

REPORTABLE (20)

MUTUMWA DZIVA MAWERE

v

**(1) REGISTRAR GENERAL (2) ZIMBABWE ELECTORAL
COMMISSION (3) PRESIDENT OF THE REPUBLIC OF
ZIMBABWE (4) ATTORNEY GENERAL OF ZIMBABWE**

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA,
GWAUNZA JA, GARWE JA, GOWORA JA,
HLATSHWAYO JA, PATEL JA, & CHIWESHE AJA
HARARE, JUNE 26, 2013**

F. Mahere, for the applicant

T. Todhlana, for the first respondent

T.M. Kanengoni with *C. Nyika*, for the second respondent

No Appearance for the third & fourth respondents

GARWE JA

(1) This is an application, filed on the basis of urgency, in which the applicant seeks a *declaratur* that, being a citizen by birth, he is entitled to dual citizenship and that the law does not require of him to renounce his foreign citizenship before he can be issued with a Zimbabwean national identity document.

(2) After hearing submissions from counsel, the court issued the following order:-

“It is ordered that:-

1. The applicant, Mutumwa Dziva Mawere, born 11 January 1960, is a citizen of Zimbabwe by birth in terms of Section 36 (1) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013.

2. The first respondent is interdicted from demanding of the applicant to first renounce his foreign – acquired citizenship before he can be issued with a national identity document.
3. The first respondent is directed to issue the applicant with a national registration document forthwith and in any event before the voter registration process being conducted by the second respondent in terms of Section 6 (3) of the Sixth Schedule to the Constitution is concluded.
4. The first respondent pay the costs of this application.”

The court further indicated that the full reasons for the order would be made available in due course.

What follows are the reasons.

BACKGROUND

- (3) The applicant was born in Bindura, Zimbabwe, on 11 January 1960. Both of his parents were also born in Zimbabwe. On 10 July 2002 the applicant acquired the citizenship of South Africa by registration.
- (4) In order to register as a voter in national elections that were scheduled to take place in 2013, the applicant approached the offices of the first respondent in order to procure a duplicate national identity document, having lost the original. He was advised that for as long as he remained a South African citizen, he would not be eligible for a Zimbabwean national identity document.

(5) It is not in dispute that prior to the enactment of the new constitution, the law prohibited dual citizenship. In terms of the law then in operation, the applicant was required to renounce his South African citizenship before he could be eligible for Zimbabwean citizenship. Only then would he have been eligible for a Zimbabwean national identity card.

(6) On 22 May 2013, the Constitution of Zimbabwe Amendment (No. 20) Act, 2013, (“the Constitution”) was gazetted and became operational. Section 36 of the Constitution provides, in relevant part:

“36 CITIZENSHIP BY BIRTH

- (1) Persons are Zimbabwean citizens by birth if they were born in Zimbabwe and, when they were born –
- (a) Either their mother or their father was a Zimbabwean citizen; or
 - (b) ... (not relevant) ...”

(7) The dispute in the present matter revolves around the interpretation to be accorded to the above provision and whether in terms of the Constitution it is now permissible for a person in the position of the applicant to enjoy both Zimbabwean and South African citizenship. Put differently, the question is whether the applicant is required to do anything more in order to qualify as a citizen.

THE APPLICANT’S SUBMISSIONS

(8) It is the applicant’s submission that citizenship by birth may only be revoked in two situations. The first is where citizenship is acquired by fraud, false representation or concealment of a material fact by any person. See s 39(2)(a). The second is where

the nationality or parentage of a child found in Zimbabwe, who is or appears to be less than fifteen years of age and whose nationality and parents are unknown and is presumed to be a Zimbabwean citizen by birth, becomes known.

(9) The applicant further submits that although s 42 of the Constitution empowers Parliament to pass an enactment prohibiting dual citizenship, such prohibition is in respect of citizens by descent or registration. Such enactment must in any event be consistent with the provisions of Chapter 3 of the Constitution. Therefore the prohibition of dual citizenship for citizens by birth, whose parents were born in Zimbabwe, as provided for in s 9 of the Citizenship of Zimbabwe, Act Chapter 4:01 would be inconsistent with Chapter 3 and consequently null and void. Had the intention been to prohibit dual citizenship in respect of citizens by birth, the Constitution would have expressly made provision for the potentiality of such prohibition in s 42(e).

(10) The applicant further submits that contrary to submissions by the first respondent, there is no residency requirement in terms of the law for citizens by birth whose parents were born in Zimbabwe. Section 43(2) of the Constitution in particular applies to a person born in Zimbabwe, was ordinarily resident in Zimbabwe on the publication day and at least one of his or her parents was a citizen of a SADC member State.

THE FIRST RESPONDENT'S SUBMISSIONS

(11) The first respondent, the Registrar-General, does not agree. His argument is as follows:-

11.1 In terms of s 43(1) of the Constitution, the applicant was not a Zimbabwean citizen before 22 May 2013 when the new Constitution came into operation. He was a South African citizen. He could not therefore have metamorphosized into a citizen by birth immediately after that date solely because of the provisions of s 36(1).

11.2 Having previously lost his citizenship, he needs to perform a formal act to have the citizenship restored to him. Such restoration can only be in terms of an Act of Parliament still to be passed in terms of s 42, which Act would prescribe the procedure to be followed by persons wishing to have their citizenship restored in terms of s 42(d) of the Constitution.

THE RELEVANT CONSTITUTIONAL PROVISIONS

- (12) Sections 35 to 43 of the Constitution deal with the question of citizenship. Amongst other things, citizens are entitled to passports and travel documents as well as birth certificates and other identity documents issued by the State. Section 35 makes it clear that citizenship is by birth, descent or registration.
- (13) As already noted s 36 states that a person is a citizen by birth, *inter alia*, if such person was born in Zimbabwe to either a mother or father who was a Zimbabwean citizen.
- (14) Section 38 provides for citizenship by registration to three classes of persons. These are (a) persons who have been married to Zimbabwean citizens and satisfy other conditions prescribed by an Act of Parliament (b) persons who have been

continuously and lawfully resident in Zimbabwe for a period of at least ten years and
(c) a child who is not a Zimbabwean citizen but is adopted by a Zimbabwean citizen.

- (15) Section 39 provides for the revocation of citizenship, but only in respect of two types of citizenship. The first is citizenship by registration. Such citizenship may be revoked if the acquisition of citizenship was through fraud, false representation or concealment of a material fact or, during war situations, the person concerned unlawfully trades, communicates or associates with any business that is carried out to assist an enemy. The second is citizenship by birth. Such citizenship may be revoked if it is acquired by fraud, false representation or concealment of a material fact or, in the case of a child found in Zimbabwe who appears to be less than fifteen years of age and is presumed to be a citizen by birth in terms of s 36(3), the person's nationality or parentage becomes known and it is established that such person was a citizen of another country.
- (16) Section 42 provides for the enactment of a law, consistent with Chapter 3, providing for (a) the procedures to be followed in acquiring citizenship by registration (b) the voluntary renunciation of Zimbabwean citizenship (c) the procedures for the revocation of Zimbabwean citizenship by registration (d) the restoration of Zimbabwean citizenship (e) the prohibition of dual citizenship in respect of citizenship by registration or descent and (f) any other issues to give effect to Chapter 3.
- (17) Section 43 on the other hand provides that every person who before 22 May 2013 was a citizen continues to be one after that date.

It also provides that any person who was born in Zimbabwe before 22 May 2013 is a citizen by birth if one or both of his parents was a citizen of a SADC member State and he or she was ordinarily resident in Zimbabwe as at that date.

INTERPRETATION OF THE CONSTITUTION

- (18) Section 2 of the Constitution provides that the Constitution is the Supreme law of the land and that any law, practice, custom or conduct inconsistent with it, is invalid to the extent of the inconsistency. It also provides that the obligations imposed by the Constitution are binding on every person, including the State and all its organs at every level.
- (19) This section is important as it stipulates beyond doubt that anything done contrary to the provisions of the Constitution is invalid.
- (20) Various decisions of this Court and elsewhere have made pronouncements on the correct approach to the interpretation of a Constitution.

20.1 In *Rattigan & Others v Chief Immigration Officer & Others* 1994(2) ZLR 54(S), 57, GUBBAY CJ remarked:

“What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly and strictly construed.”

20.2 In *Park – Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) SA 148(C), 1601 – 161 A-J, the court stated:-

“It must be recognized that a constitution is *sui generis*, that the spirit and tenor of the Constitution must “permeate the process of judicial interpretation”, that the meaning of a right or freedom guaranteed by a Constitution must be ascertained by an analysis of the purpose of such guarantee and that such purpose must be sought, *inter alia*, in the character, larger objects, historical origins of the concepts enshrined in the Constitution and in the language in which the concepts are expressed.”

20.3 *In Government of the Republic of Namibia and Another v Cultura 2000 and Another 1994(1) S.A. 407 (Nm S), 418 F-H Mahomed CJ remarked:-*

“A Constitution is an organic instrument. Although it is enacted in the form of a statute, it is *sui generis*. It must be broadly, liberally and purposively interpreted so as to avoid the “austerity of tabulated legalism” and so as to enable it to continue to play a creative and dynamic role in the expression and the achievement of the ideals and aspirations of a nation ...”

20.4 *In State v Zuma & Others 1995 (2) SA 642 (CC) Kentridge JA stated thus:*

“... But it cannot be too strongly stressed that the Constitution does not mean whatever we might wish it to mean. We must heed Lord Wilberforce’s reminder that even a Constitution is a legal instrument, the language of which must be respected. ... I would say that a Constitution “embodying fundamental principles should as far as its language permits be given a broad construction.”

20.5 Attention may also drawn to the remarks by Fieldscend CJ *in Hewlett v Minister of Finance 1981 ZLR 571* that the principles governing interpretation of a Constitution are basically no different from those governing the interpretation of any other legislation and the remarks by Georges CJ *in Minister of Home Affairs v Bickle & Others 1984 (2) S.A. 439(ZS) at 447* that:-

“The question, then, is one of construction, and in the ultimate resort must be determined upon the actual words used, read not in *vacuo* but as occurring in a single complex instrument, in which one part may throw light on another The true test must as always, be the actual language used.”

WHETHER APPLICANT NEEDS TO RENOUNCE HIS FOREIGN CITIZENSHIP FIRST

(21) The first respondent's argument is that since the applicant had already lost his citizenship prior to the enactment of the Constitution, he needs to go through other procedures to be provided for in an Act of Parliament still to be passed in order to have his citizenship restored and that only then would he be entitled to citizenship in terms of the current Constitution, together with the benefits that citizens enjoy.

(22) Bearing in mind that the provisions in Chapter 3 of the Constitution must be read together, one must, I think, start by looking at the language used in s 36 of the Constitution. As already noted, the section provides, in simple and clear language that a person

“is a Zimbabwean citizen by birth if he or she was born in Zimbabwe and when born either his or her mother or father was a Zimbabwean citizen.”

(23) Section 36 is not made subject to any other section in the Constitution. It stands alone. The ordinary grammatical meaning of the section is clear and allows of no ambiguity. A person born in Zimbabwe to a parent who, at the time of birth, was a Zimbabwean citizen, is a Zimbabwean citizen. That section does not oblige a person in this category to do anything further to qualify for Zimbabwean citizenship.

(24) Section 36(1) however needs to be considered in the context of the other provisions of Chapter 3 of the Constitution.

(25) Section 38 provides for citizenship by registration to persons married to a Zimbabwean citizen or who have been continuously and lawfully resident in

Zimbabwe for at least ten years and in both cases satisfy other conditions prescribed by an Act of Parliament. Also included in this category are children, who are not ordinarily citizens, but are adopted by a Zimbabwean citizen.

This class of citizenship becomes relevant in cases where citizenship is sought to be revoked by the State.

(26) Section 39 deals with the circumstances in which citizenship may be revoked. Such revocation is limited to citizenship by registration and citizenship by birth in cases where such citizenship was acquired by false representation or where it is established that, a child below fifteen years of age, who is presumed in terms of s 36(3) of the Constitution to be a citizen by birth, is a citizen of another country.

(27) What is significant about s 39 is that it does not provide for the revocation of the citizenship of a person who is born in Zimbabwe to a Zimbabwean parent as provided in s 36 (1) of the Constitution.

Read against s 39, the necessary corollary is that citizenship acquired in terms of s 36(1) cannot be revoked by the State under any circumstances.

(28) One must however go further and consider the provisions of s 42 and 43 of the Constitution. It is, I think, convenient to consider s 43 (1) first.

(29) Section 43(1) is a neutral provision which simply restates that any person who, before 22 May 2013, was a Zimbabwean citizen, continues to be a Zimbabwean citizen after that date.

(30) Of significance is the fact that the citizenship referred to in that section is not confined to citizenship by birth only. Citizenship by descent and registration is also included. This is a savings provision, intended to put beyond dispute that any person who enjoyed any type of citizenship before 22 May 2013 would continue to be a citizen after that date and would consequently enjoy all the benefits of citizenship bestowed on a citizen in terms of s 35 of the Constitution.

(31) Section 42 provides for the passing of an Act of Parliament to deal with the following:-

- (a) the procedures to be followed in acquiring citizenship by registration;
- (b) the voluntary renunciation of Zimbabwean citizenship;
- (c) the procedures to be followed in the revocation of citizenship by registration;
- (d) the restoration of Zimbabwean citizenship;
- (e) the prohibition of dual citizenship in respect of citizens by descent or registration; and
- (f) generally giving effect to the provisions of Chapter 3 of the Constitution.

(32) A number of observations must be made from the above provisions.

32.1 First, s 42 makes it possible for Parliament to enact legislation to deal with the various aspects of citizenship itemised in that section.

- 32.2 Second, such legislation must be consistent with Chapter 3 of the Constitution. In other words such legislation may not allow for the derogation of any rights conferred in terms of Chapter 3.
- 32.3 Third, the section makes it clear that such legislation may deal with the prohibition of dual citizenship in respect of citizenship by descent or registration only. It does not provide for the prohibition of dual citizenship in respect of persons who are citizens by birth.
- 32.4 Fourth, the section provides for the enactment of legislation dealing with the restoration of Zimbabwean citizenship. It is implicit that the Constitution envisages a situation where citizenship is lost but an application is then made for the restoration of such citizenship.
- 32.5 Fifth, it is clear that citizenship can be lost in a number of situations. It may be revoked in terms of s 39 of the Constitution. It may also be the result of voluntary renunciation as provided for in 42(b) or the prohibition of dual citizenship in terms of s 43 (e) of the Constitution.
- (33) In all these situations, any affected person may apply for the restoration of Zimbabwean citizenship. An Act of Parliament will provide details on how such citizenship can be restored.
- (34) Section 42 does not and cannot have an overriding effect on the other provisions of Chapter 3. If anything, it complements these other provisions and is not inconsistent with them.

- (35) Consequently, on a proper reading of all the provisions of Chapter 3, the inference is irresistible that dual citizenship in respect of citizens by birth is not proscribed. Such citizenship exists by operation of law.
- (36) It was for the above reasons that, after hearing counsel, we made the order reflected in paragraph 2 of this judgment.

CHIDYAUSIKU CJ I agree

MALABA DCJ: I agree

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

GOWORA JA: I agree

PATEL JA: I agree

HLATSHWAYO JA: I agree

CHIWESHE AJA: I agree

Nyakutombwa/Mugabe, Legal Counsel, applicant's legal practitioners

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