



REPORTABLE

CASE NO: SA 76/2017

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

**MINISTER OF HOME AFFAIRS AND
IMMIGRATION**

First

Appellant

**CHAIRPERSON OF THE IMMIGRATION
SELECTION BOARD**

Second Appellant

THE IMMIGRATION SELECTION BOARD

Third Appellant

THE IMMIGRATION SELECTION TRIBUNAL

Fourth Appellant

and

RALPH HOLTSMANN

First Respondent

SUSANNE HOLTSMANN

Second Respondent

COENRAAD PROLLIUS**Third Respondent**

Coram: DAMASEB DCJ, MAINGA JA and NKABINDE AJA

Heard: 7 October 2019

Delivered: 19 March 2020

Summary: The immigrant respondents entered Namibia on valid work permits issued in terms of s 27 of the Immigration Control Act 7 of 1993 (the ICA) and lawfully resided in the country for over two years. The High Court found that they did so with the intent to reside in Namibia for an indefinite period of time. The Immigration Selection Board sought to deport them from Namibia under the coercive machinery (arrest, detention and removal of prohibited immigrants) of Part VI of the ICA on the ground that their work permits had expired and they were unlawfully in the country.

The respondents challenged their intended removals on the basis that, having severed their ties to their homelands (South Africa and Germany respectively); having formed the intent to make Namibia their new home and making financial investments here, they had acquired domicile in Namibia in terms of s 22(1)(d) of the ICA. The High Court agreed and granted them declarations to that effect. The appellants appealed to the Supreme Court on the ground that the High Court misdirected itself in holding that s 22(1)(d) of the ICA had not changed the common-law definition of domicile of choice which was acquired by proving: (a) lawful physical presence and (b) the intent to reside in Namibia indefinitely. The respondents relied on s 22(2) of the ICA which provides that domicile will not arise where the person relying thereon resided in Namibia 'only by virtue of' a work permit.

On appeal to the Supreme Court:

Held that s 22(1)(d) read with s 22(2) had indeed changed the common law such that if an immigrant resides in Namibia 'only' on the strength of a work permit, they could not acquire domicile in Namibia.

Held that the adverb ‘only’ in s 22(2)(b) could not be interpreted in a way that extinguished the sovereign state’s prerogative to control immigrants’ entry into and residence in the country; that the conclusion reached by the High Court had that effect but also undermined the purpose and regulatory scheme of the ICA.

High Court’s judgment and order therefore set aside and appeal allowed, with costs.

APPEAL JUDGMENT

DAMASEB DCJ (MAINGA JA and NKABINDE AJA concurring):

The central issue on appeal

[1] The central issue in this appeal is whether an immigrant who enters Namibia on a work permit¹ and decides to settle here and makes an investment in the country acquires a domicile of choice entitling him or her to permanently reside in Namibia without hindrance by, or contrary to the wishes of, the Namibian authorities. The High Court answered the question in the affirmative in favour of the respondents and the Government (or appellants) appeal against that decision.

The context

Common law on domicile of choice

[2] The parties are *ad idem* that at common law a domicile of choice is acquired by the person who relies on it (the *propositus*) establishing two requirements:

- (a) lawful physical presence in the country for however brief a period; and

¹Granted in terms of s 27 of the Immigration Control Act 7 of 1993.

(b) the intention to remain indefinitely in the country.

(Government of the Republic of Namibia v Getachew 2008 (1) NR 1 (SC) paras 41-42; Minister of Home Affairs v Dickson and another 2008 (2) NR 665 (SC) paras 25-28).

[3] Under the common law, the requirement of 'lawful presence' serves to disqualify those who seek to claim domicile but are in the country unlawfully; such as a person who has overstayed in the country after the expiry of a lawfully granted permit and is therefore liable to be deported upon arrest. The principle is articulated as follows in *Smith v Smith*²:

'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.'

Domicile under statute

[4] Section 1 of the Immigration Control Act 7 of 1993 (ICA) defines domicile as follows:

'subject to the provisions of Part IV, [domicile] means the place where a person has his or her home or permanent residence or to which such person returns as his or her

² 1962 (3) SA 930 (FSC) at 936F.

permanent abode, and not merely for a special or temporary presence.' (Underlined for emphasis).

[5] Section 22 of the ICA (which is contained in Part IV of ICA) and to which, therefore, the definition above is subject, states:

- (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.' (Emphasis supplied).

Loss of domicile under ICA

[6] Another provision under Part IV to which the acquisition of domicile is subject, is s 23 of the ICA which deals with loss of domicile. In relevant part, s 23 (1)(d) stipulates that a person who acquired domicile of choice in Namibia may only lose it if he or she has been absent from Namibia for a continuous period exceeding two years or

exceeding such longer period as the Minister of Home Affairs may in writing in each case determine; or such person has made a declaration for the purposes of the ICA or any other law to the effect that he or she no longer resides in Namibia or regards himself or herself as no longer being resident in Namibia. In terms of subsec (3), if a Namibian domiciliary acquires permanent residence in a country other than Namibia that 'shall be *prima facie* proof of a declaration by that person that he or she no longer resides in Namibia.'

[7] As will soon become apparent and is common ground, the facts of the present dispute involve the proper interpretation of paragraph (d) of s 22(1) of the ICA. The scope of that provision is limited in the following way by subsec (2) of s 22 of the ICA:

'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 always 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 paragraph (d), (e), (f) or (g) of section 2(1)

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

[8] The effect of the underlined provisions is that an immigrant who lands on our shores and resides here ‘only’ on the strength of a provisional permit, an employment permit or a student’s permit cannot lay claim to domicile as defined under the ICA. The question is: What is meant by ‘only by virtue of’? We need to understand the context in which that is to be interpreted. It is to that context I turn next as the content of the right to domicile is a good indicator of what the legislature intended.

Rights enjoyed by domiciliary under the ICA

[9] Section 24 of the ICA provides as follows:

‘24. Subject to the provisions 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 intends 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 person is in possession of an employment permit issued to him or her in terms of section 27; or
 - (ii) in the case of any 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.'

[10] Part IV of the ICA gives the authorities the power to arrest, detain and remove from Namibia 'prohibited immigrants'.

[11] Section 2(1)(b) of the ICA renders immune a person who has acquired a domicile from the restrictions imposed on immigrants under s 24 (Part IV) and the coercive machinery of 'arrest, detention and removal of prohibited immigrants' contained in Part VI of that Act. In other words, once an immigrant has acquired a Namibian domicile, he or she cannot be deported from Namibia for the violation of the laws of the land. Thus, barring limited rights reserved for citizens such as social welfare benefits - short of voting a domiciliary enjoys almost the same rights as a Namibian citizen: In other words, to live here, to work here and to return without any restriction or limitation.

[12] It is against the above background that the respondents' disputed claim to domicile in Namibia is to be adjudicated.

Factual matrix

[13] Before the High Court were two separate cases: *Coenraad Prollius v The Minister of Home Affairs and others* Case No.: HC-MD-CIV-MOT-GEN-2016/00251 and 2016/00268 and *Ralph Holtmann and another v Minister of Home Affairs and others* Case No.: HC-MD-CIV-MOT-GEN-2016/00347.

[14] The material facts of the two cases are either common cause or incontrovertible. In both, the applicants brought proceedings in the High Court on notice of motion indirectly challenging decisions by the Immigration Selection Board (the Board) to deport them. Indirectly because the respondents had asked the court to declare that they were domiciled in Namibia in terms of the ICA. Their claim to domicile was predicated on the admitted fact that they had entered the country on work permits and had, prior to the expiry of the respective work permits, resided in the country for a continuous period of over two years and made financial investments in the country.

[15] The High Court was satisfied that the facts of the two cases raised the same legal issue which lent itself to being disposed of in a single judgment. As the learned judge put it at paras [32] and [33] of the judgement:

[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 [ICA].

[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 [ICA]. Are the applicants... on a proper interpretation of s 22(1)(d) read with s 22(2)(b) domiciled in Namibia.'

[16] Because the judge approached the matter in that way and not on the unique circumstances of the two cases, I find it unnecessary to set out the detailed facts of the two cases as the appeal turns on the narrow legal question whether an immigrant who enters Namibia on a work permit and makes significant financial investments here with the intent to settle, thereby acquires domicile under the ICA.

The High Court's approach

[17] The court *a quo* held that the legislature did not, either in the definition of the noun 'domicile' in s 1 or the language used in s 22 of the ICA, employ clear and unambiguous language capable of being understood as having altered the principle that for the *propositus* to acquire domicile of choice in Namibia, he or she must satisfy the essential elements of (a) physical presence and (b) the intention to remain indefinitely in this country.

[18] On the contrary, according to the judge *a quo*, the legislature unequivocally enacted that physical presence must be for a period of not less than two years in addition to the two elements of physical presence and the *animus namendi*. Relying on the presumption that parliament does not change the common law any more than is necessary and does so only by employing clear and unambiguous language, the High Court was satisfied that the ICA had not changed the common-law requirements for domicile: physical presence in Namibia and the intention to remain here indefinitely.

[19] The learned judge reasoned thus:

[56] The legal position is now ...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 the lawful presence the intention to remain permanently in Namibia.

[57] 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.'

[20] Turning to s 22(1)(d) and how the adverb 'only' therein is to be interpreted, the court held:

[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, defines that adverb to mean 'and no one or nothing 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.' (My underlining)

[21] Moving on to whether the intention to reside in Namibia was established on the admitted and common cause facts, the learned judge made the following findings in respect of the different applicants.

Prollius

[22] This respondent severed his ties with South Africa by removing himself from that country and moving to Namibia including everything he possessed. He sold his home and property in South Africa and lived in a property he acquired here. He worked for a period extending over seven years in Namibia and purchased a close corporation here with the intention to carry on serious business. On those facts, the High Court concluded:

'[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 only by virtue of the work permit issued to him in terms of s 27 of the Act.'

Holtmanns

[23] The High Court found that this couple who hailed from Germany had, prior to their coming to Namibia, formed the intention to emigrate from their homeland. They had sold all assets in Germany when they left there in 2006. During 2006 they entered Namibia, initially as tourists to explore the country. Whilst here on tourist visas they were issued work permits for successive periods amounting cumulatively to seven years. They purchased two dormant close corporations and three immovable

properties. All told they invested N\$ 10 000 000 in Namibia. They decided to settle in Namibia and have no intention to return to Germany as they severed all ties to their homeland. They regard Namibia as their home.

[24] On those facts, the learned judge *a quo* concluded:

[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' presence in Namibia is not only by virtue of the work permit issued to them in terms of s 27 of the Act.'

[25] The High Court consequently granted identical declarations in favour of Prollius and the Holtmanns that they are 'domiciled in Namibia'. The court also granted them costs.

Submissions on appeal

[26] Mr Maleka SC for the appellants argued that based on the common cause fact that the Holtmanns did not apply for permanent residence permits in terms of section 26(3) while in Namibia and before the expiry of their work permits, they were unlawfully resident in Namibia in contravention of s 22(1)(d), read with section 22(2)(b) and could therefore not reside lawfully in Namibia for a period of two years to acquire domicile. For that reason, Mr Maleka argued, the declaration by the court *a quo* was wrong as the

jurisdictional precondition provided for lawful residence for a continuous period of two years, was absent. Counsel submitted further that in the absence of the setting aside of their convictions on review or appeal, the Holtmanns were liable to be dealt with as prohibited immigrants as contemplated under s 27(6), read with s 39(1) and (2) of ICA.

[27] Counsel pointed out that the effect of s 22(2)(b) is not to include in the computation of the period of two years, the time that the respondents spent in Namibia by virtue of their work permits, irrespective of what their intentions were. Mr Maleka submitted that one may only be lawfully resident in Namibia by virtue of having applied for permanent residence in terms of s 26(3) or s 26(6) read with s 24.

[28] Mr Heathcote who appeared for both respondents supports the order of the High Court and the reasoning underpinning it. Counsel argued that it is common cause that the respondents did not enter Namibia unlawfully and had therefore been lawfully resident as contemplated by s 22(1)(d). Besides, the appellants do not dispute that the respondents at all times intended to make Namibia their new home and to live here permanently. They severed their ties with their countries of origin and made huge financial investments in Namibia. They had therefore established sufficient basis to acquire domicile in Namibia as contemplated by s 22(1)(d). Relying on this Court's decision in *Government of the Republic of Namibia v Getachew*³ counsel submitted that the only requirements to be met to obtain domicile of choice are lawful factual presence for a continuous period of two years and the intention to reside in Namibia permanently.

³ 2008 (1) NR 1 (SC).

[29] Mr Heathcote submitted that s 2(1) of the ICA makes clear that once the respondents had established domicile, it would render them immune from the coercive machinery of Part VI of the ICA. He maintained that the appellants' argument that lawful residence could only arise by virtue of a permanent residence permit is not supported by the scheme of the ICA. Mr Heathcote therefore supported the court *a quo's* reasoning and asked that the appeal be dismissed.

[30] In my view, interpretation of the relevant provisions of the ICA must not lose sight of the declared purpose of the legislation which is stated in the preamble as 'to regulate the entry into, and residence in Namibia [and] removal from Namibia of certain immigrants.' Section 24 of the ICA quoted in full at para [9] above reinforces the legislative intent. It is equally important to remind ourselves at the outset that what the respondents sought to enforce in the present case is a right to reside in Namibia in terms of the ICA, relying on domicile as defined in and for the purpose of that Act: In other words, immigration control. These two considerations represent the most important departure point which the High Court lost focus of and that resulted in the faulty reasoning which informed the orders it made.

[31] Since the appellants' stance is that permanent residence is the only route through which domicile can be acquired under the ICA, it is necessary that I briefly sketch how permanent residence is acquired and potentially lost under that Act.

Permanent residence

[32] A permanent residence permit is granted by the Immigration Selection Board (the Board) and is applied for in terms of s 26 of the ICA. It is clear from the language of the section that an immigrant desiring to be admitted to permanent residence in Namibia must apply for it whilst outside the country.⁴ The application must meet with stringent requirements of s 26 and it is not had for the asking. The authorities can refuse to approve an application for permanent residence.⁵ Once granted, a permanent residence permit has definite duration and can be issued subject to conditions.⁶ The holder of a permanent residence permit is subject to the limitation of entry requirement of s 24 and the coercive machinery of arrest, detention and deportation under Part IV.

[33] Although the default position is that a person must apply for permanent residence whilst outside the country, s 26(3) of the ICA authorises the Board to issue permanent residence to:

‘a person who has been permitted under this Act to be in Namibia or to whom an employment permit referred to in section 27 or a student’s permit referred to in section 28 or a visitor’s entry permit referred to in section 29 has been issued . . . as if he or she were outside Namibia and upon the issue of that permit he or she may reside permanently in Namibia.’

The significance of this provision is that a person such as the respondents may, whilst on a work permit, apply for permanent residence in Namibia. That places the Namibian authorities in a position to satisfy themselves as to the suitability of such person in terms

⁴ ICA, s 26(6).

⁵ ICA, s 26(7)(a).

⁶ ICA, s 26(3).

of the criteria set out in s 26(3) of ICA. (Those provisions are set out in full in para [35] below).

[34] Even on the version of the respondents, sought to be buttressed by the allegation that when entering Namibia, they did so with the intent to settle here, as far as permanent residence goes they clearly fell foul of section 24 of the ICA which states:

‘ . . . no person shall -

- (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 . . . ’

[35] Under s 26(3) of the ICA, a person may be admitted to permanent residence subject to conditions. That provision is, however, subject to the *proviso* that the Board ‘shall not authorise’ the issuing of a permanent residence permit unless the applicant satisfies the Board that:

- ‘(a) he or she is of good character; and
- (b) he or she will within a reasonable time after entry into Namibia assimilate with the inhabitants of Namibia and be a desirable inhabitant of Namibia; and
- (c) he or she is not likely to be harmful to the welfare of Namibia; and
- (d) he or she has sufficient means or likely to earn sufficient means to maintain himself or herself and his or her spouse and dependent children (if any), or he or she has such qualifications, education and training or experience as are likely to

render him or her efficient in the employment, business, profession or occupation he or she intends to pursue in Namibia; and

- (e) he or she does not and is not likely to pursue any employment, business, profession or occupation in which a sufficient number of persons are already engaged in Namibia to meet the requirements of the inhabitants of Namibia; and
- (f) the issue to him or her of a permanent residence permit would not be in conflict with the other provisions of this Act or any other law; or
- (g) he or she is the spouse or dependent child, or a destitute, aged or infirm parent of a person permanently resident in Namibia who is able and undertakes in writing to maintain him or her.'

[36] Were we to find in favour of the respondents about how domicile is acquired, Namibian authorities would be effectively precluded from enforcing the provisions of section 26(3). That section is important for the protection of the country's vital national security interests. Therefore, the respondent's contention has far-reaching implications for Namibia's immigration policy, the public interest and Namibia's national security interests which s 26(3) is clearly intended to serve. I will demonstrate.

[37] It bears mention that since by virtue of s 2(1)(b), Part VI of the ICA is not applicable to a person holding Namibian domicile, s 49⁷ of the ICA which falls under

⁷ Which empowers the authorities to remove a person from Namibia for reasons of state security. That provision provides: '49(1) Notwithstanding anything to the contrary in this Act or any other law contained, the Minister may, on the recommendation of Security Commission established under Article 114 of the Namibian Constitution, forthwith remove or cause to be removed from Namibia by warrant issued under his or her hand any person who enters or has entered or is found in Namibia and whose activities endanger or are calculated to endanger the security of the State, whether or not such person is prohibited immigrant in respect of Namibia.'

(2) An immigration officer may –

Part VI does not apply to such a person. Therefore, on the approach contended for by the respondents, even if the Board has credible information on which it forms the view that the *propositus* not only entered Namibia with an improper motive (say to use it as a conduit for nefarious activities) but actually does so, they would be powerless to deploy the coercive machinery of Part VI of ICA on such person while they had no say whatsoever whether a *propositus* should acquire domicile in Namibia.

Is the High Court's interpretation of s 22(1)(d) correct?

[38] The court *a quo* was satisfied that s 22(2) of the ICA did not alter the common law on domicile. The significance of that finding is that once an immigrant enters Namibia on the strength of a permit issued under either ss 11, 27, 28 or 29, he or she is the sole determinant of whether or not they acquire domicile in Namibia.

[39] Central to the High Court's conclusion is its interpretation of the adverb 'only' in subsection s 22 (2) (b). The court reasoned that the legislature's intent is that domicile of choice would not avail if the only thing the *propositus* relies on is residence arising from an employment permit and nothing else. But if the *propositus*, in addition to the employment permit, relies on the intent to reside here permanently, which intent is evidenced by an investment in the country, he or she falls outside the prohibition in the subsection.

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- (a) if a person referred to in subsection (1) is not in custody, arrest such person or cause him or her to be arrested without a warrant; and
 - (b) pending his or her removal from Namibia under that subsection, detain such person in the manner and at the place determined by the Minister.
- (3) No appeal shall lie against any decision of the Minister under subsection (1).

[40] If the respondents are correct in their interpretation of s 22, domicile is acquired independently of the wishes of those carrying the burden and responsibility of administration and the protection of the public interest and the nation's vital national security interest. In other words, once the *propositus* had formed the settled intent to make Namibia his or her home and, unbeknown to the authorities, embarks on a course of action in furtherance of the settled intent, only one outcome is possible: domicile of choice which places the holder of it beyond the reach of the coercive machinery of the ICA. That begs the obvious question: With such a generous domicile regime, why would anyone bother to apply for permanent residence and stand the risk of being rejected or being booted out of the country? Not only that: why would the legislature make any effort to make the law regulating immigration?

[41] As I will presently demonstrate, the proposition that a subjective choice an immigrant makes binds the State in a way that infringes its sovereign choice concerning which immigrants to admit or not, has no basis either under international law or the Namibian Constitution. That is an important factor the High Court should have had regard to when considering whether the legislature in enacting s 22(1)(d) intended to change the common law of domicile.

[42] In the manner that it interpreted the relevant provisions of the ICA, the High Court was concerned more about not upsetting the common-law on domicile and in the process overlooked the legislature's clearly expressed intent to place strict limits on the manner of entry into and the conditions and circumstances of residence in the country

as reinforced in s 24 of the ICA. As I will demonstrate below, that intent is in complete harmony with international law and practice.

[43] The High Court's approach had the result that it did not consider the equally plausible alternative meaning of 'only': That is, had the *propositus* not had an employment permit in Namibia he or she would have had no lawful reason for being in the country. Thus considered, the 'only' lawful basis for his or her presence is the employment permit.

[44] The intent to settle in Namibia is, by itself, no lawful basis for an immigrant's presence in Namibia and since it cannot be relied on as an independent ground for lawful residence in Namibia, it cannot be read to give colour to the adverb 'only' in the subsection.

[45] The High Court's approach pays scant regard for the object of the ICA which is to regulate entry into and residence in Namibia. By interpreting s 22 in the way it did, the court *a quo* effectively rendered s 24 superfluous. In so doing the court *a quo* misdirected itself.

International law

[46] Additionally, there is an important principle which the High Court overlooked when considering what import to assign to the adverb 'only' in s 22(1)(d) of ICA.

[47] It is generally accepted that a State has the unfettered right and discretion to admit into its borders such persons, not being citizens of that State, as it chooses and to make such entry and presence subject to conditions.⁸ The United States Supreme Court has recognised that principle of State sovereignty in the following terms:

'It is an accepted maxim of international law, that every sovereign nation has the power, as inherent in sovereignty, and essential to its self-preservation, to forbid the entrance of foreigners within its domain, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.'⁹

[48] It was observed by Justice Stephen Field in the so-called *Chinese Exclusion case*:¹⁰

'The power of exclusion of foreigners [is] an incident of sovereignty belonging to the government of the United States. . . . [T]he right to its exercise at any time when, in the judgment of the government, the interest of the country require it, it cannot be granted away or restrained on behalf of any one.'

⁸ Oppenheim, *International Law* (1962), Vol. 1., p.161.

⁹ *Nishimura Ekiu v. U.S.*, 142 U.S. 651, 659 (1892).

¹⁰ *Chae Chan Ping v. United States* 130 U.S 581 (1889). The approach has been applied consistently by the U.S. Supreme Court: *Nishimura Eiku v. United States*, 142 U.S. 651, 659 (1892) - "It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty, and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe.";

Landon v. Plasencia, 459 U.S. 21, 32 (1982): The power to admit or exclude aliens is a sovereign prerogative; *Fong You Ting v United States* 149 US 698, 707, 711 (1893): The power to exclude was but one element of a general national state power to control the people within its limits and expel from its territory persons who are dangerous to the peace of the State; *United States ex rel. Knauff v Shaughnessy*, 338 U.A 537, 542 (1950): An alien seeking initial admission to the United States requests a privilege and has no constitutional right regarding the application, for the power to admit or exclude aliens is a sovereign prerogative; *Harisiades v. Shaughnessy*, 342 U.S. 580, 588-89 (1952): The "traditional power of the Nation over the alien" is "a power inherent in every sovereign state") and it was described in *Kleindienst v. Mandel*, 408 U.S. 753, 765 (1972) as being part of "ancient principles of the international law of nation-states").

[49] The principle of a sovereign State's power to impose direct controls on immigration represents world-wide practice.¹¹ Starke¹² writes:

'Most states claim in legal theory to exclude all aliens at will, affirming that such unqualified right is an essential attribute of sovereign government. The courts of Great Britain and the United States have laid it down that the right to exclude aliens at will is an incident of territorial sovereignty. Unless bound by an international treaty to the contrary, states are not subject to a duty under international law to admit aliens or any duty thereunder not to expel them. Nor does international law impose any duty as to the period of stay of an admitted alien. The absence of any duty at international law to admit aliens is supported by an examination of State immigration laws, showing that scarcely any State freely admit aliens.

...

As a general rule, conditions are imposed on admission, or only certain classes, for example tourists, or students, are freely admitted.'

[50] Article 1(1) of the Namibian Constitution recognises Namibia's sovereignty within its borders with the power by the legislature to make and unmake laws under Chapter 7 of the Constitution for the country's governance, guided by the 'objectives of the Constitution' and by the 'public interest'.

[51] There is a palpable absurdity in the interpretation of the adverb 'only' as contended for by the respondents. Such interpretation leaves no freedom of action on the part of the sovereign State of Namibia. It removes from the State the internationally recognised discretion to choose the conditions under which immigrants settle in the

¹¹ Plender, *International Immigration Law* (1972), Chap 1, n3, p.70.

¹² Starke JG. 1989. *Introduction to International Law*. (10th ed). Butterworths: London, at 348-9. See also; Brownlie, I. 2003. '*Principles of Public International Law*'. Oxford, New York: Oxford University Press, pp 498-499.

country. On the respondents' proposed interpretation accepted by the High Court, the subjective intent of the immigrant is decisive and binding on the State of Namibia. The notion that Namibia is an immigration-friendly country is at odds with the reality that no other jurisdiction that I am aware of has such a free-for-all, prone-to-abuse, immigration regime.

[52] If the respondents prevail as regards how domicile is acquired, we will in effect be holding that it is irrelevant, at the time that the intent to settle in Namibia is formed, that the *propositus* entered the country, for example:

- (a) With the intent to engage in conduct 'harmful to the welfare of Namibia';
- (b) In order to 'pursue any employment, business, profession or occupation in which a sufficient number of persons are already engaged ...to meet the requirements of the inhabitants of Namibia; or
- (c) That the *propositus* has no intention within a reasonable time of entering Namibia to 'assimilate with the inhabitants of Namibia and be a desirable inhabitant of Namibia'.

[53] I come to the conclusion that it was a misdirection by the High Court to interpret the Act and its relevant provisions in a way that extinguished the sovereign power of the

Namibian State to regulate immigration policy and to protect the vital national interest through the machinery of the ICA.

[54] For all of the above reasons, I am satisfied that the interpretation given by the High Court to the adverb 'only' in s 22(2)(b) is incorrect. The result is that the appeal must succeed and the order *a quo* be set aside.

Order:

[55] I would accordingly propose the following order:

1. The appeal succeeds and the judgment and order of the High Court is hereby set aside and substituted with the following order:
 - '1. The application of Mr Prollius in Case No.: HC-MD-CIV-MOT-GEN-2016/00251 and 2016/00268 is dismissed;
 2. The application of the Holtmanns in Case No.: HC-MD-CIV-MOT-GEN-2016/00347 is dismissed;
 3. Prollius is ordered to pay the respondents costs, to include the costs of one instructing and two instructed counsel;
 4. The Holtmanns are ordered to pay the respondents' costs, to include the costs of one instructing and two instructed counsel.'

2. Prolius shall pay the appellants' costs on appeal, to include costs consequent upon the employment of one instructing and two instructed legal practitioners.

3. The Holtmanns' shall pay the appellants' costs of appeal, to include costs consequent upon the employment of one instructing and two instructed legal practitioners.

DAMASEB DCJ

MAINGA JA

NKABINDE AJA

APPEARANCES

APPELLANTS: I V Maleka SC (with him S Namandje)
Instructed by Government Attorney

RESPONDENTS: R Heathcote (with him C E van der Westhuizen)
Instructed by Etzold-Duvenhage