOARD **SECOND RESPONDENT**
THE IMMIGRATION SELECTION BOARD **THIRD RESPONDENT**
THE IMMIGRATION TRIBUNAL **FOURTH RESPONDENT**

Neutral citation: *Prollius v Minister of Home Affairs and Immigration* (HC-MD-CIV-GEN-2016/00251 2016/00268); *Holtmann v Minister of Home Affairs and Immigration* (HC-MD-CIV-GEN-2016/00347) [2017] NAHCMD 343 (24 November 2017)

Coram: UEITELE J
Heard: **29 June 2017 and 5 October 2017**
Delivered: **24 November 2017**

Flynote: ***Domicile*** - Domicile of origin - Abandonment - Acquiring fresh domicile - Temporary right of residence in Namibia by virtue of permit issued in terms of s 27 of the Immigration Control Act, 1993 - Removal of himself and every possession to Namibia – Intending to make Namibia - Whether domicile of choice acquired.

Statute - Construction of - Presumption that a statute alters the common law as little as possible - Scope of - To be relied on only in case of ambiguity - In such case it may have to compete with other secondary canons of construction.

Immigration Control Act, **1993** – Interpretation of -Section 22(1)(d) read with section 22(2) (*b*) excludes computation of period of residence in Namibia if applicant is resident in Namibia *only* by virtue of a permit issued in terms of section 27, 28 or 29 of the Act.

Summary: This judgment consists of two applications, the first application relates to an application by Coenraad Prollius and the second application relates to Mr. and Mrs. Holtmann. These matters are discussed together as the law applicable to the set of facts are identical.

In the first application Coenraad Prollius, a citizen of South Africa, came to Namibia during February 2008. He was issued a work permit during 2008 which work permit has been renewed on a number of occasion until 2013. During 2013 he applied for a

renewal of his work permit. During March 2013 the applicant was informed that his application for the renewal of his work permit was unsuccessful. He appealed against the refusal to renew his work permit. On 4 August 2016 the Immigration Selection Board at an Extra Ordinary meeting resolved to reject the applicant's appeal and indicated that no further appeals will be entertained. The applicant was given seven days to leave Namibia.

Aggrieved by those decisions and alleging that the Immigration Selection Board acted unlawfully, Prollius, on 16 August 2016 on an urgent basis, launched an application in terms of which he amongst other reliefs sought an order interdicting and restraining the respondents from arresting, detaining or deporting him from Namibia or in any way interfering with the applicant's right to reside or move and work in Namibia pending the final determination of an application for review of the Immigration Selection Board's decision of 4 August 2016 to reject the applicant's application for an employment permit, and pending the final determination of declaratory relief that applicant is domiciled in Namibia.

The second application relates to Mr. and Mrs. Holtmann who are both citizens of Germany. The applicants have been continuously residing in Namibia since 2007 and have, since this time continuously and lawfully, been resident in Namibia by virtue of their work permits issued to them, until 2015 when the renewal of their work permits was refused.

On 7 September 2016, Mr. and Mrs. Holtmann appeared before a Magistrate in Swakopmund on a charge of contravening section 27(6) of the Immigration Control Act, 1993. They pleaded guilty (they allege that the plea of guilt was not voluntary but was obtained through improper means) to the charges of contravention of s 27 of the Act. They were found guilty on their plea of guilt and were thereafter each sentenced to a fine of N$ 2 000 or twelve months imprisonment. They paid their fines and were released from detention.

Following their release from detention Mr. and Ms. Holtmann sought legal advice as regards their situation. The legal advice that they received was to the effect that because they had been lawfully resident in Namibia for a period in excess of two years coupled with their desire to make Namibia their permanent home they were

domiciled in Namibia and that they did not require a work or permanent residence permit as the Immigration Control Act did not find application. Upon receipt of that advice the Mr. and Ms. Holtmann launched this application seeking amongst an order declaring that they are domiciled in Namibia.

The respondents particularly the Minister responsible for Home Affairs and Immigration opposed the applications of both Prollius and that of Mr. and Ms Holtmann. The basis on which the respondents oppose the relief sought by the Holtmanns is that s 22(1)(*d*) read with section 22(2) (*b*) of the Act excludes the applicants from being domiciled in Namibia because they have been resident in Namibia by virtue of employment permits issued to them in terms of section 27 of the Act.

Held that in view of the concessions by the respondents that the rejection of Prollius's application for the renewal of his work permit was tainted by irregularities, the decision by the first, second, third and fifth respondents' to reject applicant's application for a work permit taken on 4 August 2016 as well as the fifth respondent's decision to grant the applicant seven days to leave Namibia taken on 10 August 2016 is reviewed and set aside.

Held further, that on the question whether the common law had been altered by the Immigration Control 1993, the court had to bear in mind the presumption against altering of the common law by the legislature.

Held further, that the Namibian Parliament did not, either in s 1 or s 22 of the Act employ clear and unambiguous language capable of being understood that it had altered the principle that for a person to acquire domicile of choice in Namibia that person must satisfy two elements namely: the physical presence and an intention to remain indefinitely in Namibia or any part of Namibia. What Parliament has unequivocally stated is that the physical presence must be for a period of not less than two years.

Held further, that the interpretation and application of s 22(2) (*b*) is that, if a permit issued under ss 11, 27, 28 or 29 and nothing more is relied upon to compute the period of lawful residence then that period cannot be taken into account but if reliance is placed on the permit issued under ss 11, 27, 28 or 29 and 'something

else' then the period of lawful residence by virtue of the permit issued under ss 11, 27, 28 or 29 can be taken into account when computing the period of lawful residence in Namibia.

Held further, that Prollius succeeded in proving that he has established both the *factum* and the *animus manendi* required to establish that he has a domicile of choice in Namibia.

Held further that the Holtmanns succeeded in proving that they have established both the *factum* and the *animus manendi* required to establish that they have a domicile of choice in Namibia.

ORDER

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1. The first, second, third and fifth respondents' decision, taken on 4 August 2016, rejecting Coenraad Prollius' application for a work permit is reviewed and set aside.

2. The fifth respondents' decision, taken on 10 August 2016, to grant Coenraad Prollius seven day to leave Namibia is reviewed and set aside.

3. It is declared that Coenraad Prollius is domiciled in Namibia.

4. It is declared that Ralph Holtmann and Susanne Holtmann are domiciled in Namibia.

5. The respondents must, jointly and severally the one paying the other to be absolved pay Coenraad Prollius and Ralph Holtmann and Susanne Holtmann costs of the applications, the costs to include the costs of one instructing and two instructed counsel.

JUDGMENT

UEITELE J:

Introduction

[1] This judgement relates to two applications in which applications the issue in each of the application is whether the applicants are domiciled in Namibia. The first application to the matter of Coenraad Prollius against the Minister of Home Affairs and Immigration and Others, which matter was argued on 27 June 2017. Whilst the second application relates to the matter of Ralph Holtmann and Susanne Holtmann against the Minister of Home Affairs and Immigration and Others, which was argued on 5 October 2017. During the preparation of the two judgments it dawned on me that the same statutory provisions are at issue, I therefore found it convenient to deal with the two matters together.

Background to the Coenraad Prollius matter.

[2] Coenraad Prollius, who is the applicant in this matter, was born on 27 January 1975, in Upington, Republic of South Africa, and is thus a subject of that country (I will in this judgment where it is necessary to avoid any doubt or confusion refer to the applicant as Prollius). At the tender age of seven years, that is during the year 1982, the applicant under the care of his parents moved to Windhoek, where his parents worked for a period of two years. His mother was, at the time, employed by a commercial Bank which is now known as the First National Bank of Namibia.

[3] During the year 1984 his (Prollius's) mother was transferred to Keetmanshoop where she worked until 1989 when she was again transferred to Vredendaal in South Africa. The applicant being a minor at the time, moved with his parents to Vredendaal where he completed his secondary school career, and from there proceeded with his tertiary education at Cape College where he obtained a hairdressing Certificate, and qualified as a hairdresser.

[4] During February 2008 Prollius came to Namibia where he was employed by a close corporation known as Haircraft, which was owned by a certain Luigi Micillo. His initial employment was on a work visa which was valid for a period of three months. During June 2008 the applicant applied for a work permit. His application was successful and he was granted a one year work permit which was valid until August 2009. At the expiration of the work permit in 2009 the applicant applied for a renewal of that work permit. The application for renewal was successful and the work permit was renewed and issued for a period of two years, which was thus valid until December 2012.

[5] During his stay in Namibia (that is during the period (2008 to 2010) the applicant purchased (that is during 2010 and 2013) two immovable properties in Windhoek he furthermore purchased a motor vehicle with a loan obtained from Nedbank Namibia.

[6] When his work permit expired in December 2012 he applied for the renewal of his work permit. During March 2013 the applicant was informed that his application for the renewal of his work permit was unsuccessful. The applicant was thus obliged to leave Namibia, which he did. During July 2013 the applicant returned to Namibia on a holiday visa and applied for a three months' work visa. The application for a three months' work visa was successful and it was issued to him during September 2013, which work visa expired during November 2013. On the expiration of the three months work visa the applicant again left Namibia, but returned again on a holiday visa during February 2014, to prosecute an appeal against the rejection of his application for a work permit.

[7] During May 2014 the owner of Haircraft, committed suicide and the applicant's employment with Haircraft was thus uncertain. Whilst the applicant was awaiting the outcome of his appeal against the rejection of his work permit, he applied for a work visa which was granted to him during November 2014, the work visa was however only valid until February 2015. The work visa was however renewed on two occasions until October 2015.

[8] In the interim period that is between July 2014 and February 2015 the applicant investigated the possibility of commencing his own business. During March 2015, he in conjunction with two other persons founded a close corporation by the

name of C.I.A.M Hair and Beauty Academy CC. That close corporation opened its doors to the public during April 2015 and that close corporation is also geared toward training those who are interested in hairstyling and beauty industry.

[9] During August 2015 the applicant submitted a new application for a work permit. On 5 April 2016, the applicant's application for a work-permit was rejected by the Immigration Selection Board, the second respondent in this matter. On 28 April 2016 the applicant lodged an appeal against the rejection of his application for a work permit.

[10] During June 2016, while the applicant was awaiting the outcome of his appeal, he was contacted by a certain Ms Diedericks who requested certain information and documents from him. The applicant presented the information and documents requested on 28 June 2016 to Ms Diedericks. On the same date, that is on 28 June 2016, the applicant was informed by the chairperson of the Immigration Selection Board that his appeal was unsuccessful.

[11] The applicant on 7 July 2016 again lodged an appeal against the rejection of his application for a work permit. On 4 August 2016 the Immigration Selection Board at an Extra Ordinary meeting resolved to reject the applicant's appeal and indicated that no further appeals will be entertained. The applicant was given seven days to leave Namibia.

[12] Aggrieved by those decisions and alleging that the Immigration Selection Board acted unlawfully the applicant, on 16 August 2016 on an urgent basis, launched the application which is the subject matter of this judgement in terms of which he amongst other reliefs sought an order interdicting and restraining the respondents from arresting, detaining or deporting him from Namibia or in any way interfering with the applicant's right to reside or move and work in Namibia pending:

(a) The final determination of an application for review of the Immigration Selection Board's decision of 4 August 2016 to reject the applicant's application for an employment permit, and

(b) The final determination of declaratory relief that applicant is domiciled in Namibia; which application is to be launched within 30 days from date of confirmation of the *rule nisi.*

[13] The application was allocated to me for hearing. I heard the application on 17 August 2016 and after hearing arguments in respect of the interim interdict I made the following order:

'3 A *rule nisi* is issued, returnable on Wednesday, 21 September 2016 at 08H30, calling upon the respondents to show cause, if any, why an order in the following terms should not be granted:

3.1. The implementation of the first, second, third and fifth respondents' decision to reject applicant's application for a work permit taken on 4 August 2016 as well as the fifth respondent's decision to grant applicant 7 days to leave Namibia taken on 10 August 2016 is stayed pending:

3.1.1 the final determination of an application for review (which application must be lodged not later than ten days from the date of this order) of the second and third respondents' decision of 4 August 2016 to reject Applicant's application for an employment permit;

3.1.2 the final determination of review of fifth respondent's decision for applicant to leave Namibia within 7 days from 7 August 2016; as well as;

3.1.3 the final determination of declaratory relief that applicant is domiciled in Namibia; which applications are to be launched within 10 days from date of issuing of the *rule nisi.'*

[14] On 2 September 2016 the applicant lodged an application in terms of which he amongst other reliefs sought:

(a) An order reviewing and setting aside the decision by the first, second, third and fifth respondents' to reject applicant's application for a work permit taken on 4 August 2016 as well as the fifth respondent's decision to grant applicant seven days to leave Namibia taken on 10 August 2016, and

(b) An order declaring that he is domiciled in Namibia.

[15] The respondents opposed the reliefs sought by the applicant, but after the exchange of pleadings the respondents conceded that the decisions, to reject the applicant's application for work permit and to order him to leave Namibia within a period of seven days, were premised on irregular bases. The first respondent, however persisted with her opposition of the declaratory order sought by Prollius.

[16] In view of the concessions by the respondents the applicant is granted the order that he sought in prayer one of the notice of motion namely that, the decision by the first, second, third and fifth respondents' to reject applicant's application for a work permit taken on 4 August 2016 as well as the fifth respondent's decision to grant the applicant seven days to leave Namibia taken on 10 August 2016 is reviewed and set aside.

<u>Background to the Ralph Holtmann and Susanne Holtmann matter.</u>

[17] In the Holtmann matter the first applicant is Ralph Holtmann, he was born in Hanover, Germany on 31 December 1955. The second applicant is the first applicant's wife and she was born in Meldorf, Germany on 22 October 1962. They are married to each other since the year 2003 (I will in this judgment refer to these applicants as Mr and Ms Holtmann or the Holtmanns). Prior to them coming to Namibia, Mr. and Ms Holtmann spent their entire lives in Germany. They state that they travelled to a number of countries during their lives, but never with the intention to move there.

[18] In both the applications in the Prollius and Holtmann matters the first respondent is the Minister of Home Affairs and Immigration a Minister of the State of the Republic of Namibia cited herein in her official capacity. The first respondent is the Minister responsible for the administration of the Immigration Control Act, 7 of 1993 ("the Act"). The decisions or actions of the other respondents are in respect of these applications immaterial and will, except where it is necessary, not make any reference to those other respondents.

[19] The applicants allege that their religious faith caused them to belief that it was their calling to speak about their faith and the Bible outside Germany. They further allege that one of their friends became a missionary in South America and had wonderful experiences, as result they craved similar experiences and to make a difference elsewhere in the world with their faith. During or about 1993 the applicants accordingly considered to emigrate from Germany.

[20] The applicants alleged that they started researching places in the world where they could make a difference through religion and their faith and they came across Namibia and considered Namibia as one of the options to move to. Through their research they found advertisements in magazines that required qualified goldsmiths in Namibia. Since Ms Holtmann is a qualified goldsmith, which meant that she had skills that were needed in Namibia and that they would be able to make a living here through her profession they considered coming to Namibia.

[21] During or about August/September 2006 Mr. and Ms. Holtmann came to Namibia for holiday in order to see the country. They found a house in Swakopmund at Erf No. 2023, Swakopmund, (Ext 1) and they purchased that house for an amount of N$1,400,000. Mr. and Ms Holtmann also decided to sell all their assets in Germany and were ready to move to Namibia. During January 2007 Mr. and Ms Holtmann moved to Namibia and applied for work permits. The work permits, were issued either during April or May 2007 and were valid for a period of 12 months. Mr. and Ms Holtmann had in the meantime, also purchased a dormant close corporation and started Holtmann Jewelry Swakopmund CC, which is a goldsmith business.

[22] Before the first work permits expired Mr and Ms Holtmann applied for the renewal of those work permits. The renewal applications were successful and they were issued with renewed work permits that were valid for a period of two years (the work permits were thus valid until sometimes during the year 2011). After the year 2011 Mr and Ms Holtmann were again issued with two more renewed work permits, bringing the total period of time for which they have been granted work permits to seven years. The last work permits issued to them expired during February 2015.

[23] Prior to the expiry (that is, prior to February 2015) of the renewed work permits Mr. and Ms. Holtmann allege that, on 20 February 2014, they applied for

permanent residence through their agents, GK Consultancy Services. They further allege that they frequently enquired as to the status of their application. Mr. Holtmann who deposed to the founding affidavit on his and his wife's behalf states that, a certain Ms. Winston – Smith of GK Consultancy was repeatedly told by officer of the Ministry of Home Affairs that the applicants' file got lost and as a result Mr. and Ms. Holtmann resubmitted another application for permanent residence permit during September 2014.

[24] Between the period February 2014 and September 2016 Mr. and Ms. Holtmann either on their own or through the GK Consultancy Services, kept enquiring from the Ministry of Home affairs as to the status of their application for permanent residence. Mr. Holtmann attached eight letters (which were marked as annexures *'RH6', 'RH7' 'RH8'*, *RH9', 'RH10', 'RH11', 'RH12', 'RH13'* and '*RH14')* in which letters the enquiries were addressed to immigration officers in the Ministry of Home Affairs enquiring about the application in respect of the permanent residence. Not a single letter from the Ministry of Home Affairs responded to these enquiries.

[25] On 12 July 2016, allegedly out of desperation, Mr. and Ms. Holtmann re-applied for new work permits through the GK Consultancy Services. The applicants allege that up to the date when the applicants launched this application the Ministry of Home Affairs and Immigration had not yet responded to their application for permanent residence or their application for a work permit. The deponent to the affidavit on behalf of the Ministry, however, alleges that the Holtmanns were informed of the rejection of their application for permanent residence permit during September 2016.

[26] On 2 September 2016 an immigration officer by the name of Mr. Nangolo arrived at Mr. and Ms. Holtmann's residence and enquired about their status, he also demanded to see their passports. The couple provided him with the passports and also indicated that they were awaiting the outcome of both their application for permanent residence as well as their application for work permits. The couple alleges that it offered to show the immigration officer proof of their applications their application for permanent residence and work permits and the correspondence that they have addressed to the Ministry of Home Affairs and Immigration, but he did not want to see it.

[27] The couple was effectively arrested on Friday 2 September 2016. On Monday, 5 September 2016, they were taken to the Magistrate's Court in Swakopmund, but were only charged on Tuesday morning 6 September 2016, they were charged with contravening of s 27(6) of the Act. On Wednesday, 7 September 2016, they appeared before a Magistrate in Swakopmund and were asked to plead to the charges that they faced. They pleaded guilty (they allege that the plea of guilt was not voluntary but was obtained through improper means) to the charges of contravention of s 27 of the Act. They were found guilty on their plea of guilt and were thereafter each sentenced to a fine of N$ 2 000 or 12 months imprisonment. The couple paid the fine of N$ 4000 and were released from detention.

[28] Following their release from detention Mr. and Ms. Holtmann sought legal advice as regards their situation. The legal advice that they received was to the effect that because they had been lawfully resident in Namibia for a period in excess of two years coupled with their desire to make Namibia their permanent home they were domiciled in Namibia and that they did not require a work or permanent residence permit as the Immigration Control Act did not find application. Upon receipt of that advice the Mr. and Ms. Holtmann launched this application seeking amongst an order declaring that they are domiciled in Namibia.

[29] The respondents and in particular the first respondent opposed the relief sought by Mr. Holtmann and Ms. Holtmann. Ambassador Nandago who deposed to the applicants opposing/answering affidavit raised point *in limine* in his affidavit. The point *in limine* is based on the doctrine of dirty hands. The ambassador argued that Mr. and Ms. Holtmann's right to remain in Namibia lapsed when the their work permits expired and were not renewed and because they were convicted of contravening the Act and may be dealt with as prohibited immigrants their hands are unclean and they may not approach this Court. The point *in limine* relating to the doctrine of unclean hands was not pursued at the hearing of this matter and I will therefore not deal with it.

[30] The basis on which the respondents oppose the relief sought by the Holtmanns is encapsulated in the opposing/answering affidavit of Ambassador Nandago who states as follows:

'I submit that in Namibia domicile is regulated by law specifically sections 22 and 23 of the Act. Section 22(1)(*d*) read with section 22(2) (*b*) excludes the applicants from being domiciled because they have only been here by virtue of employment permits issued to the in terms of section 27 of the Act. It is further submitted that whatever the common law position applicants may seek to rely on has been superseded by the Act. Applicants have not, in their founding papers, clearly laid out any basis for their claim to enable me to canvass it in this answering paper. Apart from asserting that they are domiciled they do not state how or on what basis they are allegedly domiciled.'

[31] The respondents further contend that as a general principal, a foreign national may only enter or reside in Namibia "with a view to permanent residence therein", if that person first applied for and obtain a permanent residence permit while outside Namibia. If he somehow fails to do that and only apply for a work permit, he can only obtain a domicile status after he had successfully applied for a permanent residence permit whilst in Namibia, as if he was still outside, as per section 26(6) of the Act and will have to wait for two years required under section 22(1)(*d*) of the Act before obtaining a domicile status.

<u>The issues</u>

[32] In both the Prollius matter and the Holtmann matter the Minister of Home Affairs and Immigration opposed the declaratory relief sought by Prollius and the Holtmanns on the basis that s 22(1)(*d*) read with s 22(2) (*b*) excludes the applicants from being domiciled in Namibia because they have only been lawfully resident in Namibia by virtue of employment permits issued to them in terms of s 27 of the Act.

[33] The issue that I am thus called upon to determine in both these matters is interpretation of s 22(1)(*d*) read with s 22(2) (*b*) of the Immigration Control Act, 1993. Are the applicants (Prollius and the Holtmanns), on a proper interpretation of s 22(1)(*d*) read with s 22(2) (*b*) domiciled in Namibia.

[34] Before I deal with the issue that I am called upon to determine I find it appropriate to set out some of the legal principles governing the law of domicile in Namibia.

Some principles relating to the law of domicile

[35] I propose to start by making a general comment. Article 66 of the Namibian Constitution, provides as follows:

'Article 66

Customary and Common Law

(1) Both the customary law and the common law of Namibia in force on the date of Independence shall remain valid to the extent to which such customary or common law does not conflict with this Constitution or any other statutory law.

(2) Subject to the terms of this Constitution, any part of such common law or customary law may be repealed or modified by Act of Parliament, and the application thereof may be confined to particular parts of Namibia or to particular periods.' (Underlined for emphasis)

[36] The above quoted Article of the Constitution makes it clear that the common law and customary law of Namibia existing at the date of Independence (that is 21 March 1990) continue to be part of the law of Namibia for as long as it does not conflict with the Constitution or statute law; and that the common law and customary law so existing may be repealed or amended by statutory law. It will thus be appropriate to briefly state what the common law with respect to domicile was as at the date of independence.

[37] Forsyth CF,[1] argues that the common law definitions of domicile are generally vague or abstract (or both vague and abstract) and not very helpful. The author however states that he prefers the definition formulated by Barry JP in the matter of *Mason v Mason,*[2] namely '*domicile means the place or country which is considered by law to be a person's permanent home.'* After discussing the definition of domicile the learned author proceeds and states that our modern law of domicile rests on two principles, the first principle being that every person has a domicile at all times and

[1] *Private International Law: The modern Roman Dutch Law including the jurisdiction of the Supreme Court* 5th ed at 132-133.

[2] (1885) 4 EDC 330.

the second principle being that each person should have one and only one domicile at any time. . .' (own emphasis)

[38] The author, proceeds to state that our common-law knows three types of domicile namely: the domicile of origin - which is the domicile of a parent (the husband when legitimate, the mother otherwise) assigned to a child upon birth and which plays a controversial gap-filling role when neither a domicile of choice nor a domicile of dependence is operative,[3] - the domicile of dependence - which is the domicile assigned by law to a wife or minor child - and the domicile of choice - which may in certain factual circumstances be acquired by persons of full capacity by deciding to settle in a certain country. For the purposes of this judgment the relevant domicile is the domicile of choice and I will thus restrict the discussion to the domicile of choice.

[39] The author proceeds to state,[4] that:

> 'At common law a domicile of choice is acquired by an independent person with capacity to acquire it, when he or she fulfils the *factum* requirement of lawful residence within the country and concomitantly has the necessary *animus,* the intention to remain permanently (or possibly indefinitely) in that country.'

[40] It thus follows that a domicile of choice can be acquired by satisfying two elements namely: the physical presence (an objective fact) and an intention to remain indefinitely (a subjective test) in the chosen country. Forsyth argues that at common law the term residence, although commonplace in decided cases, is a misnomer because for the purposes of the law of domicile it means simply lawful physical presence; it does not bear a technical meaning such as it has in other branches of the law**.** At common law no minimum period of such physical presence is laid down, in the matter of *Toumbis v Antoniou,*[5] the Court said:

> 'The concept of 'residence' must not be confused with the physical element necessary for the acquisition of a domicile of choice. Whatever criteria must be satisfied for the *de cuius* to be considered 'resident' in South Africa (see *Kallos & Sons (Pty) Ltd v*

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3 *Supra* at p 137.
4 *Supra* at p 138.
5 1999 (1) SA 636 (W) at 641.

Mavromati 1946 WLD 312; *Tick v Broude and Another* 1973 (1) SA 462 (T) at 469G), it is trite that the physical requirement for the acquisition of a domicile of choice is simply presence in the country concerned.'

[41] Although it is accepted that at common law no minimum period of physical presence is laid down for the purposes of determining ones domicile it has been held, in the matter of *Chinatex Oriental Trading Co v Erskine,*[6] that a person's physical presence requires more than a visit or a sojourn to the country. Accordingly the longer the person is settled at a particular place, the greater the likelihood of a court regarding him as resident there for the purposes of domicile. The residence must, of course, be lawful.[7] The illegal immigrant cannot acquire a domicile in the country he has chosen.[8] Forsyth argues that although very brief residence may be sufficient, it must at common law be residence in pursuance of the *animus manendi.*

[42] I now proceed to discuss the second common law requirement (namely the *animus manendi)* to determine whether a person is domiciled in a given country or not. In an article which appeared in the South African Law Journal of 1933, Pollak,[9] argues that:

'It seems that the intention of a person in regard to the future residence in a country which he is at the moment residing may . . . be one or other of the following four types:

(1) An intention to reside in the country for a definite period, e.g. for the next six months, and then to leave;

(2) An intention to reside in the country for a definite purpose is achieved, e.g. until a particular piece of work is completed, and then to leave;

(3) An intention to reside in the country for an indefinite period, i.e. until and unless something, the happening of which is uncertain, occurs and to induce the person to leave;

(4) An intention to reside forever.

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6 1998 (4) SA 1087 (C) at 1093-1094.
7 *Getachew v Government of the Republic of Namibia* 2006 (2) NR 720 (HC).
8 *Dickson and Another v Minister of Home Affairs*: 2008 (2) NR 665 (SC).
9 *Domicile*, 1933 (50) South African Law Journal 449 at p465.

It is perfectly clear that neither the first nor the second type of intention is sufficient to constitute the *animus manendi.* The fourth type of intention is obviously sufficient. It is in regard to the third type that differences of opinion exists. . .'

[43] In the eighty four years since Pollack authored his article the Courts have not settled the question as to whether the test to be adopted to determine the *animus manendi* of a person for the purposes of the acquisition of a domicile of choice is 'the weak' test (that is whether the person is of the intention to settle for an indefinite period) or the 'strong test' (that is whether the person is of the intention to settle forever).

[44] After examining the authorities which considered the type of test to be adopted to determine the *animus manendi* of a person for the purposes of the acquisition of a domicile of choice the author concludes that:

'The position in common law, is therefore, somewhat equivocal. But a judge minded to apply the weak test would find authority to support his stance. It should not be forgotten that, for instance, that the English law from whence came those two disastrous cases … seems to have shaken off many of the shackles and is in the process of adopting the weaker test. Moreover in Botswana the courts have accepted that the *animus manendi* may consist of an intention to reside permanently or of an unlimited time in the country of choice. It does not [require] . . . an intention never to change the new country of domicile.'

[45] The question of which test to apply was not debated before me and I will therefore not deal with it in this judgment. Having briefly discussed the common law position I will now proceed to consider certain statutory provisions which deal with domicile in Namibia. The Immigration Control Act, 1993[10] (I will, in this judgment refer to the Immigration Control Act, 1993 as the Act) in section 1 defines 'domicile' as follows:

'subject to the provisions of Part 1V, means the place where a person has his or her home or permanent residence or to which such person returns as his or her permanent abode, and not merely for a special or temporary purpose'

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[10] Act No. 7 of 1993.

[46] Part IV of the Act, consist of only two sections namely ss 22 and 23. Section 22 deals with domicile in Namibia while s 23 deals with loss of domicile. Section 22 amongst other things provides as follows:

'22 Domicile in Namibia

(1) For the purposes of this Act, no person shall have a domicile in Namibia, unless such person-

(a) is a Namibian citizen;

(b) is entitled to reside in Namibia and so resides therein, whether before or after the commencement of this Act, in terms of the provisions of section 7(2)(*a*) of the Namibian Citizenship Act, 1990 (Act 14 of 1990);

(c) is ordinarily resident in Namibia, whether before or after the commencement of this Act, by virtue of a marriage entered into with a person referred to in paragraph (a) in good faith as contemplated in Article 4(3) of the Namibian Constitution;

(d) in the case of any other person, he or she is lawfully resident in Namibia, whether before or after the commencement of this Act, and is so resident in Namibia, for a continuous period of two years.

(2) For the purposes of the computation of any period of residence referred to in subsection (1)(d), no period during which any person-

(a) is or was confined in a prison, reformatory or mental institution or other place of detention established by or under any law;

(b) resided in Namibia <u>only by virtue of a right obtained in terms of a provisional permit issued under section 11 or an employment permit issued under section 27 or a student's permit issued under section 28 or a visitor's entry permit issued under section 29</u>;

(c) involuntarily resided or remained in Namibia;

(d) has entered or resided in Namibia through error, oversight, misrepresentation or in contravention of the provisions of this Act or any other law; or

(e) resided in Namibia in accordance with the provisions of paragraph (d), (e), (f) or (g) of section 2(1),

shall be regarded as a period of residence in Namibia.' (Underlined for emphasis).

[47] In my view the *factum* requirement (that is the lawful presence) can, in terms of the Act, be fulfilled if the person, can prove that he or she, has his or her home in Namibia, or is permanently resident in Namibia or Namibia is the place to which the person returns as his or her permanent abode and not merely for a special or temporary purpose.

[48] Section 22 of the Act qualifies these requirements by providing that for a person who has his or her home, or who permanently resides in Namibia or who has Namibia as the place to which he or she returns as his or her permanent abode, to be domiciled in Namibia that person must be:

(a) a Namibian citizen, or

(b) entitled to reside in Namibia and so resides therein, whether before or after the commencement of the Act, in terms of s 7(2)(*a*) of the Namibian Citizenship Act, 1990; or

(c) ordinarily resident in Namibia, whether before or after the commencement of the Immigration Control Act, 1993 by virtue of a marriage entered into with a person who is a Namibian citizen in good faith as contemplated in Art 4(3) of the Namibian Constitution; or

(d) in the case of any other person, be lawfully resident in Namibia, whether before or after the commencement of the Immigration Control Act, 1993, and is so resident in Namibia, for a continuous period of two years.

[49] Subsection (2) of s 2 of the Act provides that for the purposes of the computation of any period of residence referred to in ss (1)(d), no period during which any person is or was confined in a prison, reformatory or mental institution or other place of detention established by or under any law; or resided in Namibia only by virtue of a right obtained in terms of a provisional permit issued under s 11 or an employment permit issued under s 27 or a student's permit issued under s 28 or a

visitor's entry permit issued under s 29; or involuntarily resided or remained in Namibia or has entered or resided in Namibia through error, oversight, misrepresentation or in contravention of the provisions of the Act or any other law; shall be taken into consideration when computing the two year lawful residence period.

[50] The subsection furthermore provides that the period of residence in Namibia must not be taken into consideration for purposes of determining whether a person is domicile or not in respect of persons who:

(a) were or are duly accredited to Namibia by or under the authority of the government of any sovereign state; or

(b) under any law is entitled to any diplomatic immunities and privileges by reason of such person's association with an organization of which the Government of Namibia is a member; or

(c) for the purpose of employment enters Namibia-
  (i) under such conditions, excluding such provisions, as may be agreed upon between the State and such person;
  (ii) under any convention or agreement with the government of any other State; or

  (iii) in accordance with any scheme of recruitment or repatriation approved by the Minister;

(d) is member of the official staff or of the household of a person referred to in sub paragraphs (a), (b) and (c).

[51] The next question I pose is whether the common-law position as I have set it out above has been altered by s 22 of the Act. There is a presumption in the Roman-Dutch law that the legislature does not intend to alter the existing law more than is necessary. Devenish,[11] deals with that presumption and states the following:

[11] G.E Devenish *Interpretation of Statutes,* 1996 second impression of his 1992 edition at 159.

'The Legislature does not intend to alter the existing law more than is necessary. This is a seminal presumption which has been applied in innumerable cases. It is the most fundamental of the presumptions since many of the others are merely axiomatic extrapolations of it.'

[52] The learned author proceeds and state that:

'. . . The courts have to a lesser or greater degree endeavoured to provide, in effect, a common-law bill of rights . . . . Thus in terms of this presumption a court will require a directive in clear language, either by express or necessary implication, before ruling that the legislature intended a significant departure from the common-law. Therefore, statutes should, as far as possible, be construed in conformity with the common-law rather than against it and it cannot be assumed that merely because the statute creates a new obligation and prescribes a means of enforcing that obligation, the ordinary remedies are excluded. However, if it is categorically clear from both the language and the import of the statute that it is designed to alter the common-law, then full effect will be given to this object. Alteration of the common-law by a statute must either expressly say that it is the intention of the legislature to alter the common-law, or the inference . . . must be such that we come to no other conclusion. Our courts require clear and unequivocal language to effect a change to common-law.'

[53] In the matter of *Minister of Home Affairs* v *Dickson and Another,*[12] the Supreme Court per Chomba AJA said:

'It is, consequently, also trite law that a statute which is intended by Parliament to change the common law or an existing established principle of law must employ clear, express and unambiguous language in order to achieve that goal. The law goes further and states that an alteration brought about by statute may also be inferred by necessary implication. Furthermore, it provides that the presumption that the legislature does not intend to alter the law more than is necessary is to be invoked only in the event of ambiguity in the statute. To this end, "It is a sound rule to construe a statute in conformity with the common-law rather than against it, except where or insofar as a statute is plainly intended to alter the course of the common law.'

[54] Did the Act alter the established principle of common law which, as we have seen, states that *animus* and *factum* must both exist and they must exist concomitantly at some point in order for a domicile of choice to be acquired?

[12] 2008 (2) NR 665 (SC)

According to the common law, therefore, the Namibian Parliament can only be said to have changed that established principle if, in enacting the Act, it had employed clear and unambiguous language to that effect.

[55] In my view the Namibian Parliament did not, either in s 1 or s 22 of the Act employ clear and unambiguous language capable of being understood that it had altered the principle that for a person to acquire domicile of choice in Namibia that person must satisfy two elements namely: the physical presence and an intention to remain indefinitely in Namibia or any part of Namibia. What Parliament has unequivocally stated is that the physical presence must be for a period of not less than two years. The legal position is now, in my view, as follows for a person to establish domicile in Namibia that person must prove that they have been lawfully resident in Namibia for a period of not less than two years and concomitantly with that lawful presence the intention to remain permanently in Namibia.

[56] The intention to be proved is an intention to reside permanently or for an unlimited time in the country of choice (in this case Namibia). It does not include an intention never to change the new country of domicile.[13] Having set out these basic legal principles governing the law of domicile in Namibia I now proceed to consider whether or not the applicant is domiciled in Namibia.

<u>Is Prollius domiciled in Namibia?</u>

[57] I have pointed out above that it is trite law that to every person the law attributes a domicile of origin which is his domicile at birth. This domicile does not depend upon the place of his or her birth. If it is a legitimate child born during the subsistence of a valid marriage, he or she takes the domicile of his or her father on his or her birth. It is quite clear, therefore, that a person may have a domicile of origin in a country in which they never resided and which they never visited. I make that statement because the applicant in this matter simple tells me that he was born in Upington, South Africa.

[58] Apart from his being born in South Africa, the applicant told me that while he was a minor his parents resided and worked in Namibia for a period of seven years.

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[13] See the English case of *Flynn v. Flynn (*1968) 1 All E.R. 49 at p. 58.

He furthermore told me that his father always wanted to return to Namibia while the applicant was a minor. It is quite clear, therefore, that there was not placed before me any evidence from which I can arrive at a decision as to the domicile of origin of the applicant. One thing which is clear, however, is that whichever country or place is the domicile of origin of Prollius, that country is not the Republic of Namibia nor is such a place within Namibia. I, however, assume that the applicant's domicile of origin is South Africa.

[59] If the applicant's domicile of origin is South Africa that will continue to be his domicile regardless of whether or not he has visited South Africa since he left it in 2008, unless he has changed that domicile. The applicant's case is that he has changed his domicile of origin (whatever that domicile may be) to this country. The law, of course, is that the applicant, as an adult, is quite free to change his domicile of origin or any domicile of choice that he might have acquired, at his pleasure. As the House of Lords,[14] said;

'A man born with a domicile may shift and vary it as often as he pleases, indicating each change by intention and act whether in acquisition or abandonment.'

[60] The burden of proof of an intention to substitute a new domicile for the domicile of origin is on the person asserting it, in this case, Prollius. As I have indicated above to establish the change of domicile a person has to establish two elements namely, lawful presence and *animus manendi*. In this matter the dispute is around the *factum* element. The applicant alleges that he has since 2008, albeit, on work permits issued under the Act lawfully resided in Namibia. The first respondent denies that such residence in pursuance of work permits qualifies as lawful residence for the purpose of considering whether the applicant is or is not domiciled in Namibia. In her opposing affidavit the Minister said:

'10.2. After the enactment of the Act, it goes without saying that, entry into and residence in Namibia must be in compliance with the Act.

10.3 I note that applicant has "decided" to make Namibia his home. Applicant needs to be reminded that his decision remains a personal decision that must still

[14] In the case of *Udny v. Udny*, (1869), L. R. 1 Sc. & Div 44 1, at pg. 450.

meet the requirements of the law. Nobody, applicant or any other person, can be permanently resident in Namibia except by virtue of a permanent residence permit ("PRP") as regulated by section 24 read with section 26 of the Act); NOT even an application for PRP makes one a permanent resident. Applicant does not have PRP in respect of Namibia.'

[61] The first respondent's stance was articulated by Mr Hinda, who appeared for the respondents, in his written heads of arguments as follows:

'13 The statutory framework informs that the applicant needs to fulfill and comply with the requirements of section 22 to acquire domicile in Namibia. Firstly, the applicant must be lawful resident for a continuous period of two years. However, section 22(2)(b) of the Act places a limitation on what periods may not be taken into account to compute the two year period for an applicant to claim the right to domicile under section 22(1)(d) of the Act. The limitation introduced a clear addition to the common law requirement for domicile of choice and the respondents submit that the Act has altered the common law position to that extent.

14 The applicant's claim that his domicile is premised on section 22 of the Act is untenable because it is not his case in the founding affidavit. In the event that it is, which we deny, the applicant cannot ignore the prescripts of section 22(2)(*b*) of the Act.'

[62] My understanding of both the first respondent and her Counsel is that s 22(2)(b), (which provides that for the purposes of the computation of the two year period of residence referred to in s 22 (1)(*d*), no period during which any person, in this case the applicant, resided in Namibia <u>only by virtue</u> of a right obtained in terms of a provisional permit issued under s 11 or an employment permit issued under s 27 or a student's permit issued under s 28 or a visitor's entry permit issued under s 29 shall be regarded as a period of residence in Namibia), precludes the years (that is the years since 2008) which the applicant has been in Namibia from being taken into account when one computes the period which the applicant has been lawfully resident in Namibia. . .' (own emphasis)

[63] During oral arguments I suggested to Mr Hinda that the qualification contained in s 22(2) (*b*) is only applicable if the person seeking to establish domicile in Namibia solely relies on the provisional permit issued under s 11 or the employment permit issued under s 27 or the student's permit issued under s 28 or the visitor's entry

permit issued under s 29 to compute the period of lawful presence in Namibia, but if the person relies on the provisional permit, employment permit, student's permit or visitor's entry permit plus ‘something else’ than and in that event the period in respect of which the person was by virtue of the permit and the ‘something else’ lawfully present in Namibia, may be taken into account when computing the period of residence for purposes of determining lawful residence. Mr Hinda accepted that proposition as correct.

[64] The adverb ‘*only*’ qualifies the sentence ‘by virtue of a right obtained in terms of a provisional permit issued under s 11 or an employment permit issued under s 27 or a student's permit issued under s 28 or a visitor's entry permit issued under s 29’. The Concise Oxford English Dictionary,[15] defines that adverb to mean ‘and no one or nothing more besides.’ Accordingly, the interpretation and application of s 22(2) (*b*) is that, if a permit issued under ss 11, 27, 28 or 29 and nothing more is relied upon to compute the period of lawful residence then that period cannot be taken into account but if reliance is placed on a permit issued under ss 11, 27, 28 or 29 and ‘something else’ then the period of lawful residence by virtue of the permit issued under ss 11, 27, 28 or 29 can be taken into account when computing the period of lawful residence in Namibia.

[65] At common law it is the lawful residence concomitantly with the intention to indefinitely reside at a given place that must be established. I therefore do not agree with advocate Hinda that the Act has altered the common law in that respect.

[66] The evidence to support an alleged intention to change domicile must be very clear but it is on a balance of probabilities.[16] The intention to be proved is an intention to:

(a) have Namibia as his or her home; or

(b) have Namibia as his or her permanent residence, or

[15] Eleventh Edition Revised
[16] See *Webber v. Webber* 1915 A.D. 239.

(c) to have Namibia as the place to which the person returns as his or her permanent abode, and not merely for a special or temporary purpose.

[67] There can be little doubt that the enquiry involved in establishing the intention of the person who wants to adopt a domicile of choice is a subjective one, namely, whether the applicant habours an intention to abandon his domicile in South Africa and acquire one in Namibia. To determine the genuineness of the applicant's evidence as to his subjective state of his mind a court can of course have regard to relevant objective facts such as for example, the extent of the breach of his ties with the country of his origin, the length of his stay in the country to which he has moved and in which he is at the relevant time residing, the extent and duration of his future physical commitment to the country in which he is residing and any other factors which would render it probable that he would wish to stay indefinitely in such country.

[68] Prollius in his founding affidavit placed certain objective factors which are consistent with the intention he claims to have. Prollius claims that he severed his ties with South Africa by removing not only himself but everything he possesses to Namibia. In addition, he stated that he sold his home and property in South Africa and bought and lived in a property he acquired in Namibia and has worked for a period extending over seven years in Namibia and has purchased a close corporation in Namibia with the intention to carry on serious business in Namibia, how could it be said that Namibia is not the place to which he returns as his or her permanent abode, and not merely for a special or temporary purpose as a matter of course after his wanderings? These factors lend verisimilitude to his evidence as to his intentions.

[69] In the absence of any denial by the respondents that Prollius (a) intended to make Namibia his new home; (b) that he acquired and increased his business interests in this country for the purpose of settling here; (c) that he sold his property in his homeland and acquired property here because this is where he wishes to settle; and (d) that he has no desire to return to his homeland but to live in Namibia. I am satisfied that Prollius has proven the intention to choose a new domicile and abandon his old domicile, I am therefore further satisfied that Prollius' presence in

Namibia is not <u>only</u> by virtue of the work permit issued to him in terms of s 27 of the Act. . .' (own underlining)

[70] I conclude, accordingly, that Prollius succeeded in proving that he has established both the *factum* and the *animus manendi* required to establish that he has a domicile of choice in Namibia.

<u>Are the Holtmanns domiciled in Namibia?</u>

[71] Mr and Ms Holtmann were both born in Germany and they spent the greater part of their adult lives in Germany. On the facts that Mr and Ms Holtmann placed before me, the only reasonable inference that I can draw from those facts is that both Mr and Ms Holtmann's domicile of origin is Germany. Prior to their coming to Namibia they formed the intention to emigrate from Germany for purpose of performing 'missionary' work. During 2006 they entered Namibia with valid German travel documents, initially as tourist to explore Namibia. What they read about Namibia is what they experienced during their visit and they decided to return to Namibia which they did during January 2007. Whilst in Namibia they were issued with work permits for successive periods which cumulatively amounts to seven years.

[72] During their stay Namibia between the years 2007 to 2015 the couple purchased two dormant close corporations, namely Holtmann Jewellery Swakopmund CC and, Holcon Bricks CC. They also purchased three immovable properties namely Erf No. 2023, Swakopmund, (Ext 1) which doubles as their residence and their place of business, Erf No.621, Mondesa, (Ext 1), Swakopmund and Erf No. 3014, Mondesa, (Ext 6), Swakopmund. The couple further alleges that they invested approximately N$ 10 000 000 in Namibia since they arrived here in 2007 (the couple attached documents to their affidavit as proof of this allegation).

[73] The present application was instituted eight years after the Holtmanns arrived in Namibia. They state in their affidavit that they do not intend to return to Germany and have severed all ties with German, they do not even have an address in Germany where to return to, and that they presently regard Swakopmund and Namibia as their home where they intend to remain indefinitely. At the time when the

Holtmanns launched this application Mr Holtmann was 61 years of age while Ms Holtmann was 54. In their founding affidavit Mr and Ms Holtmann tell me that when they decided to leave German in 2007 they sold all their assets in Germany. In Namibia they acquired three immovable properties one of which they made their home and made substantial investments in Namibia because they chosen Namibia as the place where their permanent place of abode will be situated. The Holtmann couple accordingly assert that they have established a domicile of choice in Namibia.

[74] The Minster of Home Affairs and Immigration's on the other hand denies that the Holtmann couple have established a domicile of choice in Namibia. Her denial is based on her interpretation of s 22(1)(*d*) read with s 22(2)(*b*) of the Act. My finding that, the Namibian Parliament did not, either in s 1 or s 22 of the Act, employ clear and unambiguous language capable of being understood that it had altered the principle that for a person to acquire domicile of choice in Namibia that person must satisfy two elements namely: the physical presence and an intention to remain indefinitely in Namibia or any part of Namibia ought to have settled the question of whether or not Mr. and Ms. Holtmann are domiciled in Namibia. But Mr. Namandje who appeared for the Minister in the Holtmann matter argued differently from Mr. Hinda who appeared for the Minster in the Prollius matter and I thus have to consider the arguments advanced by Mr. Namandje.

[75] The essence of Mr. Namandje's argument is that a person who wants to acquire a domicile of choice in Namibia and who is lawfully resident in Namibia by virtue of a work permit issued to him or her in terms of s 27 of the Act can only acquire a domicile of choice in Namibia if that person is in possession of a <u>permanent residence permit</u> issued to him or her in terms of s 26 of the Act. I will below in detail quote from the written submission submitted by Mr. Namandje, he said:

> '7. The definition of "*domicile*" under section 1 of the Act is subject to the provisions of Part IV. Section 22(1)(d) of the Act (which is under part IV of the Act) *inter alia* makes provision to the effect that **no** person shall have domicile in Namibia unless such person is **lawfully resident in Namibia**, whether before or after the commencement of this Act and is so resident in Namibia for a continuous period of two years …

9. It is thus clear that for somebody to acquire domicile in Namibia the jurisdictional preconditions under section 22(1)(d) read with section 24(a) are that one must lawfully reside in Namibia for a continuous period of two years.

10. The computation of the continuous period of two years (section 22(2)(b)) would not include any period during which a person resided in Namibia *inter alia* by virtue of an employment permit issued under section 27 such as the applicants in this case.

11. In this context it is thus clear that, because of the exclusion, under section 22(2)(b) of the Act, of residence in Namibia by virtue of an employment permit given in terms of section 27 of the Act, the "*lawful residence*" period of two years required under section 22(1)(d) can only mean permanent residence as during one's residence in Namibia on the basis of a work permit the computation of two years contemplated under section 22(1)(d) would not become operative.

12. Our submissions above are reinforced by the limitation provided for under section 24, and subject to section 35 of the Act, to the effect that **no** person shall (section 24(a)) **enter** or reside in Namibia "*with a view to permanent residence therein*", unless such a person is in possession of a permanent residence permit issued to him or her in terms of section 26.

13. It would thus follow that for the applicants to have entered into Namibia from Germany in 2007 "*with a view to permanent residence therein*", as they allege, they ought to have applied for a permanent residence permit prior to entering Namibia as contemplated under section 26(3) of the Act …

17. It is thus clear that …the correct legal position is:

17.1 One cannot obtain domicile unless you have been a lawful resident in Namibia for a continuous period of two years.

17.2 One cannot obtain domicile in Namibia based on any continuous period of years whilst on employment permit as the computation of the two-year period in such circumstances (which is required under section 22(1)(d)) is excluded by virtue of section 22(2)(b).

17.3 The general principle is that for a foreigner to enter or reside in Namibia "*with a view to permanent residence therein*", such a person must first apply and obtain a permanent

residence permit while outside Namibia. If he somehow fails to do that and only apply for a work permit, he can only obtain a domicile status after he had successfully applied for a permanent residence permit whilst in Namibia, as if he was still outside, as per section 26(6) of the Act and will have to wait for two years required under section 22(1)(d) of the Act before obtaining a domicile status.'

[76] The fallacy of Mr. Namandje's argument is not far to seek. His argument sins against the fundamental rule of construction that no word in a statute must be rendered redundant. The interpretation advanced by Mr. Namandje, ignores the adverb (*only)* in s 22(2)(*b*) rendering that word redundant. As I have indicated earlier the adverb (only) qualifies the sentence by virtue of a permit issued in terms of ss, 27, 28 or 29 and that section must be interpreted to mean, if the permit and nothing more is relied upon then the period of lawful residence by virtue of that permit cannot be taken into account, but if reliance is placed on the permit and 'something else' then period of lawful residence by virtue of the permit can be taken into account when computing the period of lawful residence in Namibia. The 'something else' is the intention to reside permanently in Namibia. . .' (own emphasis)

[77] Mr Namandje's further argument that, a person who wants to acquire a domicile of choice in Namibia and who is lawfully resident in Namibia by virtue of a work permit issued to him or her in terms of s 27 of the Act can only acquire the domicile of choice in Namibia if that person is in possession of a <u>permanent residence permit</u> issued to him or her in terms of s 26 of the Act flies directly in the face of sections 1 and 22 of the Act. I say so because the concepts lawfully resident, ordinarily resident, permanent residence and permanent residence permit are concepts with distinct meanings. Sections 1 and 22 of the Act do not use the phrase 'permanent residence permit' one can therefore not read that phrase into sections 1 or 22. . .' (own underlining)

[78] Section 1 of the Act which I have quoted above[17] commences with the expression 'subject to'. In the South African case of *Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd,*[18] the Appellate Division held that, that expression 'has no *a priori* meaning'. The expression is, however, normally used in statutory contexts to establish what is dominant and what is subservient, but its meaning in a statutory

[17] In paragraph 45.
[18] 1996(1) SA 1182(A) at 1187J-1188A.

context is not confined thereto and it frequently means no more than that a qualification or limitation is introduced so that it can be read as meaning 'except as curtailed by'.[19] In the Zimbabwean case of *Hickman v The Attorney-General,*[20] , Goldin J said:

'Generally speaking, the words 'subject to' have the effect of introducing a qualification, limitation or condition precedent, thereby curtailing a person's exercise of otherwise unlimited or unrestricted rights. It does not, in this sense, mean an alternative or optional right without affecting an unfettered original right … In *Hawkins v Administration of SWA 1924 SWA 57,* the words 'subject to' were interpreted to mean 'except as curtailed by'.

[79] I am thus of the view that the above interpretation is what is clearly meant in section 1 of the Act. It is thus clear that the meaning of domicile can only be curtailed by Part IV of the Act which as I mentioned above only consists of sections 22 and 23. The meaning of domicile in the Act cannot be curtailed by ss 24 or 26 or 35 as Mr Namandje attempted to do.

[80] In a supplementary answering affidavit ambassador Nandago contends that the Holtmanns came to Namibia in 2007 and applied for work permits which were issued to them, those work permits expired on 2015. Subsequent to the expiry of the expiry of the work permits in 2015 the Holtmanns did not apply for a renewal or extension of their work permits, says Ambassador Nandago. He proceeded and state that on 7 September 2016 the Holtmanns appeared before the Swakopmund Magistrates Court charged with the offences contravening s 27(6) of the Immigration Control Act, 1993. They pleaded guilty and were convicted on their plea of guilty. They are thus persons who may be dealt with as prohibited immigrants in terms of the Act. The deponent also attached to the supplementary affidavit a copy of the record of proceedings in the Magistrates Court in Swakopmund.

[81] On the strength of the evidence of Ambassador Nandago, Mr. Namandje further argued that the applicants' 'vulnerable fate' has now been aggravated by the conviction they now have for contravening certain provisions of the Act. They have

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19 *Hawkins v Administration of South West Africa* 1924 SWA 57 and *Crook and Another v Minister of Home Affairs and Another* 2000(2) SA 385(T) at 389A-D.

20 1980 (2) SA 583 (R) at 585E.

now become illegal and prohibited immigrants. The declarator sought in the notice of motion would thus not be available to them at all, argued Mr. Namandje.

[82] Mr. Heathcote who also appeared for the Holtmanns argued that based on the *Hollington rule,* the evidence of Ambassador Nandago in respect of the Holtmanns' conviction in the Magistrates Court of Swakopmund is irrelevant. The *Hollington* rule is to the effect that, in civil proceedings, evidence that a party to the lawsuit has previously been convicted of an offence arising out of the same facts as are at issue in the civil proceedings is not admissible. This rule of evidence is known as the rule in *Hollington v. Hewthorn*, after the mid-twentieth-century English case in which it was stated.

[83] The Hollington rule was applied by this court in the matter of *Van Wyk v Ambata,*[21] *where Parker J said:*

'[15] In these proceedings, Mr. Denk cross-examined the defendant on matters that are in the record (which was filed of record in these proceedings) of the criminal trial where the dependent was charged with culpable homicide for causing the death of the deceased and convicted on that charge. I have decided, for a good reason, not to rely on the evidence adduced in the defendant's criminal trial as proof of certain facts tending to establish the liability of the defendant in these civil proceedings. The rule in *Hollington v F. Hewthorn and Co. Ltd* [1943] 2 All ER 35 whereby a conviction in a criminal court is not admissible in subsequent civil proceedings as evidence that the accused committed the offence of which he has been convicted has been held to apply also to a civil judgment in subsequent civil proceedings between different parties. Thus, in Land Securities plc v Westminster City Council [1993] 4 All ER 124, Hofmann, J. (as he then was) stated at 126C:

> "In principle the judgment, verdict or award of another tribunal is not admissible evidence to prove a fact in issue or a fact relevant to the issue in other proceedings between different parties.")

[84] The Constitutional Court of South Africa, in the matter of *Prophet v National Director of Public Prosecutions*[22] said:

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21 An unreported judgement of this Court Case Number I 1769/2004 delivered on 29 June 2010.
22 2006 (2) SACR 525 (CC)

'[42] The main reason that the applicant wanted to have the transcript of the proceedings in the magistrate's court admitted was to persuade this Court to accept that court's conclusion that the evidence gathered during the search on the property should be excluded, and its conclusion that the applicant be found not guilty. It needs to be said that the provisions of ch 6 are not conviction-based. The findings of the magistrate as reflected in the transcript in a related criminal trial are, for the purpose of this judgment, irrelevant and may be described as 'superfluous' or 'supererogatory evidence' because they amount to an opinion on a matter in which a Judge might, in the forfeiture application, have to decide. In any event, on the record, the applicant has admitted what was found on the property and has not sought to withdraw those admissions. Accordingly, the transcript falls to be excluded.'

[85] I am accordingly of the view that the evidence by Ambassador Nandago with respect to the Holtmanns' conviction in the Magistrates Court of Swakopmund is irrelevant for the purposes of this matter. The argument of Mr. Namandje that the declarator sought by the Holtmanns is, because of their conviction, not available to them rejected.

[86] In any event, on the record of this application, the Holtmanns state (this evidence is not denied or contradicted by the Minister or any officer of the Ministry of Home Affairs and Immigration) that prior to their work permit expiring they applied to the Ministry of Home Affairs and Immigration for permanent residence permit. When, after twenty nine months, and after no less than seven enquiries, the Holtmanns had not yet received any answer with respect to their application or enquiries, they applied for the renewal of their work permits. Ambassador Nandago denies that the Ministry received that application but Mr. Holtmann attached prove of the receipt of the application (by the Ministry of Home Affairs and Immigration) to their affidavit.

[87] Ambassador Nandago states that the Holtmanns' application for a permanent residence was rejected on 20 September 2017 he further states that the letter of rejection was send to the Holtmanns to postal address in Swakopmund. The Holtmanns deny having received the letter of rejection. If this is correct that, the Holtmanns' application for permanent residence was rejected on 20 September 2016, I fail to understand how it could be said that the Holtmanns contravened s 27(6) of the Act, if by 7 September 2016, their application for permanent residence

had not yet been determined as at that date. This brings to a point where I will digress and make a brief comment.

[88] Accountability and responsiveness are founding values of our democracy.[23] All organs of state must provide effective and accountable government. The basic values and principles governing public administration include: the promotion and maintenance of a high standard of professional ethics; the promotion of efficient, economic and effective use of resources; public administration must be development-orientated; people's needs must be responded to; public administration must be accountable; and transparency must be fostered by providing the public with timely, accessible and accurate information. All constitutional obligations must be performed diligently and without delay.

[89] The Ministry of Home Affairs Immigration, on their website, set out their vision as follows:

> 'It is the Vision of this Government, to transform the Ministry of Home Affairs and Immigration into a Highly Efficient Organisation that will make all Namibians proud.'

[90] The Ministry proceeds, on the same website, lists its values as follows:

> '1. **Commitment**: We demonstrate commitment towards Service Delivery through our actions and decisions that we make.
>
> 2. **Synergy** We work as a team, we value Effective Communication and all our effort are coordinated towards achieving our Vision.
>
> 3. **Ethics**: In all our dealings we are guided and principled through our Punctuality, Customer Focus, Professionalism and Transparency.
>
> 4. **Efficiency**: We strive to achieve more with limited resources whilst maximizing outputs.'

[91] Both the vision and the values of the Ministry of Home Affairs are noble and laudable, but they will remain hollow and worthless if not put in practice and adhered to. The evidence by Mr. Holtmann, to the effect that for a period of twenty nine

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23 Article 1(1) of the Constitution.

months (that is approximately two and a half years) they did not, despite follow ups and enquiries, receive any reply, let alone an acknowledgment that their applications and letters have been received, lays bare the lip service that the Ministry of Home Affairs and Immigration pays to its Vision and values.

[92] The immigration officials' failure to reply to the Holtmanns' application or to acknowledge receipt of the correspondences emanating from them and thereafter put in motion the machinery to deprive them of their liberty is disgraceful and should not be associated with a professional public service in a constitutional State. Furthermore, this is irresponsible behaviour that borders on incompetence and lack of accountability. The manner in which the Holtmanns were treated can just embarrass Namibians and not make us proud as per the vision of the Ministry of Home Affairs and Immigration. The Permanent Secretary in the Ministry of Home Affairs and Immigration must take steps to ensure that the officers in that Ministry of Home Affairs and Immigration must diligently and without delay perform the functions entrusted on them and must live up to the Values and vison which the Ministry has set.

[93] Having made those remarks I return to consider whether Mr and Ms Holtmann have discharged the onus resting on them to establish a domicile of choice in Namibia.

[94] Mr Holtmann in the founding affidavit in support of their application, placed certain objective factors, before curt, which are consistent with the intention they claim to have. The Holtmanns claim that they severed their ties with Germany by removing not only themselves but everything they possessed to Namibia. In addition, they state that they sold their home and property in Germany. They not only bought properties in Namibia but have made significant investments in Namibia and have worked for a period extending over eight years in Namibia, they purchased close corporations in Namibia with the intention to carry on serious business here with the intention to make Namibia the place to which they return as their permanent place of abode. How could it be said that Namibia is not the place to which they return as their permanent place of abode, and not merely for a special or temporary purpose as a matter of course after his wanderings?

[95] In the absence of any denial by the respondents that the Holtmanns (a) intend to make Namibia their new home; (b) that they acquired and increased their business interests in this country for the purpose of settling here; (c) that they sold their assets in their homeland and acquired property here because this is where they wish to settle; and (d) that they have no desire to return to their homeland but to live in Namibia. I am satisfied that the Holtmanns have proven the intention to choose a new domicile and abandon their old domicile, I am therefore further satisfied that the Holtmanns s' presence in Namibia is not only by virtue of the work permit issued to them in terms of s 27 of the Act. . .' (own underlying)

[96] I conclude, accordingly, that the Holtmanns succeeded in proving that they have established both the *factum* and the *animus manendi* required to establish that they have a domicile of choice in Namibia.

[97] I accordingly make the following orders.

1. The first, second, third and fifth respondents' decision, taken on 4 August 2016, rejecting Coenraad Prollius' application for a work permit is reviewed and set aside.

2. The fifth respondents' decision, taken on 10 August 2016, to grant Coenraad Prollius seven day to leave Namibia is reviewed and set aside.

3. It is declared that Coenraad Prollius is domiciled in Namibia.

4. It is declared that Ralph Holtmann and Susanne Holtmann are domiciled in Namibia.

5. The respondents must, jointly and severally the one paying the other to be absolved pay Coenraad Prollius and Ralph Holtmann and Susanne Holtmann costs of the applications, the costs to include the costs of one instructing and two instructed counsel.

S Ueitele

Judge

APPEARANCES:

APPLICANT:	R Heathcote SC (with him Van Der Westhuizen) in both the Prollius and Holtmann matters Instructed by Etzold, Duvenhage, Windhoek
RESPONDENTS:	G Hinda SC (with him Kandovazu) in the Prollius matter. S Namandje (with him Wakuramenua) in the Holtmann matter Instructed by Government Attorneys, Windhoek