

REPORTABLE (2)

FARAI DANIEL MADZIMBAMUTO

v

**(1) THE REGISTRAR GENERAL (2) PRINCIPAL DIRECTOR OF
IMMIGRATION (3) MINISTER OF HOME AFFAIRS
(4) ATTORNEY GENERAL**

**CONSTITUTIONAL COURT OF ZIMBABWE
CHIDYAUSIKU CJ, MALABA DCJ, ZIYAMBI JA,
GWAUNZA JA, GARWE JA, GOWORA JA,
HLATSHWAYO JA, PATEL JA & GUVAVA JA
HARARE, FEBRUARY 12 & JUNE 25, 2014**

*Mrs J. B Wood with her E H Mugwadi, for the applicant
S Pedzisayi, for the respondents*

ZIYAMBI JA: The applicant is a citizen of Zimbabwe by birth. He initially sought a declaratory order confirming his right to a Zimbabwean passport and certain ancillary relief. He also sought an order compelling the second respondent to endorse his South African passport with an unrestricted and indefinite residence permit.

THE BACKGROUND

The appellant was born in Zimbabwe. One of his parents is Zimbabwean by birth while the other is South African by birth. Sometime in 2003 the applicant left on a Zimbabwean passport for the United Kingdom in order to take up employment in that country. On the expiry of his passport, he attempted to get a new one through the Zimbabwean Embassy in London but was referred to Harare, the embassy no longer having the capacity to issue passports.

The applicant returned home briefly but due to the chaotic situation and long queues then prevailing at the passport office he failed to submit an application for a passport. He returned to the United Kingdom where he was able to obtain a South African passport by virtue of his mother's birth in South Africa.

In mid 2012, the applicant returned home permanently. Upon presentation of his South African passport to the second respondent's officials, he was advised to apply for a residence permit, which he did. A 2-year residence expiring on 16 August 2014 was granted to him by the second respondent.

When the new Constitution was promulgated, the applicant applied to the second respondent for his acceptance as a citizen, and therefore a permanent resident, by making an endorsement of his permanent residence status on his South African passport. The application was declined with the advice that the applicant should first acquire a Zimbabwean passport. On 28 October 2013 the applicant wrote to the second respondent advising that he now had a Zimbabwean passport and requesting an endorsement of his permanent residence status on his South African passport. No response has been received to date.

THE ORDER SOUGHT

At the hearing, the Court was advised that the order initially sought against the first respondent was no longer being pursued as the applicant had been granted a Zimbabwean passport. The order now being sought is set out in the draft order produced to the Court by Mrs Wood. It prays that:

“The applicant be and is hereby declared to be a citizen of Zimbabwe by birth with entitlement to dual citizenship;

The second respondent shall with immediate effect record in the Applicant's South African passport his right to unrestricted and unconditional residence in Zimbabwe.”

THE SECOND RESPONDENT'S OPPOSITION

The second respondent opposed the application on the basis that its officials were within their rights to refuse the endorsement sought. He took the position that:

“To the extent that Applicant holds a South African passport, he is an alien and we are entitled to govern his status in terms of the Immigration Regulations 1998. Applicant’s current status is as provided for in section 16 of the Regulations. In terms of section 17 of the Immigration Regulations, on the face of it, Applicant does not qualify for an unrestricted residence permit given the circumstances he has presented...”

It was submitted by Mr *Pedzisai*, on behalf of the second respondent, that the latter was acting in terms of the Immigration Regulations 1998, which regulations govern the actions of immigration officers. Upon presentation of a South African passport, the presenter is regarded as an alien and is expected to comply with the Regulations. While acknowledging the entitlement of the applicant to dual citizenship and therefore to unrestricted entry into and exit from Zimbabwe, the second respondent was of the firm view that if the applicant chooses to travel on a South African passport then he should apply for a residence permit like all other alien holders of foreign passports.

THE CONSTITUTIONAL PROVISIONS

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) any of their grandparents was a Zimbabwean citizen by birth or descent.

- (2) Persons born outside Zimbabwe are Zimbabwean citizens by birth if, when they were born, either of their parents was a Zimbabwean citizen and—
 - (a) ordinarily resident in Zimbabwe; or
 - (b) working outside Zimbabwe for the State or an international organisation.

- (3) A child found in Zimbabwe who is, or appears to be, less than fifteen years of age, and whose nationality and parents are not known, is presumed to be a Zimbabwean citizen by birth.

42 Powers of Parliament in regard to citizenship

An Act of Parliament may make provision, consistent with this Chapter, for—

- (a) procedures by which Zimbabwean citizenship by registration may be acquired;
- (b) the voluntary renunciation of Zimbabwean citizenship;
- (c) procedures for the revocation of Zimbabwean 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 this Chapter.

The powers given to Parliament in respect of revocation of Zimbabwean citizenship and the prohibition of dual citizenship relate only to citizens of Zimbabwe other than by birth. No similar provision is made in respect of citizens by birth. Thus a Zimbabwean citizen by birth does not lose his or her citizenship on acquiring a foreign citizenship. He or she is entitled to hold foreign citizenship and a foreign passport. Indeed the Constitution has made it clear that Zimbabwean citizenship by birth cannot be lost. That much was decided in *Mawere v Registrar General* CCZ 30/13 (not yet reported) and conceded by the respondents in this case. The only issue which falls for determination is whether this Court should order the endorsement sought by the applicant.

THE RIGHT TO FREEDOM OF MOVEMENT

The freedom of movement and residence in Zimbabwe is a right guaranteed by the Constitution to every Zimbabwean citizen and every person who is legally in Zimbabwe. It includes the right to enter and leave Zimbabwe as well as immunity from expulsion from Zimbabwe. Section 66 of the Constitution provides:

“66 Freedom of movement and residence

- (1) Every Zimbabwean citizen has—
 - (a) the right to enter Zimbabwe;
 - (b) immunity from expulsion from Zimbabwe; and
 - (c) the right to a passport or other travel document.
- (2) Every Zimbabwean citizen and everyone else who is legally in Zimbabwe has the right to—

- (a) move freely within Zimbabwe;
- (b) reside in any part of Zimbabwe; and
- (c) leave Zimbabwe.”

It was contended on behalf of the applicant that the two year time-restricted residence permit endorsed by the second respondent on his South African passport is an infringement of his right under s 66 of the Constitution to immunity from expulsion from Zimbabwe, and to enter Zimbabwe on such passport once the two year permit expires or is, at the second respondent’s whim, withdrawn.

In view of the submission by Mr *Pedzisai*, on behalf of the second respondent, that “*if the applicant presents a South African passport upon entry into Zimbabwe to the immigration officials he will be treated as an alien and made to apply for a residence permit in terms of the Regulations,*” there is, in my view, a real danger of expulsion of the applicant by the second respondent’s officials in the event that the applicant enters Zimbabwe and presents his South African passport endorsed with an expired residence permit, a withdrawn residence permit or no residence permit at all.

INTERPRETATION OF THE CONSTITUTIONAL RIGHT

The approach to interpretation of a constitutional right has been laid down in many decisions of the predecessor of this Court. Thus in *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S) at 57 F-H the Court held:

“This Court has on several occasions in the past pronounced upon the proper approach to constitutional construction embodying fundamental rights and protections. 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 or strictly construed.”

CONCLUSION

The second respondent concedes that the applicant is entitled to dual citizenship by virtue of the Constitution but insists that he be treated as an alien if he enters Zimbabwe using a South African passport. This, it was submitted, is because the second respondent is governed by the Regulations. It must be emphatically stated here that the Regulations are governed by the Constitution and not the Constitution by the Regulations. Any law which is inconsistent with the Constitution is void to the extent of the inconsistency¹. To say that the applicant, as a citizen by birth, is entitled to dual citizenship conferred by the Constitution and then to deny him the right to freely enter and leave Zimbabwe, which right is afforded to all citizens in terms of s 66, on the grounds that he has presented a foreign passport, is to deprive him of the benefits of the enjoyment of two fundamental rights conferred on him by the Constitution of Zimbabwe, namely the right to dual citizenship inherent in his birthright as a Zimbabwe citizen by birth and the right to freedom of movement.

A purposive interpretation of the right conferred in s 66 read with the applicant's entitlement to dual citizenship is that the applicant's right to enter, remain and leave Zimbabwe cannot be restricted even when he presents or travels upon a foreign passport. It is for the Regulations to be brought into conformity with the Constitution and not for the Constitution to conform to the Regulations. It is also for the framers of the Regulations to decide how best to align the Regulations with the Constitution in order to give effect to the Constitutional rights of Zimbabwean citizens.

¹ Constitution of Zimbabwe s2

Because of the firm stance taken by Mr *Pedzisai*, on behalf of the second respondent, that the applicant will be treated as an alien if he presents a South African passport to the immigration officials upon entry into Zimbabwe, we consider that it is necessary, in this case, to grant an order in the terms sought by the applicant.

Accordingly, the application is allowed and the following order is issued:

1. It is declared that the applicant is a citizen of Zimbabwe by birth with entitlement to dual citizenship.
2. The second respondent is hereby ordered to endorse in the applicant's South African passport upon presentation thereof to him, the applicant's right to unrestricted and unconditional residence in Zimbabwe.

CHIDYAUSIKU CJ: I agree

MALABA DCJ: I agree

ZIYAMBI JA: I agree

GWAUNZA JA: I agree

GARWE JA: I agree

GOWORA JA: I agree

HLATSHWAYO JA: I agree

PATEL JA: I agree

GUVAVA JA: I agree

Mugwadi & Associates, applicant's legal practitioners

Civil Division of the Attorney General's Office, respondent's legal practitioners