



REPORTABLE

CASE NO: SA 18/2021

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

EDUARDO GUILLERMO DELGADO CASTAÑEDA

Appellant

and

MINISTER OF HOME AFFAIRS AND IMMIGRATION

First Respondent

CHIEF OF IMMIGRATION

Second Respondent

Coram: SHIVUTE CJ, DAMASEB DCJ and SMUTS JA

Heard: 11 October 2021

Delivered: 7 March 2022

Summary: In this appeal, the appellant seeks to overturn a decision of the High Court dismissing an application for a declaration that he was domiciled in Namibia as well as an application to review and set aside the respondents' decision refusing his application for a certificate issued under section 38 of the Immigration Control Act 7 of 1993 (s 38 certificate).

The appellant is a Mexican national who is in a same-sex relationship with a Namibian citizen. Since 2011, he had been lawfully resident in Namibia on periodic employment permits issued to him by the respondents. The last employment

permit expired on 5 June 2019. A few days before the expiry of the permit, the appellant applied for what he referred to as a renewal or extension of his s 38 certificate. As no information about the status of his application was forthcoming from the respondents, he made enquiries and was informed that the application was still pending and that once a decision had been made, it would be communicated to him telephonically.

During January 2020, the appellant and his companions arrived at the Ngoma border post for what they intended to be a day trip to the Victoria Falls. At the border post, the appellant was informed by an immigration official that his application for a s 38 certificate had been declined and that none of the documents in his possession was valid for re-entry into Namibia. He was left with no choice but to proceed to South Africa – via Botswana – where Mexican nationals did not require visas.

The appellant eventually instituted motion proceedings in the High Court for, amongst other things, the review and setting aside of the respondents' decision refusing to issue the s 38 certificate. He also sought an order for the maintenance of the status quo, pending the determination of the review application. In support of that application, the appellant contended that by virtue of his universal partnership with a Namibian national, he had acquired domicile and was thus entitled to live and work in this country. The appellant further contended that he had a right, in terms of Article 18 of the Namibian Constitution, to be heard before any decision adverse to him was made. The respondents opposed the application, contending that the appellant did not acquire domicile in Namibia. They further contended that the appellant's previous s 38 certificate had expired by effluxion of time and was thus incapable of renewal or extension.

After considering the competing contentions and submissions advanced on behalf of the parties, the court *a quo* dismissed the review application holding that the s 38 certificate did not confer on its holder a status of domicile, but that it was only meant to identify the holder in doubt of being allowed back in Namibia that he or she was lawfully resident in the country so that he or she could be allowed re-

entry. It was further held that it was not apparent from the applicable legislation that the certificate may be renewed. As the appellant's attempt to have the respondents' decision reviewed was based on the erroneous understanding of the status and import of the certificate in question, the application was dismissed. The appellant is now contesting the adverse outcome in this Court.

On appeal, *held* that the court *a quo* was correct in finding that the s 38 certificate could not in law confer domicile on its holder. The certificate in question is simply issued to 'any person who is lawfully resident in Namibia and who desires to leave Namibia temporarily but is for any reason in doubt whether he or she will be able to lawfully enter Namibia on his or her return'.

Further *held* that in terms of Art 18 of the Namibian Constitution, the appellant had the right to be informed of the decision adversely affecting him so that he could seek redress if so advised or minded. As the action of the respondents falls short of this constitutional requirement, the decision of the respondents rejecting the appellant's application for a s 38 certificate is reviewed and set aside. The matter is referred back to the respondents to determine the application afresh.

APPEAL JUDGMENT

SHIVUTE CJ (DAMASEB DCJ and SMUTS JA concurring):

Introduction

[1] This is an appeal against the judgment and order of the High Court refusing a declarator to the effect that the appellant had acquired domicile in Namibia. The appeal is also directed against that court's order dismissing an application for the review and setting aside of the respondents' decision rejecting the appellant's application for a certificate of identity issued under s 38 of the Immigration Control Act 7 of 1993 (the ICA). The case is not about same sex-marriages. It also does

not concern the correctness or otherwise of the judgment of this court in *Chairperson of the Immigration Selection Board v Frank & another* 2001 NR 107 (SC) either. The appeal thus concerns the question of how domicile is acquired in Namibia. It is also about the issue of whether or not the decision by the respondents to decline the appellant's application for a certificate issued in terms of s 38 of the ICA should be reviewed and set aside.

Background

[2] The appellant is a Mexican national who had been lawfully resident in this country since 2011 on periodic employment permits issued to him by the respondents. He had brought a review application in the High Court essentially seeking a declaration that he was domiciled in this country and an order reviewing and setting aside the respondents' decision to decline his application for a certificate issued in terms of s 38 of the ICA. The appellant deposed to the founding affidavit in which he gave a chronological account of his residency in Namibia and of events leading to the institution of the review proceedings.

[3] In brief, he stated that he had relocated to this country in 2011 following a decision by his partner, a Namibian citizen, to return home from his studies overseas. At the time the two were already in a relationship, which the appellant described as stable and loving. They eventually got married to each other in South Africa where same sex marriages are recognised. On 6 March 2014, they welcomed a son who was born to them through surrogacy in South Africa, where the procedure is allowed.

[4] On 10 May 2017, the appellant applied for a certificate of identity issued in terms of s 38 of the ICA. For some reason, this certificate appears to be generally known even in official circles as a 'domicile certificate'. However, the respondents now dispute this designation, so a neutral 's 38 certificate' will instead be used in this judgment.

[5] When the respondents failed to inform the appellant of the status of his s 38 certificate application, the appellant's legal practitioner wrote a letter to the respondents in which it was stated, amongst other things, that the appellant had acquired domicile in Namibia on the basis that he and his partner had entered into what the legal practitioner referred to as a universal partnership. On 5 June 2018, a s 38 certificate was issued to the appellant. It was valid until 5 June 2019. On 31 May 2019, the appellant applied for what he referred to as a renewal of his certificate. On 2 December 2019, the appellant enquired about the status of his application at the offices of the respondents and was informed that it was still pending and that he would be informed by telephone when a decision had been made. He was not informed of anything until on 7 January 2020.

[6] Events took a turn for the worse on 7 January 2020, when the appellant and his companions, including his sister who was visiting Namibia, intended taking a day trip to the Victoria Falls. When they presented themselves at the Ngoma border post, they were told that as his sister only had a single-entry visa for Namibia, she would not be allowed entry upon return from Victoria Falls. On being informed of the position, they decided to abort the journey and return to Windhoek. When they requested their travel documents back from the immigration officer who

was attending to them, they were told to wait for a while for the immigration officer to ascertain the validity of the appellant's documents with the assistance of a senior official in Windhoek. This position was evidently taken after the officer had noticed that the appellant's s 38 certificate had expired and that he was only in possession of the acknowledgement of receipt of the new application.

[7] Upon his return an hour or so later, the officer informed the appellant that he had spoken to the second respondent who informed him that the appellant's application had been declined. When pressed to show proof of the rejection and to give reasons therefor, the officer replied that his word alone was sufficient. The officer proceeded to place a stamp in the appellant's passport and that of his sister's, thereby sealing their fate as he had effectively endorsed their exit from Namibia. The appellant remonstrated with him to allow them re-entry into Namibia seeing that they had earlier elected to cancel their trip to the Victoria Falls in light of the development that his sister would not be allowed entry if she chose to leave the country. Although the official ultimately relented, he did so only in respect of the appellant's sister whose 'exit' was cancelled and was allowed to return to Windhoek. The appellant was not so lucky. He was informed that none of the documents in his possession was valid for re-entry into Namibia and that if he returned he would in all probabilities be arrested and be dealt with as a prohibited immigrant. As Botswana did not require visas for Mexican nationals, the appellant decided to go via Botswana, to South Africa, from where he lodged the review application.

[8] On 20 January 2020, the parties entered into a settlement agreement which was made an order of court. In terms of the agreement, the appellant was allowed entry in the country on a tourist visa ordinarily applicable to Mexican nationals. The respondents undertook to expedite the consideration of the appellant's employment permit application, which he had submitted on 16 January 2020, to enable him to resume work in Namibia. Lastly, the parties agreed to allow the review to proceed in the normal course.

[9] The appellant contended that he had acquired domicile in Namibia by virtue of his universal partnership with a Namibian citizen and that he was therefore entitled to live and work in this country. He argued that the initial issuance of a s 38 certificate to him was an acknowledgement of this position by the respondents. He submitted that he was entitled to be heard by the respondents in terms of Art 18 of the Namibian Constitution before the decision to refuse his application for a s 38 certificate was taken and took issue with the way he was treated by an immigration officer at the border.

[10] On their part, the respondents denied that the appellant had acquired domicile in Namibia. They maintained that the appellant's previous s 38 certificate had been issued under a mistaken belief that the applicant and his spouse were lawfully married in terms of Namibian law. As same sex marriages were not recognised in Namibia, so the respondents argued, the appellant's marriage to a Namibian could not form a basis for the acquisition of a s 38 certificate. It was on this basis that the application for the certificate was declined. In any event, so the respondents further contended, the certificate was valid for one year only and had

expired by effluxion of time. It could not be extended. Instead, every subsequent application was considered to be a new application. The respondents maintained furthermore that the appellant should have successfully applied for a permanent residence permit in terms of s 26 of the ICA for him to have acquired domicile. He thus did not satisfy the requirement of lawful residence for the s 38 certificate to be issued to him.

[11] The respondents further denied that the appellant was forced to leave Namibia as he maintained. They contended, rather that he could not be allowed re-entry as he had no valid permit to remain in the country. The respondents maintained that the rejection of the appellant's s 38 application was made in August 2019. They conceded that such decision was not communicated to the appellant in writing. They argued nevertheless that the belated verbal communication of the decision by the immigration officer at the border in January 2020 constituted effective communication.

High Court's approach

[12] The High Court's reasoning centred on the authority of this court on domicile, namely *Minister of Home Affairs and Immigration & others v Holtmann & others*.¹ The appellant urged the High Court to not follow *Holtmann* because,

¹ 2020 (2) NR 303 (SC). Mr Holtmann's case was decided together with that of Mr Prollius. The two matters were heard and decided together because they essentially raised the same legal issue. The decision of the High Court was reported as *Prollius v Minister of Home Affairs and Immigration & others and One Similar Case* 2018 (1) NR 118 (HC). On appeal, the case was also argued and decided under the honorific Prollius. It would appear that somehow Prollius' name got lost in the translocation from the Supreme Court to the law reporters. The case was instead reported under the name Holtmann. At the hearing of this appeal and of the application in the High Court the parties referred to the case as *Prollius* and not *Holtmann* as it appears in the law report. To avoid possible confusion, in this judgment the decision of this court will be referred to under its reported name of *Holtmann*.

according to the appellant, it was decided *per incuriam*. The High Court resisted the invitation to reject a binding judgment of the Supreme Court, holding correctly, that it was bound by it on the basis of the principle of stare decisis. It held that the facts in the appellant's case were not different from those in *Holtmann*. Like in *Holtmann*, so the High Court reasoned, the appellant had unilaterally formed a settled intention to make Namibia his permanent home, which intention was not binding on Namibia. In view of the binding nature of *Holtmann* on it, the High Court did not find it necessary to deal with the argument advanced by the appellant relating to universal partnership and its effect on the acquisition of domicile.

[13] On the issue of the review, the High Court held that the appellant's understanding that the s 38 certificate conferred on its holder a status of domicile was ill-conceived as the certificate was only meant to identify the holder in doubt of being allowed back in Namibia that he or she was lawfully resident in the country so that he or she could be allowed re-entry. Furthermore, the High Court found that it was not apparent from the ICA that the certificate may be renewed. As the appellant's attempt to have the respondents' decision reviewed was premised on the erroneous understanding of the status and import of the certificate in question, the court dismissed the application.

Brief summary of arguments of the parties

[14] The legal practitioner for the appellant persisted with the argument advanced in the court below that *Holtmann* was decided on an incorrect reading of the ICA. As such, so the argument developed, the decision should be 'revisited against the facts of this case'. The appellant maintained that the court in *Holtmann*

did not distinguish between 'domicile' and 'permanent residence' which were two different concepts. The appellant's legal practitioner proceeded to present a spirited argument why *Holtmann* should be overruled and why the interpretation on the acquisition of domicile adopted by the High Court in *Prollius*² and cases preceding it should be followed instead. It was further contended that the appellant was lawfully resident in the country and that on both the test for the acquisition of domicile adopted by the High Court in *Prollius* and on the alternative approach developed by this court in *Holtmann*, the appellant had acquired domicile. The appellant's legal practitioner argued further that on this court's approach to lawful residence and 'something else,' the 'only' other lawful reason for his residence was the stable and loving relationship with a Namibian citizen to whom the appellant was married in accordance with the laws of South Africa. Such relationship 'organically progressed' as evidenced by the steps taken before the partners decided to relocate to Namibia.

[15] The respondents, on the other hand, supported the judgment of the High Court. They maintained, correctly in my view, that *Holtmann* was binding on that court. They argued that *Holtmann* was correctly decided. The respondents further contended that how domicile was acquired in Namibia depended on the interpretation of s 22(1)(d) read with the provisions of s 22(2)(b) of the ICA. On the s 38 certificate, the respondents argued that the reasons for the rejection of the application were available though not communicated to the appellant. They contended further that the appellant should have brought a mandamus to direct the respondents to provide reasons. The appellant was not entitled to a hearing

² Cited in footnote 1 above.

after the refusal of the second s 38 certificate application. There was no legitimate expectation to obtain the s 38 certificate again. Moreover, so the respondents further argued, the appellant's case was not brought on the basis of a legitimate expectation to obtain the certificate.

[16] On the argument based on universal partnership, the respondents contended that no case establishing it had been made out on affidavit. According to the respondents, there was in fact no universal partnership; the appellant and his partner were married, albeit their marriage was not recognised under Namibian law. They argued that the court could not decide the appeal on the basis of a universal partnership while fully aware of the true position that the relationship was based on a civil marriage that is not recognised in Namibia. They maintained that the decision to reject the application for a s 38 certificate was reasonable and lawful and there could therefore be no basis for its review.

Domicile

The High Court's holding

[17] *Holtmann* concerned the question whether a person who had entered Namibia on a work permit and made financial investments in Namibia with the intention to settle in the country, acquired domicile of choice entitling him or her to permanently reside in the country. The High Court held, relying on the presumption that the Legislature did not change the common law any more than was necessary and did so only by using clear and unambiguous language, that the Immigration Control Act 7 of 1993 (the ICA) had not changed the common law requirements for domicile, namely physical presence in Namibia and the intention

to remain there indefinitely. In respect of the interpretation of s 22(1)(d) of the ICA and the use of the word 'only' in subsec (2)(b), it held that if a permit issued under ss 11, 27, 28 or 29 and nothing more was relied upon to compute a period of lawful residence, then that period could not be considered. However, if a permit issued under ss 11, 27, 28 or 29 and 'something else' – such as *animus manendi* – was relied upon, then the period issued under those sections could be considered when computing the period of lawful residence in Namibia.

The Supreme Court's approach

[18] On appeal, this court had to consider whether that interpretation was correct. Writing for the unanimous court, Damaseb DCJ reasoned that even on the version of the respondents that they entered Namibia with the intent to settle, as far as permanent residence went, the respondents fell foul of s 24 of the ICA which provides that no person shall enter or reside in Namibia with a view to permanent residence therein, unless such a person was in possession of a permanent residence permit issued under s 26. Section 26(3) allowed the acquisition of permanent residence permit subject to the proviso that in authorising the issuance of such a permit, the Immigration Selection Board must be satisfied that the applicant for the permit had met specified stringent requirements.

[19] The court went on to hold that if the respondents' argument about how domicile was acquired was accepted, the Namibian authorities would be effectively precluded from enforcing the provisions of s 26(3), a section the court found was important for the protection of the country's vital national security interests.

[20] The court held further in its interpretation of the relevant provisions of the ICA, the High Court focused more on preserving the common law on domicile, and in the process had overlooked the legislature's expressed intention 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. The High Court's approach, so the Deputy Chief Justice reasoned, had the consequence that that court did not consider the equally plausible alternative meaning of 'only' in s 22(2) (b), which is that had the person claiming domicile not had an employment permit in Namibia he or she would have had no lawful reason to remain in the country. Considered in that context, the 'only' lawful basis for his or her presence was the employment permit. The intention to settle in Namibia in itself was not a lawful basis for an immigrant's presence in the country. As the intention to so settle could not be relied upon as an independent ground for lawful residence, it could not give colour to the adverb 'only'. The court found that the High Court's interpretation of s 22 effectively rendered s 24 superfluous.

[21] Having undertaken a comparative study of international law and domestic law of comparable jurisdictions as well as having analysed the Namibian constitutional setting, the court held that the respondents' interpretation of the adverb 'only' left no freedom of action on the part of the sovereign State of Namibia and removed from it the internationally recognised discretion to choose the conditions under which immigrants settled in the country. Instead, it made the subjective intent of the immigrant decisive and binding on the State. The court reasoned that the notion that Namibia was an immigration-friendly country was at odds with the reality that no other jurisdiction had what the court described as 'a

free for all, prone to abuse' immigration regime. It concluded that it was a misdirection by the High Court to interpret the ICA and its provisions in a way that extinguished the sovereign power of the State to regulate its immigration policy. The appeal accordingly succeeded and the declaratory order made by the court *a quo* was set aside.

Was Holtmann wrongly decided?

[22] The appellant's contention that *Holtmann* was decided on an incorrect reading of the ICA and therefore wrongly decided cannot be supported as correct. As demonstrated above, the court carefully considered the constitutional setting; the legislative scheme; the position in international law, and comparative jurisprudence on the point and concluded that the interpretation contended for by the appellant would not only render certain provisions of the ICA superfluous, but more so would make Namibia the odd one country in the world to have an immigration regime that is so generous and susceptible to abuse. Doubtless, it is necessary for the Namibian authorities to control immigration in accordance with the overall statutory scheme. An interpretation that renders nugatory the prospects of effective implementation of the statute should be avoided. The approach set out in *Holtmann* is undoubtedly correct and hardly requires any amplification.

[23] *Holtmann* represents a jurisprudential paradigm shift on how domicile is acquired in Namibia. The case was decided from the international law perspective and in the constitutional and legislative context in contradistinction to the previous judgments where consideration of this dichotomy was lacking and emphasis placed almost exclusively on the position at common law. That one disagrees with

the reasoning in *Holtmann* and prefers the retention of the status quo ante can be no basis for seeking to impugn a carefully considered and closely reasoned judgment. In my respectful view, there can be no basis for the reconsideration of the judgment. In view of this conclusion, I mean no disrespect if I do not deal with the many submissions on the acquisition of domicile, including the argument relating to universal partnerships rendered with aplomb and industry by the parties' legal representatives. I consider that the appeal can be decided on this confined basis.

[24] I respectfully agree with the court *a quo*'s finding that the facts in the appellant's case neatly fit in the *ratio decidendi* in *Holtmann* and are virtually indistinguishable in principle. The appellant's only claim in Namibian law to domicile is the employment permit that was previously issued to him. The High Court is also correct to have found that the s 38 certificate issued to the appellant could not in law confer domicile on him. This is the correct position in law despite the reference to the certificate in question even in official circles as a 'domicile certificate'. The High Court was thus correct to have declined to issue the declaration that the appellant had acquired domicile in Namibia.

Review

[25] The prayer based on review rests on an entirely different footing. The appellant was effectively expelled at the border when he was in the country still waiting for the outcome of his s 38 certificate application. The respondents seemingly sat on his application while repeatedly telling him that it was pending and that he would be informed once a decision had been made. When a decision

was made to reject his application, such decision and the reasons therefor were not communicated to him. The next time he heard from the respondents was when he was told at the border that it had been rejected. He had to rely on the *ipse dixit* of the immigration official who in a cavalier attitude informed him that his word that the application had been declined was sufficient. The official continued to subject the appellant to the contumely of being summarily ordered out of the country. In terms of Art 18 of the Namibian Constitution, the appellant had the right to be informed of the decision adversely affecting him so that he could seek redress if so advised or minded. This is even the more so because the certificate had in the past been issued to him without demur. The need to inform the appellant of the decision is part of the constitutional obligation imposed on administrative bodies and officials to act fairly and reasonably towards persons aggrieved by the exercise of such decision.

[26] Even if the s 38 certificate application was reasonably and lawfully made, there is a process that the respondents must follow to deport the appellant. They could not simply resort to self-help. The respondents say that the appellant was given a choice: to leave the country or be detained as a prohibited immigrant. This command is hardly a choice. There is no lesser evil between them. There can be no doubt that the appellant was treated appallingly and in a most undignified manner. He had to make an unplanned exit out of the country, leaving behind his companions, including his visiting sister. It is an inhumane and degrading treatment that has no place in a society based on the rule of law and other values of inherent dignity as well as justice for all espoused in the Namibian Constitution. For all these reasons, the decision of the respondents rejecting the appellant's

application for a s 38 certificate has to be reviewed and set aside. The matter must be referred back to them to consider the application afresh.

Lack of procedure for application for a s 38 certificate

[27] The High Court is correct to have found that the s 38 certificate issued to the appellant could not in law confer domicile on him. The s 38 certificate – styled ‘certificate of identity’ in the ICA – simply is issued to ‘any person who is lawfully resident in Namibia and who desires to leave Namibia temporarily but is for any reason in doubt whether he or she will be able to lawfully enter Namibia on his or her return’.³ Despite the reference to the certificate even in official circles as a ‘domicile certificate’, the s 38 certificate cannot be a basis for the acquisition of domicile in the country.

[28] While on the s 38 certificate, I note that while the ICA makes provision for an application for various permits such as a permanent residence permit;⁴ employment permit;⁵ students’ permits;⁶ visitors’ entry permits;⁷ no provision is made for the application for a s 38 certificate. This is an obvious lacuna in the Act, which has been conceded by the respondents in their oral arguments. It may conduce to a better understanding and regulation of the application for this type of certificate if a provision is made setting out the scope and ambit of the certificate. This would inform the applicants for the certificate of what procedure to follow and

³ Section 38.

⁴ Section 26.

⁵ Section 27.

⁶ Section 28.

⁷ Section 29.

what to expect when the application has been submitted and what their status is while waiting for the application to be considered. This matter certainly requires urgent legislative intervention. The lacuna referred to above appears to have created a grey area that has in turn given rise to confusion even amongst administrative officials within the respondents as to the proper ambit of the s 38 certificate. As noted previously, in practice officials also refer to s 38 certificate as the 'domicile certificate'. I am of the considered view that the mistaken belief on the part of the respondents' officials as to whether the s 38 certificate confers domicile on its holder or not cannot trump its true ambit and scope in law, which is that it does not.

Application for condonation and reinstatement

[29] The appellant has made application for condonation and reinstatement of the appeal that had lapsed on account of the appellant's failure to file security for costs. The appellant was apparently advised that security was not required because the appeal was against an order and not a judgment of the High Court. As the High Court dismissed the appellant's application and its judgment was not suspended pending appeal, so the argument ran, it was not required to furnish security for costs. Upon realising that the practitioners' understanding of the legal position on the point was incorrect, the appellant took timeous steps to obtain an amount of security for the respondents' costs and security was ultimately furnished. The application for condonation and reinstatement went unopposed and as the explanation for the failure to provide security is satisfactory, coupled with the good prospects of partial success on appeal, the application for condonation and reinstatement must be granted.

Costs

[30] It is axiomatic that ordinarily costs follow the result. Although the respondents have scored some success on the issue of domicile, the appellant has also been partially successful. The respondents' treatment of the appellant was found to be appalling. To mark the court's displeasure of the respondents' conduct towards the appellant, it is fair and just that they should be ordered to pay the appellant's costs on a high scale.

Order

[31] In the result, the following order is made:

- (a) The application for condonation and reinstatement is granted.
- (b) The appeal succeeds in part.
- (c) The decision by the respondents rejecting the appellant's application for a s 38 certificate is reviewed and set aside.
- (d) The matter is referred back to the respondents to consider and decide the appellant's application afresh.
- (e) The respondents are ordered to pay the appellant's costs in the High Court and in this court on an attorney and own client scale.

SHIVUTE CJ

DAMASEB DCJ

SMUTS JA

APPEARANCES

APPELLANT: U Katjipuka
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RESPONDENTS: T G Madonsela SC (with him J Ncube)
Instructed by the Government Attorney