

CHARLEEN SEHLISELO SIBANDA

Versus

CHIEF IMMIGRATION OFFICER

And

**MINISTER OF HOME AFFAIRS
AND CULTURAL HERITAGE**

IN THE HIGH COURT OF ZIMBABWE
KABASA J
BULAWAYO 2 AND 5 OCTOBER 2023

Opposed Application

M. Ncube, for the applicant
S. Jukwa, for the 1st respondent
No appearance for the 2nd respondent

KABASA J: This is an application for a declaratur. The relief sought is couched as follows:-

“It is declared that sections 31 of the Immigration Act [Chapter 4:02) and sections 9 of the Immigration Regulations, 1998, Statutory Instrument 195/1998 do not apply to applicant as a Zimbabwean citizen and consequently;

- (i) Respondents including their agents in the form of Immigration Officers at any point of entry into Zimbabwe are directed that they should not endorse a visitor’s entry certificate on applicant’s travel document when she enters Zimbabwe.
 - (ii) Respondents including their agents in the form of Immigration Officers at any port of entry into Zimbabwe are directed not to demand any payment from applicant on her entry into Zimbabwe of such fees as are to be paid by visitors on entry into Zimbabwe.
2. No order as to costs unless any of the respondents oppose in which case they have to pay costs.”

The application is brought in terms of s14 of the High Court Act, Chapter 7:06. Section 14 provides that:-

“The High Court may, in its discretion, at the instance of any interested person, inquire into and determine any existing, future or contingent right or obligation, notwithstanding that such person cannot claim any relief consequential upon such determination.”

The applicant must therefore be an interested person to be able to bring an application of this nature. This is the first hurdle the applicant has to surmount. Is the applicant *in casu* an interested person? It is important to look at the factual background of the matter. These background facts are common cause. These are they. The applicant is a Zimbabwean citizen who also holds a Canadian passport and is a Canadian citizen. She therefore enjoys dual citizenship. On her visit to Zimbabwe she uses the Canadian passport and is subjected to visitor entry procedures which entail the endorsement of a visitors' entry certificate for which a fee of US\$75 is payable. Such endorsement allows the applicant a 30 day stay in Zimbabwe. At the lapse of such period the applicant has to seek an extension should she desire to remain in Zimbabwe. The extension entitles her to a total 60 days' stay without payment. In 2021 such extensions were sought and obtained on two occasions. The third to fifth extensions attracted a fee of US\$20 on each occasion. An attempt to extend on the sixth occasion was declined on the basis that the applicant had exceeded the total 180 days allowed to visitors. She was able to extend her stay further upon payment of US\$100. These extensions and payments were being done under protest.

The applicant now seeks a definitive pronouncement to the effect that as a Zimbabwean citizen with dual citizenship she should not be subjected to the visitors' entry certificates and once in Zimbabwe she should be able to stay for as long as she wants, just like any other Zimbabwean citizen.

The application was opposed by the 1st respondent. The 2nd respondent did not file any papers, an indication that he will abide by the decision of the court.

Prosper Kambarami deposed to the opposing affidavit. He is an Immigration Officer. The applicant's status was not challenged. The 1st respondent acknowledged that she has dual citizenship. The point of departure was that since the Canadian passport was not issued in Zimbabwe, considerations of safe, secure and orderly movement demands that she presents her foreign passport so that appropriate endorsements are made therein indicating her status and upon such endorsement she would not be treated as a visitor and not expected to abide by any regulation pertaining to her stay in Zimbabwe.

The following extract from the opposing affidavit crystallised the position:

“The endorsement made in a passport of a foreigner is the same as that made in a Zimbabwean passport, it remains either an entry or exit certificate. What delineates the two is either the passport held or a prerequisite substantive status endorsement in the case of a foreign passport. To the extent that the applicant tenders a Canadian passport on entry without any prerequisite substantive status endorsement in the foreign passport that reflects dual nationality/unrestricted residency, the scenarios presented do occur.”

These scenarios are the characterization of the applicant as a visitor and subject to visitor procedures.

To obviate this characterization the applicant has to submit to the administrative processes which will enable her to travel in and out of Zimbabwe without restrictions.

The foregoing narrative puts the applicant in the bracket of an “interested person.”

In *Munn Publishing (Pvt) Ltd v Zimbabwe Broadcasting Corporation* 1994 (1) ZLR 337 (S) GUBBAY CJ had this to say:-

“The condition precedent to the grant of a declaratory order is that the applicant must be an interested person in the sense of having a direct and substantial interest in the subject matter of the suit which could be prejudicially affected by the judgment of the court. See *United Watch & Diamond Co (Pty) Ltd & Ors v Disa Hotels Ltd & Anor* 1972 (4) SA 409 (C), *Milani & Anor v South African Medical and Dental Council & Anor* 1990 (1) SA 899 (T). The interest must relate to an existing future or contingent right. The court will not decide abstract, academic or hypothetical questions unrelated to such interest. See *Anglo – Transvaal Collieries Ltd v SA Mutual Life Assurance Soc* 1977 (3) SA 631 (T).” (See also *Johnson v AFC* 1995 (1) ZLR 65 *Mugangavari v Provincial Mining Director – Midlands & Anor* HB 254-20).

This application does not seek to have the court decide on abstract, academic or hypothetical questions unrelated to the applicant’s interest. The applicant therefore passed the first and second hurdles.

The issue however is whether a case has been made for the grant of a declaratur?

Counsel for the applicant’s submissions as regards the provisions of s41 (1) and (2) (j) regarding the regulations the 2nd respondent can make for the better carrying out of the objects

and purposes of the Immigration Act [Chapter 4:02] which regulations may include the conditions subject to which visitors may enter or remain in Zimbabwe are not disputed.

Equally correct is counsel's submission on the rights applicant is entitled to in terms of sections 35 (2) and 66 (a) and (2) (c) of the Constitution.

Section 35 (2) provides that:-

“All Zimbabwean citizens are equally entitled to the rights, privileges and benefits of citizenship and are equally subject to the duties and obligations of citizenship.”

Section 66 (1) (a) provides that:-

“(1) Every Zimbabwean citizen has –

(a) the right to enter Zimbabwe”

Section 66 (2) (c) equally gives every Zimbabwean the right to leave Zimbabwe.

In *Kirsten v Registrar-General of Zimbabwe & 4 Ors* 2019 (3) ZLR 1275 DUBE-BANDA J had this to say:-

“A citizen entering Zimbabwe on a foreign passport remains a citizen. She must be treated on the same footing with citizens entering the country on a Zimbabwean passport. Otherwise any different treatment will also be a violation of the right to equality enshrined in section 56 of the Constitution. A passport of a citizen entering the country on a foreign passport must not be endorsed with a specified number of days for such individual to remain in the country. Any demand or requirement that such a person pays visa fees which citizens entering the country on a Zimbabwean passport are not required to do, would also amount to discrimination and violation of the right to equality. And a violation of sections 35, 36 and 66 of the Constitution.”

I associate myself with this articulation of the law. Is one to read into this that an administrative procedure that requires such citizens to have an endorsement of their dual citizenship status in their foreign passports for ease of passage in and out of the country without need to prove their dual citizenship by production of some other documentary evidence is a violation of sections 35, 36 and 66 of the Constitution? I think not.

The issue *in casu* is not that the applicant is being discriminated for being a dual citizen. The 1st respondent's assertion that some dual nationals elect to remain as visitors for purposes of tax rebates or to avoid censures peculiar to dual national laws of their foreign nationality speaks to the uncontroverted fact that all dual nationals have their passports endorsed with such status so that on presentation of their foreign passport their dual citizenship is so stated and they are then not regarded as visitors. The mere possession of the foreign passport does not translate to a differentiation in treatment, the appropriate endorsement, which is optional depending on what suits the holder, determines whether one elects to be a visitor subject to visitors' procedures or a dual citizen holder who enjoys their Zimbabwean citizenship of free entry into and out of the country, with no restriction of their stay in Zimbabwe.

Mr. Ncube for the applicant's argument that such endorsement must be done at an office located at the point of entry is not what this application is about. The location of such offices is not a matter for this court to adjudicate and subsequently interfere with a purely administrative issue. It is important to note that counsel does not say such endorsement is discriminatory or unreasonable. His issue is such process must be done at the point of entry.

Unlike *Kirsten* who was awaiting issuance of a Zimbabwean passport, the applicant is a holder of a Zimbabwean passport. Should she so choose she can use that Zimbabwean passport to gain unfettered entrance into Zimbabwe, have her Canadian passport appropriately endorsed with her dual nationality status and subsequently elect to use that Canadian passport should she be so inclined.

The declaratur sought by the applicant seeks to circumvent a purely administrative procedure which speaks of no discrimination. Just as one's passport is endorsed upon entry and exit from any country, the applicant's passport's endorsement is dependent on which passport she elects to use and further when she elects to use the foreign passport whether she elects to do so as a visitor or a citizen, which would entail the status endorsement for the reasons articulated in the 1st respondent's opposing affidavit.

An endorsement reflecting dual citizenship does not in any way restrict the applicant's constitutionally guaranteed rights.

The dual citizenship endorsement is not to be equated to the “unconditional status endorsement in a foreign passport granted, on application, to deserving persons.” (*Kirsten v Registrar- General & Ors* (supra)).

Had this been the 1st respondent’s argument I would have had no hesitation in holding that a citizen ought not to be subjected to this selective status endorsement to deserving persons. Every citizen is deserving and to hold otherwise would be tantamount to limit the rights enshrined in the Constitution.

I am therefore persuaded by counsel for the 1st respondent’s argument that the applicant is not required to do anything more than just presenting the Canadian passport for dual citizenship status endorsement. Should she elect not to for the purpose of the tax rebate or for the simple reason of preferring to be regarded as a Canadian, that election cannot trigger this court’s jurisdiction to grant a declaratory order.

This is not a case where I can exercise the discretion reposed in this court by section 14 of the High Court Act, to grant a declaratory order.

I therefore come to the conclusion that a case has not been made for the relief the applicant seeks.

In the result, I make the following order:-

The application for a declaratory order be and is hereby dismissed, with costs.

Ncube Attorneys, applicant’s legal practitioners
Civil Division of the Attorney General’s Office, 1st respondent’s legal practitioners

