REPORTABLE
CASE NO. SA 21/2006

IN THE SUPREME COURT OF NAMIBIA
In the matter between:

THE GOVERNMENT OF THE REPUBLIC OF NAMIBIA **APPELLANT**

And

DEREJE DEMMSE GETACHEW **RESPONDENT**

Coram: Shivute, C.J., Chomba, A.J.A. *et* Gibson, A.J.A

Heard on: 2007/04/02

Delivered on: 2008/04/15

APPEAL JUDGMENT

CHOMBA, A.J.A:

[1] This appeal arises from civil proceedings which were commenced in the High Court by way of combined summons. The summons was instituted at the instance of one Dereje Demmse Getachew, an Ethiopian by nationality, who sued the Government of the Republic of Namibia for wrongful and unlawful arrest and consequential detention. The gist of the action is captured in paragraphs 3 and 4 of the Particulars of Claim which accompanied the combined summons. The two

paragraphs state as follows:

> "3. On 28 October, 2004, the Plaintiff was unlawfully and wrongfully arrested by immigration officials and/or members of the Namibian Police at Academia, Windhoek, and wrongfully and unlawfully detained from the time and date of arrest until 28 January 2005.
>
> 4. The said wrongful and unlawful detention further violated the following of the Plaintiff's rights guaranteed under the Namibian Constitution:
>
> 4.1 the right not to be subjected to arbitrary detention;
>
> 4.2 the right to be brought before the nearest Magistrate or other judicial officer within a period of forty-eight hours of his arrest;
>
> 4.3 the right to fair and reasonable administrative action;
>
> 4.4 the right to personal liberty; and/or
>
> 4.5 the right to dignity."

The following further particulars are disclosed by the Particulars of Claim, that is to say –

(a) that the plaintiff aforementioned was resident at 1225 Ganges Street, Wanaheda, Windhoek in Namibia;

(b) that the defendant, namely the Government of the Republic of Namibia was duly constituted as such in terms of the Namibian Constitution, herein represented by the Minister of Home Affairs, in his capacity as the official responsible for police and immigration matters, care of the

Government Attorney, 1st Floor, Marie Neef Building, Independence Avenue, Windhoek.

(c) That at all material times, the said members of the Namibian Police and/or immigration officials acted in the course and within the scope of employment with the defendant ; and

(d) That due and proper notice of the plaintiff's claims had been given to the Inspector-General of Namibia Police in terms of section 39 (1) of the Police Act, No. 19 of 1990.

In consequence of the foregoing the plaintiff claimed damages in the sum of N$100.000.00; interest thereon at the rate of 20% per annum *a tempore morae*, further and/or alternative relief and costs of the suit.

[2] The defendant denied liability and averred as follows, namely that while admitting the arrest and subsequent detention of the plaintiff, the arrest and said detention were not unlawful or wrongful. It asserted that both the arrest and detention were in accordance with the law; that it had no knowledge of the damages allegedly suffered by the plaintiff and therefore did not admit the same and consequently put the plaintiff to proof. Further, the defendant denied liability to pay the reliefs claimed by the plaintiff.

[3] The action was heard by Muller, J, in the court below, with Mr. N. Tjombe of the Legal Assistance Centre, and Mr. R. Goba of the Government Attorney respectively, representing the plaintiff and defendant. Judgment was awarded in favour of the plaintiff and, except that the damages granted were pegged at N$65,000, all the other reliefs were awarded as claimed. The Government, not being satisfied with the whole of the judgment, launched an appeal. The same legal practitioners who represented the parties in the court below also argued the appeal before us still representing their respective clients.

In this appeal I shall refer to Getachew as the respondent and to the Government of the Republic of Namibia as the appellant.

FACTS WHICH ARE COMMON CAUSE

[4] Acting on information received, Walter Aribeb, an Immigration Officer, accompanied by a member of the Namibian Police, arrested the respondent to the present appeal on 18 October 2004. The information on which Aribeb acted was to the effect that two foreigners believed to be of Ethiopian nationality were known to be residing at an address on Blatter Street in the Academia area of Windhoek and that they were driving a motor car bearing a Botswana registration number. After two days of surveillance, the two men were seen driving into that residential address and were followed closely behind by Aribeb and the Police Officer who were also driving. The two law officers identified themselves. Aribeb, as an Immigration Officer, asked the

then suspected foreigners to produce their documents of identity. One of them, named only as David, because Aribeb could not remember his surname, produced an acknowledgement showing that the Immigration Department of the Ministry of Home Affairs was in possession of his Ethiopian passport for some official purpose. The other foreigner, who turned out to be the current respondent, only produced an old and scruffy affidavit which stated that he had lost his Ethiopian passport. Both men were requested to accompany Aribeb and the police officer to the Police Station and they did so. There, David was subsequently released while the respondent was in due course detained on the strength of a detention warrant of current date, namely 18 October, 2004. For the ostensible reason of wanting to establish the respondent's immigration status in Namibia, Aribeb continued to detain him until 28 January 2005 when he was released.

[5] In the intervening period between the date of expiry of the first detention warrant, dated October 18, and the day of the respondent's release on 28 January, 2005, warrants of further detention were issued on 1 and 22 November, 9 and 28 December 2004, and 14 January 2005. The respondent was first detained in Windhoek for about one week and then transferred to Okahandja where he remained for about two weeks before being returned to Windhoek for further detention.

[6] It was also common cause that the respondent at a later stage during his detention disclosed to Aribeb that in fact his passport was not lost but was in the possession of a lady going by the name of Tony who lived in Wanaheda area of

Katutura. The passport was in due course found sometime in early January 2005 at some flat in Windhoek. The respondent was one of the two persons who led Aribeb and Acting Chief Immigration Officer Matrida Masweu to that flat. It was equally an undisputed fact that at some stage still during the respondent's detention a marriage certificate was produced to Aribeb. This certificate showed that the respondent was married to a Namibian citizen called Dale Dawn Van Wyk.

[7] Equally common cause is the fact that the Ethiopian passport which surfaced in the manner described in the preceding paragraph, though bearing the purported holder's photographic portrait, does not show the holder's signature or thumb print. Pages 7 and 8 of the passport are missing. Other features to be observed in the passport are that it was issued by the Ethiopian Embassy in Pretoria, Republic of South Africa on 2 October 2002, while on the Visas page 9 is endorsed a "Re-Entry Visa" dated 3 October 2002 issued at Windhoek in Namibia. Finally in this respect, the said passport was exhibited in the trial in the court a quo and was marked "Ex N".

ISSUES FOR DETERMINATION IN THE APPEAL.

[8] In the course of hearing this appeal a number of issues arose. They require to be determined. The principal ones are whether or not the arrest of the respondent was wrongful and unlawful and secondly whether the subsequent detention following the arrest was wrongful and unlawful or not. Under each of these principal issues are

a number of incidental questions to be resolved. These are:

1. The arrest:

   (i) whether there was a reasonable suspicion to justify it

   (ii) whether Walter Aribeb, the Immigration Officer acted *in fraudem legis* in arresting the respondent

   (iii) whether at the time of his arrest the respondent was *domiciled* in Namibia

2. The Detention:

   (i) lawfulness of the initial warrant of detention issued on 18 October, 2004

   (ii) lawfulness of further warrants of detention dated 1 and 22 November, 9 and 28 December, 2004 and 14 January 2005

   (iii) the status of the respondent during the period of detention

[9] The credibility of Immigration Officer Aribeb has been a subject of contention in this appeal. That, too, deserves consideration as an issue.

WHETHER RESPONDENT'S ARREST WAS UNLAWFUL

[10] According to the evidence of Aribeb, the Immigration Officer, the circumstances leading to the arrest of the respondent were these. First he received instructions to follow up two men suspected to be residing in Namibia illegally. They were believed to be Ethiopians and were driving a motor car with a Botswana registration number plate. Their address of abode was identified as being in the Academia area of Windhoek. Aribeb testified that the instructions were given to him on or about 16 October 2004. He kept surveillance on the house on the 17 and 18 October. On the latter date he got a police officer by the name of Calitious or Clasius Mwilima to accompany him to the said house. The two proceeded to the vicinity of the house. This was in the early hours of the night of 18. They subsequently saw the suspect car drive into the identified premises. The two officers, who were themselves driving an official car, drove into the premises closely behind the suspect car.

[11] At the house, Aribeb told the two men who emerged from the Botswana numbered car that he wanted to see their legal documents. He said he made that request in order to verify their immigration status. One of the two referred to as David, produced a document which Aribeb identified as an acknowledgement showing that his passport was with the Immigration Department for some official purpose. The respondent, being one of the two, only produced an old and scruffy looking affidavit

declaring that his passport was lost. Aribeb became suspicious of the legality of the men's presence in Namibia. He asked them to accompany him to a police station, which they did co-operatively. At the Police Station Aribeb informed the men that he was going to detain them pending verification of the documentation they had displayed. The respondent refused to sign a Notice of Detention in respect of himself. On the same date, 18 October, a warrant of detention was issued in respect of the respondent's detention.

[12] In his heads of argument on the foregoing point, Mr. Tjombe stated that the arrest of the respondent could be justified only if the arresting officer, Aribeb, had a reasonable suspicion. As to what amounts to a reasonable suspicion he cited a passage from Du Toit *et al*, "The commentary on the Criminal Procedure Act," *viz*:

> "The question as to whether the suspicion of the person effecting the arrest is reasonable, must be approached objectively. Accordingly the circumstances giving rise to the suspicion must be such as would ordinarily move a reasonable man to form the suspicion that the arrestee has committed a First Schedule offence**.** *R v Van Heerden* 1958 (3) SA 150 (TPD) 152.
>
> In judgments of the erstwhile Rhodesia Appeal Court the sensible view was adopted that a police officer, who suspects a crime has been committed, must take the trouble to confirm his suspicion, or allow to dissipate, if he has the opportunity. This must be done especially if the suspicion is somewhat unfounded. A police officer who fails to substantiate his suspicions where he has the opportunity does not act reasonably. It follows that his suspicion will not be reasonable" (*S v Purcell–Gilpin* 1971(3) S A 548 (RAD) 554C)

[13] I pause here to observe that the second paragraph as quoted above does not

tally with the paragraph of the text I have found in the photocopy which Mr. Tjombe supplied to the bench during the hearing of the appeal. The text appearing in the photocopy reads as follows in the last paragraph of clause 5-10 under the rubric "Reasonable suspicion":

> "The erstwhile Rhodesian Appeal Court adopted the sensible view that a police officer who suspects that a crime has been committed must, if he has the opportunity, take the trouble to either confirm his suspicion or allow it to dissipate. This must be done especially where the suspicion is somewhat unfounded. A police officer who fails to substantiate his suspicion even though he has the opportunity to do so, does not act reasonably. It follows that his suspicion will not be reasonable. (S v Purcell-Gilpin 1971 (3) SA 548 (RAD) 554C**;** *S v Miller* 1974 (2) SA33 (RAD) 35E)."

[14] Based on the authority of the foregoing passage Mr. Tjombe submitted that Aribeb did not have a reasonable suspicion in effecting the respondent's arrest. This was because, according to him, before the arrest Aribeb visited the work place of Dale Dawn Van Wyk whom he already knew as the respondent's wife and there asked Dale for the whereabouts of her husband. As will be discussed later, Mr. Tjombe contended that the respondent was domiciled in Namibia by virtue of his marriage in good faith to Dale, a Namibian citizen.

[15] In his evidence under cross-examination Aribeb denied that the purpose of his visit to Motown, which happened to be Dale's work place, was to go and ask Dale for the whereabouts of the respondent. Rather he went to Motown because the

instructions he had received from Mushilenga included the need to visit Motown on account of the fact that the respondent was reputed to be a regular visitor to that place as most foreigners were wont to do. In other words, Motown was included as an alternative to the house in Academia where the wanted foreigners might be found.

[16] Despite Aribeb's denial of the postulation put to him in regard to the visit to Motown, Mr. Tjombe preferred to draw our attention to the fact that the trial judge had found that Aribeb lacked credit as a witness. The insinuation was therefore that Aribeb, having already known that the respondent was married to a Namibian, could not have had a reasonable suspicion that the presence of the respondent, a foreigner, in this country was illegal.

[17] I shall delve into the question whether the situation portrayed in Du Toit's commentary, as quoted above, is on all fours with the present case. Here I note that the first paragraph which Mr. Tjombe quoted from the commentary talks about an arrested person being a person reasonably suspected to have committed a Schedule 1 offence. Section 40(1) of the Criminal Procedure Act, No. 51 of 1977 provides that a peace officer may arrest without warrant any person:

> "(b) whom he reasonably suspects of having committed an offence referred to in Schedule 1 ..."

[18] Schedule 1 contains a list of criminal offences ranging in seriousness from

Treason, Sedition, Murder, Rape, Robbery to offences of Escaping from lawful custody, including offences of conspiracy, incitement or attempt to commit any offence referred to in that schedule. The list does not include immigration offences. For circumstances empowering a peace officer to arrest for such an offence one has to look to some law outside the Criminal Procedure Act. *In casu*, that law is the Immigration Control Act, No. 7 of 1993 Act. For a start I shall therefore reproduce sections 6, 7, 8, 9, 12, 39 and 42 of that Act and consider to what extent they affect foreigners entering into Namibia:

> "6(1) subject to the provisions of section 7, 8 and 9, no person shall enter Namibia at any place other than a port of entry, unless –
>
> (a) the passport of such person of a category determined by the Minister, bears an endorsement; or
>
> (b) such person is in possession of a document issued to him or her by an immigration officer, to the effect that permission has been granted to him or her by the Minister or such immigration officer to enter Namibia at such place and to be in Namibia for such purposes and during such period and subject to such conditions as may be stated in that endorsement or document.
>
> 7. A person seeking to enter Namibia shall, before entering Namibia, present himself or herself to an immigration officer at a port of entry and shall satisfy such officer that he or she is not a prohibited immigrant in respect of Namibia and is entitled to be in Namibia.
>
> 8(1) For the purpose of ascertaining any matter referred to in section 7, an immigration officer may require any person referred to in that section –
>
> (a) …
>
> (b) …

(c) to produce documentary or other evidence relevant to his or her claim to enter or be in Namibia or that his or her entry into or his or her presence within Namibia will not be unlawful.

9. An immigration officer shall, if he or she is satisfied that a person seeking to enter Namibia complies with the requirements of sections 6,7 and 8 and who is not or is clearly not a prohibited immigrant in respect of Namibia, or is clearly entitled to enter or be in Namibia, permit such person to land and enter or remain in Namibia.

12(1) Any person seeking to enter Namibia who fails on demand by an immigration officer to produce to such immigration officer an unexpired passport which bears a valid visa or an endorsement by a person authorized thereto by the Government of Namibia to the effect that authority to proceed to Namibia for the purpose of being examined under this Act has been granted by the Minister or an officer authorised thereto by the Minister, or such person is accompanied by a document containing a statement to that effect together with particulars of such passport, shall be refused to enter and to be in Namibia, unless such person is proved to be a Namibian citizen or a person domiciled in Namibia.

39(1) Any of the persons referred to in sub section (2) who enters or has entered Namibia or is in Namibia, shall be a prohibited immigrant in respect of Namibia.

(2) A person referred in sub section (1) shall be a prohibited immigrant in respect of Namibia, if –

(a) – (b) (not applicable)

(h) such person, in terms of any other provisions of this Act, may be dealt with as a prohibited immigrant or is not in terms of such provision otherwise entitled to be or to remain in Namibia.

42(1)(a) When a person who enters or has entered or is found within Namibia, on reasonable grounds is suspected of being a prohibited immigrant in terms of any provision of this Act, an immigration officer may –

(i) if such person is not in custody, arrest such person or cause him or her to be arrested without warrant; and

(ii) pending the investigations to be made in terms of sub-

> section (4) by such immigration officer, detain such person or cause him or her to be detained in the manner and at the place determined by the Minister, for such period, not exceeding 14 days, or for such longer period as the Minister, may determine, not exceeding 14 days at a time."

[19] I pause there for a moment to translate the provisions of all the foregoing sections in a language ordinarily understood by the man in the street. In terms of the provisions quoted from section 6 of the Act, all persons traveling to Namibia are required to enter into the country at designated ports of entry. Such a person should be in possession of a passport, or if they do not have a passport, then they should have a document issued to them by an immigration officer. The passport or document should show that permission has been granted to the holder thereof to enter Namibia for the purpose, period and subject to the conditions endorsed in such passport or document. Section 7 in essence requires intending entrants into Namibia and present at a port of entry to present themselves to an immigration officer. Such intending entrants should satisfy the attendant immigration officer that they are not prohibited immigrants to Namibia and further that they are entitled to enter and to be in Namibia. Section 8 gives power to an immigration officer to require such persons present at a port of entry with an intent to enter Namibia to produce to the immigration officer evidence that they have a good claim to enter and remain in Namibia and thereby to show that their presence in Namibia will not be unlawful. The tone of the foregoing sections is peremptory and obligatory in nature and, therefore, inescapable. If therefore the persons reporting at the port of entry and intending to enter this country have satisfied the requirements of sections 6,7 and 8 to the extent explained in this

paragraph, then in terms of section 9 of the Act the immigration officer attending to them may allow them to enter and remain in Namibia for the duration and on conditions prescribed and endorsed in their passport or document.

[20] As is shown by the provisions of section 12 of the Act, persons seeking to enter Namibia are required to have in their possession an unexpired passport which should bear a valid visa. If they do not have these, an immigration officer is empowered to refuse them entry into Namibia, unless they are Namibian citizens or they are domiciled in Namibia.

[21] The effect of the quoted provisions of section 39 is that any foreigner who is present in Namibia is declared to be a prohibited immigrant if such foreigner in terms of any provision of the Act is not entitled to be or to remain in Namibia. By section 42(1) of the Act when a foreigner is found in Namibia and is not in custody, an immigration officer is empowered, if he has a reasonable suspicion that such foreigner is a prohibited immigrant, to arrest and detain him or her.

[22] I shall now consider how the foregoing provisions affected the respondent herein on the basis of the evidence presented before the learned trial judge. On the day of arrest, 18 October 2004, the respondent was initially not under any restraint when he was found by Aribeb. Aribeb testified that he in effect asked the respondent for evidence that his presence in Namibia was lawful. On the basis of the information

and instructions he had earlier received from his superior, Mushilenga, the Chief of Immigration, it was legitimate for Aribeb to make such request because the respondent was suspected to be an Ethiopian, a foreigner. According to Aribeb the respondent, in answer to the request, produced an affidavit on old paper. The deposition in the affidavit was to the effect that the respondent's passport was lost. That such was the immediate information he provided is confirmed by the respondent's own evidence under cross-examination as reflected on pages 774 to 776, viz:-

> "Goba: I know that you were not in possession of a passport. But I assume that you were not a holder of a valid passport.
>
> Respondent: Yes
>
> Goba: Correct? At the time of your arrest, the 18th of October 2004?
> Respondent: Yes, Sir.
>
> Goba: And so, you have said that one of the persons who had arrested you was Mr. Aribeb, sitting at the back of the courtroom?
>
> Respondent: Yes.
>
> Goba: And you told the court, I think that, when he arrested you, he produced his Appointment Certificate?
>
> Respondent: Yes
>
> Goba: So you know that he was an immigration officer?
>
> Respondent: Yes
>
> Goba: And then he asked you whether you had a passport?
>
> Respondent: Yes.

Goba: You told the court --- when you testified in your evidence-in-chief earlier on, that when he asked you for your passport, you said that your passport was lost?

Respondent: Yes.

Goba: And, but then you also told the court that at that time, you had given the passport to someone else to keep it for you?

Respondent: Yes.

Goba: Even the record will show that when you just testified, you said you told Mr. Aribeb that you lost your passport, even though you knew at the time that you had given it to someone else to keep?

Respondent: Yes.

Goba: You told him that you lost the passport. Now, those are two different things?

Respondent: Yes. The time when he asked me, I gave him the Police paper Affidavit which says that I lost a driving licence and a passport."

[23] Significantly when the learned trial judge noted and listed the several aspects which he held to be common cause in this case, he omitted to include the foregoing important fact of the respondent's failure immediately prior to the arrest to produce evidence to justify as lawful his presence in Namibia: The importance of this fact is underscored on the premise that before an immigration officer can effect an arrest of a foreigner found in Namibia, such immigration officer should have reasonabe grounds for suspecting that the foreigner is a prohibited immigrant. In this regard the judge *a quo* failed also to pay regard to the information Mushilenga had communicated to Aribeb that the two foreigners, including the respondent, were suspected to be in the country illegally.

[24] Mr. Tjombe submitted before us, and he did the same in the court *a quo,* that the presence of the respondent in Namibia was lawful based on the fact that the respondent was at the time of arrest known to be a person married to a Namibia citizen. The judge below made a finding of fact that the respondent was indeed at that material time a person married to a Namibian citizen. Mr. Tjombe argued in the court below that by virtue of that marriage the respondent was domiciled in Namibia. However, the trial judge found it unnecessary to consider that extended argument. He stated at page 34 of his judgment (page 1083 of the appeal record in Volume 8) the following –

> "In the light of my decision that the immigration officer, Aribeb unlawfully arrested and detained the plaintiff, it is not necessary to deal with Mr. Tjombe's interesting argument that the plaintiff was domiciled in Namibia because of his bona fide marriage to a Namibian citizen and therefore Parts V and V1 of the Act do not apply."

[25] The learned trial judge was content in founding his decision that the respondent's arrest was unlawful principally on the evidence of the respondent's marriage to a Namibian citizen. This is evident from the following passage occurring at page 33 of his judgment (page 1082 of the record)-

> "The furnishing of the marriage certificate Annexure 'U' to Mushilenga have been much earlier than he or Aribeb indicated. Aribeb definitely, and Mushilenga most probably, knew from the beginning that the plaintiff was married to a Namibian citizen, but ignored that and did not consider this even after the marriage certificate

was handed to Mushilenga and he was satisfied that it was authentic."

[26] With due respect to the learned trial judge, he fell into error in coming to that decision. Marriage *per se* does not legalise a foreigner's residence in Namibia under the Act. In this regard the provisions of sections 24 and 35 are apposite. Section 24 provides for limitation to entry into and residence in Namibia. It states –

> "Subject to the provision of section 35, no person shall –
>
> (a) enter or reside in Namibia with a view to permanent residence therein, unless such person is in possession of a permanent residence permit issued to him or her in terms of section 26; or
>
> (b) enter or reside in Namibia with a view to temporary residence therein, unless –
>
> (i) in the case of any person who intendeds to enter or reside in Namibia for the purpose of employment or conducting a business or carrying on a profession or occupation in Namibia, such a person is in possession of an employment permit issued to him or her in terms of section 27; or
>
> (ii) in the case of a person who intends to enter or reside in Namibia for the purpose of attending or undergoing any training, instruction or education at any training or educational institution in Namibia, such person is in possession of a student's permit issued to him or her in terms of section 28; or
>
> (iii) in the case of any person who intends to enter or reside for any other purpose, such person is in possession of a visitor's entry permit issued to him or her in terms of section 29."

And section 35(1) provides –

> "Notwithstanding the provisions of this Act, the Minister may exempt any person or category of persons from all or any of the provisions of this Part,

and for a specified period and either unconditionally or subject to such conditions as the Minister may impose, and may do so also with retrospective effect whereupon the Chief of Immigration shall be notified to that effect."

The rest of the subsections of section 35 are not relevant to the present case.

[27] Therefore in terms of section 24 as read with section 35 of the Act, the only alien person entitled to enter and/or reside in Namibia are those comprising the following categories, namely –

(a) holders of permanent residence permits;

(b) students in possession of student's permits;

(c) holders of employment permits, and

(d) holders of visitors' entry permits.

Section 35 by necessary implication also grants an entitlement to residence in Namibia to persons with an exemption granted by the Minister, exempting them from holding any of the above mentioned permits referred to in section 24. The absence of marriage as a factor constituting lawful residence in Namibia is conspicuous. We have, therefore, to search elsewhere in the Act or any other law for provisions warranting lawful residence in Namibia on the basis of marriage to a Namibian citizen.

[28] Section 22 of the Act is one such other provision. It states :

"22(1) For 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 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 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;

(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

paragraphs (d), (e), (f) or (g) of section 2(1),

shall be regarded as a period of residence in Namibia."

[29] In terms of paragraph (c) of section 22(1) of the Act, if one is ordinarily resident in Namibia by virtue of his or her marriage entered into in good faith to a person falling within the ambit of Article 4(3)(a) of the Namibian Constitution, then his or her residence would be lawful. Article 4(3)(a) constitutes as Namibian citizens foreign persons who in good faith marry Namibian citizens. Upon such marriage a foreign spouse concerned acquires Namibian domicile. The rest of the provisions of section 22 are not relevant and I shall not refer to them any more.

[30] I shall in due course elaborate on the issue of residence when I come to consider the question whether the respondent was domiciled in Namibia at the time of his arrest. For now the point under consideration is whether Aribeb, the immigration officer, had a reasonable suspicion to justify his act of arresting the respondent on 18 October 2004.

[31] As we have seen, on that occasion the respondent was requested to satisfy Aribeb whether his presence in Namibia was lawful. In response to that request, the respondent produced what Aribeb perceived to be a false affidavit stating that the respondent had lost his passport. It suffices to say that when his arrest was imminent – having been required to accompany the arresting officer to a Police Station and while there, having been informed that he would be detained pending

investigation into the lawfulness of his immigration status – the respondent failed to satisfy Aribeb that his presence in Namibia was legally above reproach. It is, therefore, patent that the circumstances then prevailing were enough to induce, and I am satisfied that they did induce, a reasonable suspicion in Aribeb's mind, that the respondent was probably unlawfully present in Namibia. Therefore, the arrest was perfectly justified in law.

[32] In the event, I reject Mr. Tjombe's contention that the respondent's arrest could not be justified because the arresting officer did not have a reasonable suspicion. I am of the firm view that the requirements of section 42(1)(a)(i) of the Act were present at the time of arrest. By those requirements, an immigration officer is empowered to arrest a person who on reasonable grounds is suspected of being a prohibited immigrant. It has to be remembered that at the stage Aribeb had already been alerted by Mushilenga to the fact that there were two foreigners living at an address in the Academia area who were believed to be in Namibia unlawfully, and that they were driving a car which had Botswana registration number plates. The respondent, together with his companion David, appeared to fall within the description. With that background information, it was no wonder that Aribeb construed the respondent's failure to produce authentic evidence of residence in Namibia as an indication that the respondent was probably a prohibited immigrant.

WHETHER RESPONDENT WAS DOMICILED IN NAMIBIA

[33] We have seen that Mr. Tjombe's submission was that the respondent was domiciled in Namibia by virtue of his marriage in good faith to Dale, the Namibian citizen. Therefore my focus will be directed at paragraph (c) of section 22(1) of the Act when discussing the question whether the respondent did acquire Namibian domicile. There is no need to reproduce that provision because I have already quoted that part of section 22(1) in full elsewhere.

[34] Mr. Tjombe tried to strengthen his argument that the respondent was domiciled in Namibia. He did so by urging this court to accept that by virtue of his marriage in good faith to the named Namibian woman, he had acquired that status. He made an issue of marriage in good faith as opposed to marriage of convenience. In the course of his submission in that vein, he cited the case of *Kohlhaas v Chief Immigration Officer, Zimbabwe and Another* 1998(3) SA 1142. One of the headnotes in that case reads as follows:

> "*In Rattigan and Others v. Chief Immigration Officer, Zimbabwe and Others* 1995(2) SA 182 (ZSC) C1994(2) ZLR 54 (S), 1995(1) BCLR 1 it was declared that a female citizen of Zimbabwe, married to an alien, was entitled, by virtue of the right of freedom of movement under s 22(1) of the Constitution of Zimbabwe, to reside permanently with her husband in any part of Zimbabwe. A few months later the ruling was extended in *Salem v. Chief Immigration Officer, Zimbabwe, and Another* 1995 (4) SA 280(ZSC) 1994(2) ZLR 287(S); 1995(1) BCLR 78 to embrace within the mobility rights of the citizen wife, the right of the alien husband to lawfully engage in employment or other gainful activity in any part of Zimbabwe."

[35] In all the three above mentioned cases the accent was placed on the nature of marriage of the aliens concerned to citizens of Zimbabwe, namely whether in each case the marriage was entered into in good faith or it was a marriage of convenience, but what I have found to be of interest is that in each of the three Zimbabwean cases there was no illegality tainting the entry into or residence in Zimbabwe by each of the alien husbands. In *Kohlhaas* the alien husband entered Zimbabwe under the authority of a temporary residence and subsequent work permits. In *Rattigan* the alien husband entered Zimbabwe initially on a visitors' permit which was later extended by issuance to him of a two-year residence permit. In *Salem* the wife and alien husband met in South Africa. Both later went to Zimbabwe, the country of which the wife was a citizen. After getting married in Harare, the alien husband later applied for a residence permit. Although it is not expressly so stated, it is evident that the alien husband's entry into Zimbabwe was above board.

[36] The situation in the present case is the reverse in terms of how the respondent entered Namibia and how subsequently he resided in the country before his marriage to Dale. The uncontested evidence of Aribeb was that the respondent claimed to have entered Namibia at the Ariamsvlei port of entry on 21 September 2004. A check was made at that port and no record was found of the respondent having been attended to in accordance with the provisions of the Act. Nor did the respondent adduce any evidence to show that he entered Namibia at any other port of entry or that he had authority granted by the Minister allowing him to enter at any place other than a port

of entry.

[37] The respondent claimed to have obtained a permanent residence permit. In this regard the passport he subsequently produced, despite it having an endorsement stating that he was the holder of a permanent residence permit, did not show in it the actual permit endorsement. The evidence adduced on behalf of the government was that apart from a residence permit being stamped in the passport, an actual permanent residence certificate is issued to an applicant. The respondent produced no such certificate and gave no credible account as to why he had none. The Act requires*, inter alia*, that the passport of an intending entrant into Namibia should be valid. To the contrary, the respondent's so-called passport is of dubious validity. It has no signature of the holder. On the assertion of the respondent, it was issued by the Ethiopian Embassy in Pretoria, South Africa, on 2 October 2002, while the respondent was in Namibia, yet it purports to have a Namibian re-entry visa dated 3 October 2002. The respondent failed to give a credible explanation as to how it could have taken one day for the passport to be issued in Pretoria and then be available in Namibia the next day for the visa re-entry endorsement. Under cross-examination the respondent testified that he received the passport one week after its issue in Pretoria. That answer belies his claim that the visa endorsement of 3 October 2002 was authentic. In any event how could the visa entry of 3 October 2002 be authentic since the respondent could and did not enter Namibia on that date

as he was already in Namibia. Finally pages 7 and 8 were inexplicably missing from the so-called passport.

[38] All the foregoing anomalies show that both the respondent's entry into, and residence in Namibia were unlawful. Therefore the present case can be distinguished, and is, clearly distinguishable from *Kohlhaas, Rattigan* and *Salem*, all *supra*. The three cited Zimbabwean authorities are helpful to the present respondent only on the question of marriage in good faith, which is not a critical issue *in casu*, but they do not advance his case in as far as the legality of entry and residence for immigration purposes are concerned.

[39] The question I now pose and which has to be answered is whether despite the illegality which tainted the respondent's entry into and consequential residence in Namibia, he acquired a Namibian domicile by virtue of his marriage to the named Namibian citizen. In other words, did that marriage, like a magic wand, all of a sudden change the respondent's illegal status to a status which became acceptable in the eyes of the law?

[40] In terms of paragraph (c) of section 22(1) of the Act, the respondent could only acquire Namibian domicile if he was ordinarily resident in this country by virtue of having entered into a marriage in good faith to a Namibian citizen. Was he so resident?

[41] The type of domicile envisioned by section 22(1)(c) is domicile of choice, as opposed to domicile of origin which, in terms of Private International Law, is determined by the place of one's birth or, in the case of a foundling, the place where the infant child was found.

[42] Unfortunately, no municipal case law was drawn to our attention regarding the definition of domicile of choice or how it is acquired. However, the law on the point is to the effect that a person acquires domicile of choice when he or she leaves the country where he or she has a current domicile and takes up residence in another country, the host country, with *animus manendi*. Such residence must, however, be lawful. The learned authors of the book "**Introduction to South African Law and Legal Theory**" state, for example, that

> "In order to acquire such domicile of choice, a person must actually have taken up lawful residence at the place concerned for however brief a period, and must secondly have formed the intention to settle there for an indefinite period." (See 2nd Ed para 2.3 at page 559.)

Later at page 560, *ibid*, the learned authors state the following:

> "In practice it is not always easy to decide whether a person has the capacity freely to exercise his will in the choice of domicile. Thus a prohibited immigrant cannot acquire a domicile of choice because his residence is unlawful and he may be repatriated at any time."

For the foregoing statement of law they cite the case of *Smith v Smith* 1962(3) SA 930 (FC).

[43] *Smith v Smith*, *supra*, is a case from the now defunct Federal Supreme Court of the former Federation of Rhodesia and Nyasaland. Smith was a British national and consequently held a domicile of origin of England. He decamped from Britain as a fugitive from the criminal justice system of that country. He entered the Federation using a passport in a false assumed name. His entry in those circumstances was contrary to the provisions of the Federal Immigration Act of 1954. He settled in Southern Rhodesia (now Zimbabwe) where he eventually married his wife. In due course the wife instituted a court action claiming a declaration of nullity of her marriage to Smith. In the court papers she described the parties to the cause as being both domiciled in Southern Rhodesia. Judgment on merits was granted to the wife. Smith appealed to the Federal Supreme Court.

[44] In the course of the appeal proceedings the true facts of how Smith entered Southern Rhodesia were exposed. Hence an issue of his domicile arose. It was raised *mero motu* by the court because on the pedestal of a common domicile of the parties rested the jurisdiction of the courts of Southern Rhodesia to entertain that matrimonial cause. Having adjudged that Smith's entry into and subsequent residence in that country were unlawful under the 1954 Immigration Act, Briggs, ACJ, held that the court *a quo* lacked jurisdiction in the matter on the ground of Smith not

being domiciled in Southern Rhodesia. The learned Judge's dictum at the conclusion of the judgment is pertinent. He stated –

> "My conclusion is that it is not possible under our law for a person *sui juris* to acquire a domicile of choice in this country if his initial entry and his residence at all times thereafter have both been unlawful in terms of the Immigration Act, 1954…"

Later he went on –

> " Acquisition of domicile of choice requires both residence and *animus manendi.* Not every kind of *de facto* residence will suffice. It must usually be residence of one's free will or, at least, if it is not, the residence can be of no value as evidence of *animus manendi.* The *animus manendi* must be both genuine and honest. An intention to persist indefinitely in a course of unlawful conduct may be genuine: but it cannot be honest. Fears that the worst may happen do not necessarily preclude a sufficient *animus.* But knowledge that one is residing only in defiance of the law, and will so continue indefinitely, makes it impossible to have an *animus manendi* of the requisite quality. I think also that the matter may properly be put in another way. The *animus manendi,* though it does not require an absolute intention to reside permanently, must at least be an unconditional intention to reside for an indefinite period. In this case the intention of the appellant, putting it at the highest, can only have been, 'I will stay in Rhodesia if I can escape the attention of the authorities, whose statutory duty is to deport me, and who will at once do so if they learn the true facts about me'. I think a conditional or provisional intention of this kind cannot in law amount to the *animus manendi* necessary to establish a domicile of choice…"

[45] The point is elaborated more amply in the book "**Private International Law: the modern Roman and Dutch Law including the jurisdiction of the Supreme Court**", 3rd edition by C.F. Forsyth. The ensuing passages occur at pages 119 to 122 and 130.

> "III DOMICILE PROPER: THE TYPES OF DOMICILE
>
> Our common law knows three types of domicile: *domicile of choice* – which may in certain factual circumstances be acquired by persons of full capacity by deciding to settle in a certain country – the *domicile of dependence* – which is the domicile assigned by law to wife or minor child – and 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.
>
> IV DOMICILE OF CHOICE
>
> 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 a*nimus,* the intention to remain permanently (or possibly indefinitely) in that country. The Domicile Act 1992, in section 1(2), however, simply provides that domicile of choice is ' acquired by a person when he is lawfully present at a particular place and has the intention to settle there for an indefinite period'. Although the statute talks of 'lawful presence' and the common law of 'lawful residence', for reasons given below, this is not believed to be a significant difference.
>
> Under both the common law and the statute *animus* and *factum* must both exist and they must exist concomitantly at some point in order for a domicile of choice to be acquired."

[46] In regard to the *factum* component of the domicile of choice, the learned author continues as follows under the rubric "*factum*: the requirement of residence":

> "At common law the term residence used here, although commonplace in the decided cases, is a misnomer. 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. The Domicile Act 1992 speaks simply of 'lawful presence' and, it is submitted, this is the same concept as used in the common law. This is precisely what the Law Commission had in mind in recommending the use of 'lawful presence'."

[47] The last paragraph under the above rubric is critical and laconic and it asserts –

> "The residence must, of course, be lawful. The illegal immigrant cannot acquire a domicile in the country he has chosen."

[48] The following passage occurring at page 130 is even more elaborative and relevant to the case in hand. It is under the sub-heading – "The domicile of deportees and those who, if resident, are unlawfully resident in the country of choice". It goes as follows –

> "Here the position is relatively simple. In order to acquire a domicile of choice in a country, the *propositus* must be lawfully resident there; if his residence depends on having to evade immigration authorities and continuing to evade the police, or other authorities seeking to eject him from the country, then he cannot acquire a domicile in that country, notwithstanding the existence of *animus manendi* and, of course, his physical presence there."

[49] It is patent, therefore, that the approach of Roman-Dutch common law is that an immigrant, notwithstanding his or her ardent desire or intent to remain permanently or for an indefinite period in his or her host country, lacks the capacity to acquire a domicile of choice in that country for as long as his or her residence there remains unlawful. The statute law of South Africa is to similar effect.

[50] As Namibian jurisprudence is intimately interlinked with that of South Africa,

both being derived from the Roman-Dutch common law, the temptation is almost irresistible to end here and determine the appeal substantially successful. Such a feeling could be justified on the basis that no relevant municipal authority, statutory or juridical, has been cited before this court in support of the contrary contention – except, of course, those cases which were cited by counsel for the respondent, but which have been distinguished from the present case, and his reliance on section 22(1)(c), a correct interpretation of which, as I shall endeavour to do in this judgment, is different from the one he espoused. However, in a contentious case such as the current one which could have far-reaching repercussions, it is prudent, where possible, to try and venture far afield outside the local jurisdiction, *in casu* the Roman-Dutch common law jurisdiction, in search of foreign law which may have a bearing on the issue in controversy. To this end, an English decided case came readily to hand and I shall, therefore, instantly move to examine it.

[51] The Court of Appeal case of *Regina v Secretary of State for the Home Department, ex parte Margueritte* (1982) 3 WLR 754 is of tremendous interest. In it the Law Lords hearing the appeal set out to consider what the words, “ordinarily resident’’ were designed to import in an English statute to which I shall refer later. For now, let me give a resumé of the facts in that case.

[52] Margueritte was a man born and bred in Mauritius. So, his domicile of origin was Mauritian. In 1972 he left his home country, travelled and entered the United

Kingdom on a visitor’s permit. That permit authorised him to stay in that country for a few months only. However, he overstayed in breach of the British immigration law. In 1974 he left the U.K. and visited France. On his return to the U.K. he again managed to obtain another visitor’s permit durable for one month. But again he furtively overstayed. In due course, he got married to a native Mauritian like himself. His wife had, however, lawfully resided in the U.K. for many years. She later, after her marriage to Margueritte, qualified to apply for British citizenship. Relying on his wife's residential permit, Margueritte also applied for British citizenship. To his dismay, his application was rejected whereas that of his wife was accepted. He thereafter unsuccessfully applied for judicial review in the High Court. Disenchanted by his High Court venture, He appealed to the Court of Appeal. Lord Denning, MR, presided over the proceedings and sat with Oliver and Kerr, L.JJ. The three Law Lords delivered three separate judgments all of which were unanimous in dismissing the appeal.

[53] The *ratio decidendi* in the appeal revolved around the interpretation of the term "ordinarily resident". That term was imported into the British Nationality Act, 1948, by an amendment contained in section 5A of the Immigration Act, 1971. That new section empowered the Secretary of State in the Home Department to cause to be registered as a citizen of the United Kingdom and Colonies any person of full age and capacity who had throughout a period of five years immediately preceding his or her application for such registration been "ordinarily resident" in the United Kingdom.

[54] It suffices to refer only to the lead judgment delivered by Lord Denning MR. The following passage occurs at page 757 B – H of the law report in that case –

> "When they were first used (i.e. the words "ordinarily resident") in the Act of 1948 there were no persons in existence such as illegal entrants or 'overstayers'. So I do not think we should construe the words 'ordinarily resident' as at that time in 1948. It was in 1973 that those persons came into being in England. I think those words should be construed in their new setting. They have to be applied in a new setting and should be construed accordingly. In this new setting the Immigration Act, 1971 contains specific provisions as to whether such a person is to be regarded as 'ordinarily resident' here. There is a general provision in section 33(2) of the Immigration Act, 1971 which says:
>
> > 'It is hereby declared that, except as otherwise provided in this Act, a person is not to be treated for the purposes of any provision in this Act as ordinarily resident in the United Kingdom or any of the Islands at a time when he is there in breach of the Immigration laws.'
>
> Although that declaration is itself 'for purposes of this Act', I think it is permissible to have regard to it when considering the new section 5A of the Act of 1948. It is part of the new setting in which the words 'ordinarily resident' have to be construed.
>
> Applying it, I am of the opinion that an 'illegal entrant' or an 'overstayer' is not to be treated as 'ordinarily resident' here at a time when he is in breach of the immigration laws. Furthermore, I think the broad principle we stated in this court in *in re Abdul Manan* (1971) 1 WLR 859, 861 still applies. I said:
>
> > 'The point turns on the meaning of "ordinarily resident" in these statutes. If this were an income tax case he would, I expect, be held to be ordinarily resident here. But this is not an income tax case. It is an immigration case. In these statutes "ordinarily resident" means lawfully ordinarily resident here. The word "lawfully" is often read into these statutes.'"

[55] In the result, Margueritte lost his appeal because, as I have shown in the brief

facts set out in paragraph 52, Margueritte remained in the U.K. illegally and in breach of immigration laws after his visitor's permits of 1972 and 1974 had expired.

[56] Adverting to our present case, I have shown already in this judgment that the respondent's entry and consequential residence were in breach of the provisions of the Act. In the absence of local case law throwing light on the definition of the words "ordinarily resident" used in paragraph (c) of section 22(1) of the said Act, it is just proper and useful that this court should adopt apposite foreign law in interpreting those words. In this regard the dictum of Lord Denning quoted above is instructive. Similarly the quotation from the "**Introduction to South African Law and Legal Theory**", *supra*, being *in pari material* is equally useful to the extent that it states that a prohibited immigrant cannot acquire domicile of choice because his residence is unlawful. The Zimbabwean case of *Smith v Smith*, *supra*, is supportive of the same view. My quotation from the author Forsyth in his book **Private International Law**, *supra*, is equally supportive of that view. It is important in this regard to underscore the fact that Forsyth's exposition embraces the modern approach of Roman-Dutch common law as applied in South Africa. Being guided by the law obtaining in three foreign jurisdictions namely, South Africa, Zimbabwe and England, I feel very comfortable in coming to the conclusion that the respondent was not and continues not to be ordinarily resident in Namibia despite that his marriage to Dale Dawn van Wyk, a Namibian citizen was, according to the evidence, contracted in good faith. In the event, Mr. Tjombe's submission on this issue cannot succeed. It is rejected.

WAS RESPONDENT'S ARREST DONE *IN FRAUDEM LEGIS*

[57] Having regard to my determination that the respondent's arrest was lawful, it is merely of academic interest whether the arresting officer acted *in fraudem legis*. However, I can state at the outset that the learned trial judge erred in law when he held that Aribeb acted as stated. The case of *Dadoo Ltd. and Others v Krugersdorp Municipal Council* 1920 AD 530 is instructive in understanding the legal principle of acting *in fraudem legis*. Although the case was premised on the discriminatory laws of the then apartheid South Africa, the legal principle which the case lays down is sound. The principle is encapsulated in the laconic statement of Innes, CJ, who prepared and handed down the leading judgment of the court which comprised five judges. He stated at page 547 –

> "An examination of the authorities therefore leads me to conclude that a transaction is *in fraudem legis* when it is designedly disguised so as to escape the provisions of the law, but falls in truth within these provisions."

[58] The short facts of *Dadoo*, *supra*, were that by some discriminatory laws enacted in 1886 and 1908, people of the Asian race and those of the coloured race were forbidden from owning immovable property in the Transvaal or occupying lands held under what were called gold laws. An enterprising Asian going by the name Dadoo formed a limited company styled Dadoo Ltd., which under company law was a

legal persona separate from the shareholders. Dadoo and another Asian held all the shareholding in Dadoo Ltd. The legal persona, Dadoo Ltd, succeeded in purchasing immovable property in the forbidden land. The Krugersdorp Municipal Council which was situated in the Transvaal brought an action against Dadoo for having allegedly acted *in fraudem legis*. The rationale behind the action was that although Dadoo Ltd was a legal persona separate from its shareholders, it was wholly controlled by its Asian shareholders. The company was therefore essentially perceived to be Asian and it was presumed that it was formed in order to circumvent the spirit of the law.

[59] Certain portions of the judgment by Innes, CJ, were explicative of the essence of the action commenced by the Municipal Council. The following was stated at p.542 –

> "It is not contended in argument that Dadoo Ltd. fell under the language of either clause (i.e. clauses in the 1886 and 1908 statutes), as ordinarily interpreted; there was no suggestion that the company came within the designation of either an Asiatic or coloured person. The argument was that the law had been wrongly evaded by an arrangement which was in violation, not of its letter, but of its spirit."

And at page 544 the following passages occur :

> "A man who does what a statute forbids, transgresses the statute; a man who contravenes the intention of a statute, without disobeying the actual words, commits a fraud on it."

And –

> "A fraud is committed on a statute when something is done which the statute desired should not be done; but did not actually forbid; the difference between fraud on the law and transgression of it, is the same as that between speech and intention."

And finally :

> " Without doubt he contravenes the law who, observing its letter, opposes its spirit. Nor will a man escape its penalties who fraudulently shelters himself by a strained use of language contrary to the spirit of the law."

[60] From all the foregoing it may be stated that the principle encapsulated in the term *"in fraudem legis*" is that by its letter as well as by intent or spirit a statute should forbid the doing of a prescribed act. A person perpetrates a fraud on the statute who, by subterfuge, commits an act which avoids violation of the letter of the statute but nonetheless disobeys its intent or spirit. Did such a thing happen in the current case?

[61] The trial judge held that Aribeb, the arresting officer, acted *in fraudem legis.* His process of reasoning leading to such holding is reflected in the passage which occurs at page 43 of his judgment. There, he stated the following :

> "I find that the immigration officer, Aribeb, acting within the ambit of an instruction by Mushilenga, or on his own, arrested and detained the plaintiff for a different purpose and acted as such with an ulterior motive namely to keep the plaintiff in

> detention in order to extract information from him that could enhance his investigation into the passport scam, the purpose for which he was brought to Windhoek. To do this, he kept the plaintiff in inhuman circumstances and deprived him of his liberty. Aribeb ignored the provision of the plaintiff's marriage certificate. Even after obtaining his passport and had enough evidence to charge and prosecute the plaintiff in terms of the Act, he did not do so, evidently because that was never his motive. Aribeb acted *in fraudem legis* by using a statutory provision to obtain another purpose. Consequently, Aribeb never had reasonable grounds to detain the plaintiff for the purpose he wanted the court to believe."

[62] In the first place, I find that the judge's finding of fact that Aribeb arrested the respondent for the ulterior motive of wanting to detain him in connection with the passport scam, was misplaced. Aribeb's evidence was in part that he received instructions from his superior, the Chief Immigration Officer, to follow up two Ethiopians about whom the Chief Immigration Officer had received information that the two were believed to be in Namibia unlawfully. Mushilenga, the superior of Aribeb, corroborated Aribeb on that aspect. Aribeb's further evidence was that he was acting on those instructions when he subsequently arrested the respondent. Since the trial judge expressly stated that he would accept only such of Aribeb's evidence as was corroborated by other (credible) witnesses, and as Mushilenga's evidence was not expressed to have been discredited, the trial judge erred in holding otherwise than in keeping with Aribeb's corroborated evidence.

[63] Adverting to the in *fraudem legis* principle, I hold that the trial judge misapplied it. *In casu*, even if it were to be accepted that Aribeb in truth arrested the respondent in connection with the scam, there was no law which, either by letter or spirit, forbade

arresting any person involved in a scam, or arresting anybody believed to be a prohibited immigrant. The *fraudem legis* principle as discerned from the judgment of Innes, CJ, in *Dadoo*, *supra*, is premised on the apparent obedience of the letter of the law while acting in violation of its spirit or intent. Section 42(1) of the Act empowers an immigration officer to arrest any person whom he suspects on reasonable grounds to be a prohibited immigrant, just as such officer has powers under the law to apprehend any person involved in a passport scam. To that end, there was no statute which was furtively violated. In the event, I am satisfied and feel sure that the learned trial judge erred in law when he held that Aribeb acted *in fraudem legis*.

WHETHER THE CONTINUED DETENTION OF RESPONDENT AFTER EXPIRY OF THE INITIAL WARRANT OF DETENTION WAS UNLAWFUL

[64] The trial judge referred to section 50 of the Criminal Procedure Act, No. 51 of 1977 which requires that a person who is kept in custody after arrest with or without warrant should be taken before a magistrate within 48 hours. He however acknowledged that in the case of a person arrested and kept in custody under the Immigration Control Act he or she may be detained under a warrant for a period of 14 days to enable the immigration officer concerned to investigate the arrestee's status. Thereafter he proceeded to state the following at page 40:

> "However, the principle remains the same when this longer period expires, namely the detained person's rights as set out in Article 11(1) and (2) as well as Article 7 (of

> the Constitution of Namibia) are infringed and such custody or detention is unlawful, just as an accused held in custody for more than 48 hours before being brought before a court."

Then at page 42 of the judgment he concluded by stating –

> "In view of my decision that the plaintiff's arrest was unlawful, his detention from the beginning, namely 18 October 2004 was unlawful until the time of his release on 28 January 2005. Consequently, I do not have to find that the subsequent authorizations for further detention were invalid which they were, and his further detention therefore unlawful."

[65] Sub-articles (1) and (2) of Article 11 aforesaid provide that no person shall be subject to arbitrary arrest or detention, and that no persons who are arrested shall be detained without being informed of the grounds for such arrest. I have held in this judgment that the respondent's arrest and initial detention were lawful. I do not therefore subscribe to the trial judge's determination that the arrest was unlawful, nor that his detention was unlawful *ab initio*. It therefore goes without saying that neither his arrest nor the detention on the warrant of 18 October 2004 was arbitrary. I shall now consider the position regarding the subsequent detention warrants.

[66] We have seen that under section 42(1)(a)(ii) it is provided that after an immigration officer has arrested and detained a person in terms of the provisions of the Act, the officer may, pending investigations to be made "detain such person … for such period not exceeding 14 days or for such longer period as the Minister may determine, not exceeding 14 days at a time."

[67] In the present case, warrants issued after the first one dated 18 October 2004, were dated 1 and 22 November, 9 and 28 December 2004 and 14 January 2005. The one dated 1 November was quite clearly issued within the required period of 14 days. However, those dated 22 November, 9 and 28 December and on 14 January 2005 were issued after the 14 day period had expired on each occasion. There was thus failure to comply with the requirement of the Act after the expiry of the warrant issued on 1 November 2004. It is however, evident that during the period when the respondent may be said to have been unlawfully detained, efforts were being made either by himself or on his behalf to show that his arrest was in contravention of the law. Examples of such efforts were his claim that he had lawfully entered Namibia at Ariamsvlei on 21 September 2004. This had to be investigated and when it was, it was found to be false as I have already shown in this judgment. There was then the affidavit which he produced on the day of arrest, claiming that he had lost his passport. According to Aribeb it was only early in January 2005 that the respondent showed up and told Aribeb that he, the respondent, did after all have a passport. Ms. Masweu, who accompanied Aribeb and the respondent to Wanaheda to trace the passport testified that this happened in January 2005 on a date she could not remember. There was also a claim of justifying his presence in Namibia by reason of his marriage to a Namibian citizen. At first only a copy of the certificate of marriage was produced. A duplicate original was only produced weeks later after his arrest. This aspect had to be, and it was, also investigated.

[68] While, therefore, it is inescapable to find that the respondent was, strictly as a matter of law, unlawfully in detention from 15 November 2004 the day after the warrant dated 1 November 2004 expired, the continued detention thereafter was partly occasioned by the respondent himself or by those who were helping him to avoid the tag of being a prohibited immigrant. Indeed the matter was even filed in the High Court by way of an application for the respondent's release. Unfortunately details about that application do not appear clearly in the evidence, but from a copy of a supporting affidavit sworn by the respondent's wife, Dale, the application was probably made on or about 27 January 2005. The illegality of the continued detention notwithstanding, the respondent remained a prohibited immigrant and therefore arrestable at all times during his continued detention. This is evident from the determinations I have made herein to the effect that his arrest and consequential detention on warrants dated 18 October and 1 November 2004 were lawful, coupled with the holding that the whole period of his residence was unlawful.

[69] The initial period of 28 days (when the respondent was lawfully held) was sufficient for the detaining authority to make up their mind as to what alternatives should have been resorted to. There are a number of such alternatives provided for in section 42 of the Act. Under subsection (2) an immigration officer is required to acquaint the detainee with his right under Article 11(5) of the Constitution regarding access to a lawyer of his or her choice and coupled with complying with that

obligation the officer should furnish the detainee with written grounds of his or her detention. Under subsection (3), the officer may require the detainee to deposit with the immigration officer, *in lieu* of being detained, an amount of money determined by the Minister; the detainee would, upon making such deposit, be required to comply with certain conditions to be prescribed in writing by the immigration officer. During the period when the person is detained as stated or after release upon payment of the deposit, the immigration officer must carry out investigations to determine whether or not the person concerned is a prohibited immigrant.

[70] In the event that the investigation reveals that the affected person is a prohibited immigrant, the immigration officer is obliged to notify such person that an application shall be made under section 44 to an immigration tribunal for authorization to deport such person from Namibia. That is an alternative provided for in subsection (4) of section 42.

[71] It would appear that none of the foregoing alternatives was applied. Instead Aribeb chose to continue detaining the respondent but doing so contrary to the requirements of the law. To that end I share the sentiment expressed by the learned trial judge that Aribeb treated the respondent like a criminal and exposed him during the detention to inhuman conditions. This court frowns upon such disregard of the law by a public officer who is presumably a properly trained immigration officer.

CREDIBILITY OF IMMIGRATION OFFICER ARIBEB

[72] Before coming to the conclusion of this judgment, it is necessary to deal with the issue of credibility of Aribeb as a witness. In the court below the following was said about him by the trial judge:

> "His evidence is only corroborated by (a) Mushilenga in respect of the initial arrest on information received from an unknown source and to some extent in respect of the provision of the marriage certificate and (b) by Ms. Masweu with regard to the obtaining of the plaintiff's passport. Save for that Aribeb's evidence in respect of what happened during detention of the plaintiff, the statements made by him and what occurred between him and the plaintiff, is uncorroborated." (See page 25 of the judgment.)

Then at page 30 the judge stated:

> "I have no doubt that Aribeb on purpose lied under oath when he denied having anything to do with Exhibit "S" during his evidence before the adjournment of the case. I regard Aribeb as an unreliable and incredible witness and will only rely on his evidence to the extent that it is supported by that of another reliable witness."

[73] The well established practice observed by appellate courts is that on issues of credibility of witnesses, the finding of a trial judge should not be lightly interfered with. This is because the trial judge has an advantage which appellate judges do not have, namely of seeing and hearing the witnesses as they give their evidence and can therefore better judge their demeanour. An appellate court should only interfere when it feels sure that the trial judge's finding is clearly wrong, as for example where the

judge has clearly misdirected himself.

[74] *In casu*, I am convinced that the judge was clearly wrong and that he did misdirect himself. In the first place, it is not correct that Aribeb was corroborated only on two aspects, nor were Mushilenga and Masweu the only witnesses who corroborated him. The respondent and his wife did corroborate Aribeb respecting the fact that the couple's authentic marriage certificate was not produced at the outset. The effect of the couple's evidence was that the duplicate original of the certificate was produced some two weeks after the respondent's arrest. Aribeb testified that the affidavit the respondent produced on demand that he satisfies Aribeb about his, the respondent's status in Namibia looked suspicious. In his evidence, the respondent did concede that the deposition he had made that his passport was lost was untrue. Aribeb testified that the re-entry visa dated 3 October 2002, which was endorsed in the passport of the respondent, i.e. Visa No. W 5638/2002, in fact belonged to a South African and not to the respondent. In addition, on this aspect, Aribeb swore that the re-entry visa was not for permanent residence as endorsed in the passport, but that it related to the South African's work permit. In his evidence under cross-examination the respondent confessed that the visa endorsement in his passport was false. The following extract from the 7th volume of the appeal record, at pages 815 to 816, reflects that confession. Mr. Goba asked –

"Now you've heard the evidence before this court, Mr. Andema testified that these

visa entries are false and his signature was forged. Do you not accept his evidence that, in fact, this is a false entry the one that remained in the passport?"

Answer: "I mean since they said that is false, I mean you know they know better."

Question: "You accept?"

Answer: "Ja, I accept it is false."

[75] The only visa entry in the respondent's passport about which he was being cross-examined at that stage was the one showing that the respondent was the holder of a permanent residence permit and showing Visa No. W5638/2002. That is the one he confessed was false, thus corroborating Aribeb that that visa number did not belong to the respondent.

[76] The aspects on which the evidence of Aribeb was corroborated were highly material to the reasonableness of the suspicion Aribeb had that the respondent was unlawfully in Namibia, thus justifying the arrest. The corroborations also underscored the justification of the initial detention. The leaned trial judge, having discredited Aribeb as a witness of truth, directed himself that he would only believe those aspects of his evidence which would receive corroboration. Yet despite such corroboration being available the judge went ahead and held that the arrest and later detention of the respondent were unlawful *ab initio*. The evidence of Aribeb may have been economical of the truth on some inconsequential matters, but that did not justify dismissing totally his well corroborated evidence on matters of vital consequence and on which the whole case virtually rested. I consequently have reason to distance

myself from the trial judge's finding on the creditworthiness of Aribeb. In my well considered view the judge's holding on that aspect was clearly wrong.

CONCLUSIONS

[77] In the final analysis, I unreservedly hold that the trial judge erred when he determined that the respondent's arrest was unlawful. The arrest was justified on the basis of a clearly proved reasonable suspicion on the part of the arresting immigration officer that the respondent's presence in Namibia was probably unlawful. While it is not a bone of contention that the respondent was married to a Namibian citizen and that that marriage was contracted in good faith, the respondent was not ordinarily resident in Namibia by reason of that marriage. That was because his residence in this country was in contravention of the immigration law of Namibia. Moreover, it is my firm view that the immigration officer aforesaid did not act *in fraudem legis*, contrary to the finding of the judge below. I accordingly reverse the holding of that judge in that respect. For the reasons hereinbefore articulated, I further hold that the respondent's detention for the first twenty-eight days on the strength of the warrants issued on 18 October and 1 November 2004, was lawful. To that extent, I uphold the appeal.

[78] I dismiss the appeal in regard to the detention of the respondent from 15 October 2004 to the end of the year and up to 27 January 2005, bearing in mind that

on 28 January 2005, he was released. However, as already explained, the respondent was a major contributor to the extended detention beyond 14 October. I also emphasize that during the entire period of his detention he remained a prohibited immigrant to Namibia, thus unable to enjoy the full protection afforded by the Constitution of Namibia and in particular by the following articles thereof:

> "(a)11(1) the right not to be subjected to arbitrary detention, because his detention initially was not arbitrary;
>
> (b)11(2) the right to be brought before the nearest Magistrate or other judicial officer within a period of forty-eight hours of his arrest. This is because section 50 of the Criminal Procedure Act No. 51 of 1977 did not apply to him, but instead he fell to be dealt with under section 42 of the Immigration Control Act, No. 7 of 1993;
>
> (c)7 the right to personal liberty, because as a prohibited immigrant, his residence in Namibia was unlawful and he was arrestable at any time but for that detention."

[79] By their failure to take action provided by the alternatives referred to in paragraphs 69 and 70 above, the immigration officers who handled the respondent's case failed to comply with the requirement enshrined in Article 18, namely to take fair and reasonable administrative action. Finally, the said authorities flouted Article 8 when they exposed the respondent to indignity during part of his detention, particularly in Okahandja.

[80] Accordingly, I make the following orders:

(1) the appeal is allowed as against the holding of the trial judge that the respondent's arrest was unlawful;

(2) the appeal is allowed as against the holding that the respondent's detention was wholly unlawful;

(3) the detention was lawful for the first period of 28 days, but was unlawful from 15 October 2004 to 27 January 2005. The period of unlawful detention is reduced accordingly;

(4) the award of N$65,000.00 is set aside;

(5) I award to the respondent damages of N$10 000-00;

(6) this award shall attract interest at 20% p.a. from the date hereof till satisfaction of the judgment;

(7) the order as to costs of the suit in favour of the respondent is set aside;

(8) I order that each party shall bear their own costs in this court and in the court below.

_____
CHOMBA, A.J.A.

I agree

_____
SHIVUTE, C.J.

I agree

_____
GIBSON, A.J.A.

COUNSEL ON BEHALF OF THE APPELLANT:	**MR. R.H. GOBA**
Instructed by:	**GOVERNMENT ATTORNEY**
COUNSEL ON BEHALF OF RESPONDENT:	**MR. N. TJOMBE**
Instructed by:	**LEGAL ASSISTANCE CENTRE**