

CASE NO'S. A 155/96 & A 147

MARTTNO NEVIS COREIA versus THE COMMANDING OFFICER WINDHOEK
PRISON & MINISTER OF HOME AFFAIRS

SILUNGWE, A.J. et HANNAH. J

1996/10/15

IMMIGRATION

Applicant seeking declaration in motion proceedings that he is not a prohibited immigrant. Applicant's case yet to be heard by Immigration Tribunal. Only in exceptional circumstances would the High Court entertain the matter before a decision is made by the Immigration Tribunal. To do so would mean that the High Court is performing the statutory function of that tribunal.

Applicant also seeking order declaring parts of Immigration Control Act unconstitutional. No allegation made in founding affidavit that any of applicant's constitutional rights have been inflicted. Respondent kept in dark as to applicant's case and in particular what article or articles of Constitution are realist on for the relief sought. Founding affidavit held to be defective.

IN THE HIGH COURT OF NAMIBIA

In the matter between

MARTINO NEVIS CORREIA

versus

THE COMMANDING OFFICER WINDHOEK PRISON

MINISTER OF HOME AFFAIRS

CORAM: HANNAH, J. et SILUNGWE, A.J.

Heard on:

Delivered on: 1996.10.15

JUDGMENT

HANNAH, J. : In the applications now before us the applicant seeks various forms of relief but the principal head of relief is a declaration that he is not a prohibited immigrant in this country. Ancillary to that relief a declaration is also sought that his detention as a prohibited immigrant is accordingly unlawful and invalid and the applicant seeks an order that he be released from custody forthwith and an interdict restraining the second respondent from deporting him from Namibia. The last two items of relief have in fact already been granted on a temporary basis by this Court.

The relief sought was subsequently extended by an amendment

to the notices of motion and the extended relief embraces a declaration declaring certain sections of the Immigration Control Act, 7 of 1993, to be unconstitutional and invalid; but, as I have said, the principal relief concerns whether or not the applicant is a prohibited immigrant. This question has to be considered, at least initially, having regard not only to the facts of the case but also with regard to the proper construction to be given to certain sections of the Immigration Control Act and it is only if the construction contended for by the applicant is rejected that the constitutional points which the applicant's legal representative seeks to raise come into play.

At the outset of the hearing Mr Coetzee for the respondents raised two points in limine and we have decided to deal with these two points straightaway. The first concerns the fact that the Immigration Tribunal set up under the Immigration Control Act has not yet considered the applicant's case and it is submitted by Mr Coetzee that in these circumstances the applicant was not entitled to approach this Court for the substantive relief sought. At most he could have applied for an interim interdict restraining the respondent from deporting him, pending the determination of the matter by the tribunal and perhaps for an order for his release from custody pending the tribunal's decision.

In our opinion, the point taken on behalf*of the respondents is a good one. The function of determining whether a person is a prohibited immigrant and whether he should be deported has been entrusted by the Immigration Control Act to the

Immigration Tribunal and, in our opinion, that tribunal is clearly the best forum for determining that question. It may summon witnesses to give evidence or produce documents and thus obtain a full factual picture and should the need arise it may, at the request of the person affected by the application, reserve any question of law which arises for the decision of the High Court. It would only be in exceptional circumstances, and in our view in the present case there are none, that an application of the instant kind can properly be brought bypassing the Immigration Tribunal and in effect seeking to have this Court perform the function entrusted by statute to that tribunal. The cases relied upon by Mr Light, for the applicant, dealing with ouster of a Court's jurisdiction are in our view clearly distinguishable although that is not to say that an applicant in the position of this applicant cannot approach this Court for an order releasing him from detention or for an order interdicting the Minister of Home Affairs from deporting him. The first point in limine therefore succeeds.

The second point in limine raised by Mr Coetzee concerns the constitutional points raised by the applicant's legal representative. I say raised by the applicant's legal representative advisedly because as Mr Coetzee points out they are not raised by the applicant himself in his founding affidavit and only arose when the notice of motion was amended. No supplementary affidavit was filed. It is trite law that in motion proceedings an applicant must set out sufficient facts and allegations in his founding affidavit

upon which a Court may find in his favour. But when one examines the founding affidavit in the present case one finds that there is not a single reference to the constitutional points raised in the amended notices of motion. No factual basis is set out for the attack made on the constitutionality of the various provisions of the Immigration Control Act referred to in the amended notices of motion nor are the grounds relied on for the attack set out. No mention is made of any infringement of a constitutional right and no particulars are given of the specific article or articles of the Constitution relied on for the relief 'sought. The respondent was thus kept completely in the dark as to what the applicant's case is and light only began to dawn when heads of argument were delivered a few days before this hearing. And when that light began to dawn it emerged that amongst the points being taken was, for example, the point that one section of the Immigration Control Act, namely section 39(2) (h), is unreasonable and not necessary in a democratic society. The determination of that point could well depend on facts beyond the common knowledge of the Court and the respondents may well wish to address such facts in an answering affidavit. By concealing the nature of his case by making no reference to this aspect of his case at all in the founding affidavit the applicant effectively precluded the respondents from dealing with such facts and in my opinion this cannot be allowed.

Mr Light seeks to equate allegations of infringement of constitutional rights with pure legal argument which, of

course, it is unnecessary to set out in a founding affidavit; but it is not always the case that the two can be equated or should be equated and in our opinion this is one such case. In these circumstances, I agree with Mr Coetzee that the relief sought in paragraph 2.2 of the amended notice of motion, that is to say the extended relief, should not be granted on the papers as presently formulated before us.

However, although the application must for reasons I have given be dismissed Mr Coetzee has indicated that he would have no objection if the applicant were to be granted certain interim relief pending a decision of the Immigration Tribunal and that interim relief will be granted.

As for costs, Mr Light mounted some argument to the effect that because the merits have not been dealt with no order should be made at this stage. That is not my view of the matter at all. The application has been found to be premature and the founding affidavit to be defective and on this basis the respondents are not only entitled to have the application dismissed but are also entitled to costs.

Accordingly, the applications are dismissed with costs save that the following two orders are made:

1. The respondents are ordered to continue to release the applicant from custody pending determination of the matter by the Immigration Tribunal.

2. The second respondent is interdicted and restrained from deporting the applicant pending a decision in the matter by the Immigration Tribunal.

• AT *

HANNAN, JUDGE

I agree

A handwritten signature in black ink, consisting of a series of loops and a final horizontal stroke, positioned above a solid horizontal line.

SILUNGWE, A.J.

ON BEHALF OF THE APPLICANT:

MR LIGHT

Instructed by:

Legal Assistance Centre

ON BEHALF OF THE RESPONDENTS:

ADV G S COETZEE &

ADV A STRYDOM

Instructed by:

The Government Attorney