

KHALID MOHAMMED GOMAA SIAM

(In his capacity as biological father and legal guardian of his minor children
AAYA SIAM born 29th March 2004 and WALEED SIAM born 10th January 2007)

and

DUNIA FAWZI FAYEZ SIAM

and

QUDS KHALID MOHAMMED GOMAA

versus

THE REGISTRAR GENERAL OF ZIMBABWE

and

THE MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE

HIGH COURT OF ZIMBABWE

TAGU J

HARARE 28 July and 17 August 2022

Opposed Application

S Machiridza, for the applicants

T Marira, for the 1st and 2nd respondents

TAGU J: **KHALID MOHAMMED GOMAA SIAM** (1st Applicant) was born in Palestine, migrated to Zimbabwe and was eventually registered as a citizen of Zimbabwe on 13th February 2009. **DUNIA FAWZI FAYEZ SIAM** (2nd Applicant) is a citizen of the Hashemite Kingdom of Jordan and a permanent resident of Zimbabwe. The first and second Applicants are husband and wife and also the biological parents of **QUDS KHALID MOHAMMED GOMAA** (3rd Applicant born 26th June 2001), **AAYA SIAM** (a minor born 29th March 2004) and **WALEED SIAM** (a minor born 10th January 2007). The children are holders of Zimbabwean Passports and Birth Certificates. Sometime in 2021 the first Applicant through his Legal Practitioners wrote to the first Respondent requesting the correction of his children's status from Non-Citizen Aliens to Citizen. His request was premised on the glaring error on the part of the first Respondent in that in one breath and by way of issuance of passports, his office recognized his children as citizens of Zimbabwe, whilst in another breath and on the face of the issued birth certificates there were recorded as Non-Citizen Aliens (N.C. A). Several follow ups were made to have the Applicants' children's citizen status corrected and the first and second Applicants were requested through a

letter dated June 2021 that they bring their civil documents. In September 2021 the first Respondent confiscated second Applicant's national identity card on allegations that it had been fraudulently acquired. On 28th February 2022 first Applicant personally attended at the Central Registry and approached the passports office with the intention of renewing his son's passport which expired on the 7th May 2022. He was referred to the citizenship office because the child's birth certificate described him as a Non-Citizen Alien and the issue had to be cleared first. He was served by a Mrs Nyamunda the official In-charge of the Citizenship office. Mrs Nyamunda insisted that first Applicant hand over the children's passports which request first Applicant flatly refused. A deadlock ensued as the first Respondent insisted on the production of the children's passports in order to rectify the said anomalies while the First Applicant refused to comply.

Resultantly, the Applicants approached the Court on an urgent basis seeking interim relief against first Respondent's threatened conduct of seizing and confiscating third Applicant and her two siblings' Zimbabwean passports. The application was removed from the court's roll of urgent matters and referred to the ordinary roll. The Applicants now persist with their application, this time for final declaratory and interdictory relief. In particular, they seek:

1. Constitutional declaration of their status as citizens of Zimbabwe prior to the commencement of the Constitution of Zimbabwe, 2013 and their entitlement to continuation of their status as citizens;
2. Constitutional declaration of their entitlement of their citizenship of Zimbabwe by registration on account of their having been lawfully resident in Zimbabwe for the prescribed period;
3. Upon the issuance of the above constitutional declarations they further seek consequential interdictory relief as against the first Respondent that the latter be barred and thereby specifically interdicted from seizing and confiscating their current Zimbabwean passports and thereby revoking their citizenship and potentially rendering them stateless contrary to accepted constitutional and international law principles of protection against statelessness and the protection of the best interests of the minor children.

The application is opposed by the Respondents. In particular, the first Respondent alleged that the citizenship and passports held by the Third Applicant and the two minor children were obtained by fraud and as such it is entitled to seize the passports as the children are not citizens.

Further, in opposing the application the Respondents submitted that the Applicants ought to have exhausted domestic remedies before approaching this court.

The long and short of this application is that the Applicants wants this court to declare their citizenship in Zimbabwe before and after the effective date i.e. the coming into operation of the new Constitution of Zimbabwe Act 2013, and that the first Respondent be interdicted from confiscating their passports and birth certificates as this would render them stateless.

The law is very clear. The issue of citizenship in Zimbabwe is governed by the Constitution of Zimbabwe Amendment (No. 20) Act 2013 particularly ss 35 to 43. Some of the highlights of these sections are to the effect that:

- Persons are Zimbabwean citizens by birth, descent or registration - s 35(1),
- All Zimbabwean citizens are entitled to the following rights and benefits-
 - i) Protection of the State wherever they may be.
 - ii) To passports and other travel documents;
 - iii) A birth certificate and other identity documents issued by the State - s 35(3);
- Persons are Zimbabwean citizens by birth if they were born in Zimbabwe, and when they were born either their mother or their father was a Zimbabwean Citizen or any of their grandparents was a Zimbabwean citizen by birth or descent - s 36(1).
- Any person who has been married to a Zimbabwean citizen for at least five years, whether before or after the effective date, who satisfies the conditions prescribed by an Act of Parliament, is entitled, **on application**, to be registered as a Zimbabwean citizen- s 38(1).
- Any person who has been continuously and lawfully resident in Zimbabwe for at least ten years, whether before or after the effective date, and who satisfies the conditions prescribed by an act of Parliament, is entitled, **on application**, to be registered as a Zimbabwean citizen - s 38(2);
- Zimbabwean citizenship by registration may be revoked if the person concerned acquired the citizenship by fraud, false representation or concealment of material facts - s 39;
- Every person who, immediately before the publication day, was a Zimbabwean citizen continues to be a Zimbabwean citizen after that date - s 43.

The facts of this matter as highlighted earlier are that the Applicants noted that their children's documents bore an anomaly in that the passports indicate that they are "citizens" of

Zimbabwe while the birth certificates indicate that they are “Non-Citizen Aliens”. The first Applicant wrote to the first Respondent through his Legal practitioners to have the anomaly rectified. The first Respondent requested the first and second Applicants to bring their civil documents in order to rectify the anomalies. The Applicants complied. The first Respondent then confiscated the second Applicant’s national identity card on allegations that it had been fraudulently acquired. Later first Applicant again approached the Central Registry Passport Office with the intention of renewing his son’s passport which was to expire on 7th May 2022. He was referred to the citizenship office because the child’s birth certificate described him as a Non-Citizen Alien and that issue had to be cleared first. Mrs Nyamunda the official In-Charge of the Citizenship office insisted that he must hand over the children’s passports which the first Applicant refused to do, fearing that they would be confiscated leading to a stalemate and the filing of the present application.

ANALYSIS

First Applicant was born in Palestine, he does not reveal when he migrated to Zimbabwe, what he revealed though is that he was registered as a citizen of Zimbabwe on the 13th of February 2009. The second Applicant is a citizen of the Hashemite Kingdom of Jordan and a permanent resident of Zimbabwe. She holds a Jordanian passport and a Zimbabwean permanent residence permit. She is the wife of the first Applicant. She does not hold Zimbabwean citizenship. She is therefore not a Zimbabwean but was found in possession of a Zimbabwean Identity card which identified her as a Zimbabwean citizen, a fact which she has not refuted. How she got it is a mystery, what is of interest though is that she said it is not her fault but the fault of those who issued it. That she is a partaker in its issuance by virtue of the information she submitted or supplied is of no moment to her.

This child was born on the 26th of June 2001. She was born eight years before her father the first Applicant was granted citizenship and before she had even applied for and registered as a Zimbabwean citizen she already has a Zimbabwean passport. How that happened is another mystery. The first and second Applicants’ minor children were born on the 29th of March 2004 and 10th of January 2007 respectively. The two minor children therefore were born before their father the first Applicant had been granted Zimbabwean citizenship. The children have not yet applied for citizenship but they already hold Zimbabwean passports. The mystery continues.

The first Respondent is charged with the custody and issuance of civil documents to Zimbabwean citizens. The documents include birth certificates and passports. The first Applicant approached the first Respondent with a request for correction of the children's birth certificates. The birth certificates have the letters "NCA" inscribed on them, which means Non-Citizen Alien. The first Applicant's argument is that since the children have Zimbabwean passports they ought to be declared Zimbabwean Citizens and their birth certificates ought to reflect as such as well. The first Respondent as the custodian of the documents issued out to the Applicants then undertook to look into the matter and see how best it can address the Applicants' concerns, and in so doing requested the Applicants to surrender their children's passports as the information used to generate the passports was purportedly taken from the birth certificates which are said to be erroneous. Instead of the Applicants to be cooperative in order to be assisted in whatever way, they decided to be hostile and started raising all manner of aspersions. They claimed that they want to be stripped of their purported Zimbabwean citizenship and have therefore rushed to this court seeking declaratory reliefs to the effect that they are entitled to register as citizens of Zimbabwe.

Having refused to comply with the first Respondent's requests in order to be assisted, the Applicants have decided to approach this court for declaratory relief as to their citizenship status. The Applicants have not alleged that they made an application to the Minister of Home Affairs as prescribed by s 4(1)-(3) of The Citizenship of Zimbabwe Act [*Chapter 4.01*]. The reason why they have approached this court without following due process which is to apply to the Minister of Home affairs, or exhaust domestic remedies by cooperating with the first Respondent is everyone's guess.

The Applicants have referred to section 43(1) of the Constitution as the basis why their two minor children and the major child should be declared citizens of Zimbabwe. Section 43 (1) of The Zimbabwean Constitution reads:

"43 Continuation and restoration of previous citizenship

(1) Every person who immediately before the publication day, was a Zimbabwean citizen continues to be a Zimbabwean citizen after that date"

In this case the first Applicant alleged that his two minor children should be declared citizens of Zimbabwe because they have always been citizens of Zimbabwe before the coming into effect of the 2013 Constitution. The reason why he contended that they have always been Zimbabwean citizens is because they already held Zimbabwean passports before the coming into

effect of the 2013 constitution. However, the First Applicant was quick to state that his children have always had Zimbabwean passports, but funny enough he has not been quick enough to also explain how those passports were acquired before citizenship was granted.

Section 35(3) of the Constitution of Zimbabwe reads:

“Section 35 Zimbabwean citizenship

(All Zimbabwean citizens are entitled to the following rights and benefits in addition to any others granted to them by the law-

- (a) to the protection of the State wherever they may be.
- (b) **to passports** and other travel documents; and
- (c) to birth certificates and other identity documents issued by the state.”

The third Applicant also seeks the same relief of entitlement to citizenship registration because she holds a Zimbabwean passport. How she got that passport before registration as a citizen is a story the court did not hear. It is trite that acquisition of citizenship is the first step followed by ancillary benefits such as passports not vice versa.

The Constitution is the supreme law of the land. The above s 35(3) (b) supra makes it clear that passports are an entitlement. The entitlement is however not for everyone. It is not for residents but for citizens. In other words, for one to qualify for a Zimbabwean passport, one has to first of all be a Zimbabwean citizen. These are the dictates of the supreme law. *In casu*, the first Applicant’s children acquired passports absence of citizenship, in clear violation of set constitutional provisions. First Applicant is not prepared to have this matter discussed, neither does he want the custodian of those passports to try and understand how that happened. He just wants this court to declare them citizens of Zimbabwe. This is in the face of the fact that the documents (passports) which the first Applicant alleged indicate that his children were already Zimbabwean citizen have more to them than meets the eye. This is a story for another day.

What is instructive, as the first Respondent said, is that Applicants have approached this court after refusing, and decided not to make use of domestic remedies as I will demonstrate hereunder. None of those processes as prescribed by statute have been followed by the Applicants.

The Citizen of Zimbabwe Act [*Chapter 4.01*] is the legal statute which lays down the process which has to be followed by someone who so desires Zimbabwean citizenship. The particular section reads:

“4. Application for registration of persons of full age and sound mind

- (1) *Subject to this Part, the Minister may authorize the registration of a person as a citizen of Zimbabwe if that person-*

- (a) is of full age and sound mind; and*
- (b) applies for the Minister's authority in the prescribed form and manner; and*
- (c) satisfies the Minister that-*
 - (i) he is of good character and a fit and proper person to be registered as a citizen of Zimbabwe; and*
 - (ii) at the date of his application, he is ordinarily resident in Zimbabwe and has been so resident, whether continuously or as an aggregate of a number of periods, for at least five years:*

Provided that, if the President considers that the special circumstances of any particular case so warrant, he may authorize the Minister to accept a shorter period of residence; and

- (iii) he intends, after the grant of his application, to continue to reside in Zimbabwe, subject to the exigencies of his employment; and*
- (iv) he is willing to renounce any other citizenship he may hold if he becomes a citizen of Zimbabwe.*

2. No period during which a person who applies for the Minister's authority in terms of subsection (1) was confined to or was an inmate of prison, reformatory, mental hospital or other such institution in Zimbabwe or resided in Zimbabwe as a visitor shall be counted for the purpose of that subsection as a period of residence in Zimbabwe.

- 4. Nothing in this section shall be construed as limiting in any way the entitlement of a person referred to in section 7 of the Constitution to be registered as a citizen of Zimbabwe."*

The above cited section supra, indicates that there is process that has to be followed, if one wants to be granted citizenship by registration. The person has to be of full age and sound mind and must make an application to the Minister in a prescribed form and manner. In the present case the Applicants have not averred that they made an application to the Minister in any way. When an application is made to the Minister, then an enquiry starts. All they say is that they approached the First Respondent's offices intending to get birth certificates corrected and one Mrs Nyamunda threatened to seize their passports. If Applicants had cooperated with first Respondent's requirements, and if the Minister upon application refused to grant citizenship or first Respondent confiscated their civil documents and refused to correct the errors on the Applicants' children's birth certificates, rendering them stateless, then this court be in a better position to review the basis on which the Applicants' requests were refused and the court may make appropriate declarations. The question is why are the Applicants avoiding this straight forward process which is followed by others who desire Zimbabwean citizenship? It would be weird if people who desire Zimbabwean citizenship or have civil documents corrected to just rush to court to be declared citizens without first of all making the relevant application to the Minister as prescribed by statute.

The second Applicant likewise seeks to be declared a Zimbabwean citizen in terms of s 38(1) (2) of the Constitution. Second Applicant did aver that she made an application to the Minister as per procedure. Domestic remedies have to be exhausted first unless there are special circumstances. The Applicants have not shown any special circumstances. They are merely trying to avoid an enquiry as provided by Statute. If they had submitted their civil documents to the first Respondent. A correct picture would have emerged as to their citizenship status before and after the effective date of the current Constitution. They should have gone through that enquiry and should have stated how it is that they hold Zimbabwean passports absence of certificates of citizenship. On domestic remedies see- *Masunda v Chairperson Cresta Lodge Disciplinary and Grievance Hearing Committee* HH- 15/94 at p 7; *Dlodlo and Others v Road Motor Services (Pvt) Ltd* (SC 81/2006 and *Jambwa v GMB* (HC1113/2011) [ZWHHC 124/04 April 2013] MATHONSI J (as he then was) had occasion to deal with litigants who do not want to make use of available domestic remedies without any cogent reasons. He said-

“Mr *Maphosa* for the applicant argued that this is an application for a declaratory order and that this court must entertain it for that reason. I do not agree. The applicant elected to ignore the available domestic remedy provided for in the code of conduct, preferring to seek redress in this court. There is a *catona* of cases in which this court has stated that it will be slow to exercise its general review discretion where a litigant has not exhausted available domestic remedies before approaching the court. It will only exercise that jurisdiction where good cause is shown for the early approach.”

In the premises, the Applicants cannot be assisted by this court to become a law unto themselves. They have deliberately chosen to disregard laid down procedures for them to be lawfully registered as citizens of Zimbabwe, for the birth certificates to be corrected, for proper enquiries to be made and consequently for this court to make appropriate declarations on their Zimbabwean citizenship prior and after the effective date of the new Constitution of Zimbabwe.

In the result, the relief sought by the Applicants cannot be granted.

IT IS ORDERED THAT:

1. The application is dismissed.
2. The applicants to pay costs of suit.

TAGU J.....

Tafadzwa Ralph Mugabe, applicants' legal practitioners
Civil Division of the Attorney General's office, respondents' legal practitioners.