

RICHARD PAUL ERNEST ODENDAAL
versus
REGISTRAR –GENERAL OF ZIMBABWE
and
PRINCIPAL DIRECTOR OF IMMIGRATION
and
MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE
and
ATTORNEY –GENERAL

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 5, 11 & 13 March 2019

OPPOSED MATTER

S Machiridza for the applicant
Mrs *P Kashiri-Chiyangwa*, for the 1st and 3rd respondents
No appearance for the 2nd and 4th respondents

CHIRAWU-MUGOMBA J: The applicant in *casu* seeks a *declaratur*. At the hearing the applicant's legal practitioner Mr *Machiridza* sought an amendment of the draft order. Mrs *Kashiri-Chiyangwa* was not opposed and accordingly the relief sought by the applicant is as follows:-

IT IS DECLARED THAT:-

1. The applicant RICHARD PAUL ERNEST ODENDAAL is a citizen of Zimbabwe by birth as contemplated by section 43(1) of the Constitution of Zimbabwe, 2013 with all the rights, duties and entitlements attendant thereto including but not limited to a Zimbabwean Citizen national Identity card and a passport.

Alternatively

2. The applicant Richard Paul Ernest Odendaal is a citizen of Zimbabwe by birth as contemplated by section 43(2) of the Constitution of Zimbabwe, 2013 with all the

rights, duties and entitlements attendant thereto including but not limited to a Zimbabwean Citizen National Identity card and a passport.

CONSEQUENTLY

IT IS ORDERED THAT:-

3. The 1st respondent be and is hereby ordered to amend its records to reflect that the applicant is a citizen of Zimbabwe by birth and annul the registration certificate issued to the applicant on 13th October 2003.
4. The 1st respondent shall forthwith, and upon sight of this order issue the applicant with a confirmation of citizenship.
5. The 1st respondent shall forthwith, upon sight of this order issue the applicant with unconditional permanent residence permit in his British passport.
6. Applicant's legal counsel is granted leave to serve this order.
7. Costs of this application on an attorney scale to be borne by the respondents jointly and severally, one paying the other to be absolved.
8. No relief is sought against the 3rd and 4th respondents.

BACKGROUND

The applicant was born in Harare, Zimbabwe on the 30th of November 1947. His father one Johannes Ernest Conraad Odendaal was according to the applicant born in the then Northern Rhodesia (now Zambia). His late mother Pearl Margaret Dyer was a British citizen. The applicant is now a citizen of the United Kingdom. Applicant once held a Zimbabwean identity card but has since lost same. He also held on several occasions a Zimbabwean passport. In October 2003, applicant was made to acquire citizenship by registration and he was accordingly granted a certificate to that effect. Applicant averred that he needed not renounce any citizenship he might hold with any other country apart from Zimbabwe.

RELIEF SOUGHT

In support of the relief sought, the applicant averred as follows: - the actions and instructions to have the applicant register his citizenship has interfered with his status as a citizen of Zimbabwe. There are rights and privileges associated with being a citizen by birth

that are not enjoyed by citizens by registration the major one being the ability to hold dual citizenship. Applicant has therefore approached the court to confirm that he is a citizen of Zimbabwe by birth and entitled to all benefits, rights, entitlements and obligations. He is also facing inconvenience as he has to pay visa fees each time that he travels to Zimbabwe using a foreign passport.

1ST AND 3RD RESPONDENTS' RESPONSE

In response to the application, the 1st and 3rd respondents averred as follows: - the applicant has failed to satisfy the requirements of s43 (2) of the Constitution more particularly in that he has failed to show that when he was born in Zimbabwe before the publication date, one or both of his parents was a citizen of a country which became a member of SADC and that he was ordinarily resident in Zimbabwe. Further that the documents attached do not show that applicant's father was a citizen of Zambia at the time of his birth. The fact that the applicant's father was born in Zambia does not mean that he was a citizen of Zambia. The 1st and 3rd respondents admitted that the applicant at a certain point was registered as citizen of Zimbabwe on the basis of the provisions of the Citizenship of Zimbabwe Act [*Chapter 4:01*]. The applicant lost that citizenship when he acquired foreign citizenship as that law prohibited dual citizenship. If the applicant claims to be a citizen by birth, he must meet all the requirements set out in section 43(2) of the Constitution. The 1st and 3rd respondents denied that the applicant was ever at any stage ordered to renounce his citizenship of another country.

2ND RESPONDENT'S RESPONSE

The 2nd respondent opposed the application. Its notice of opposition is misleading in that it indicates that the 'respondents' intend to oppose the application and that the court application was served on the 'respondents' on a specified date. The error is repeated under the caption, "Civil Division of the Attorney-General's Office", 'Respondents' Legal Practitioners. It is imperative that correct information be presented to the court as the fact that the Civil Division purported to be representing all the respondents might have consequences. It is only upon a reading of the opposing affidavit that it becomes clear that the deponent is representing the 2nd respondent. The deponent averred that whilst the applicant was born in Zimbabwe, the annexes fell short of showing the nationality of his parents at the time of his birth. The annexes show that applicant's parents were non-citizens at the time of his birth.

Only citizens by birth have unfettered right to dual citizenship. By admitting that he is a citizen of the United Kingdom who acquired citizenship by registration, the applicant cannot have it both. The 2nd respondent also averred that the applicant is the holder of permanent residence status. To that end, the 2nd respondent attached a letter addressed to the applicant dated the 24th of June 2018 advising him that his application for a residence permit had been approved with the status, 'permanent'. He was advised to bring his national passport for endorsement to that effect.

The applicant did not file an answering affidavit.

THE LAW

Section 35 of the Constitution provides that persons are Zimbabwean citizens by birth, descent or registration. Section 35(2) bestows rights on citizens but also places obligations on them. Section 36 broadly sets out citizenship by birth. Section 43 sets out provisions relating to continuation and restoration of previous citizenship as follows:-

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

(2) Every person who was born in Zimbabwe before the publication day is a Zimbabwean citizen by birth if—

(a) one or both of his or her parents was a citizen of a country which became a member of the Southern African Development Community established by the treaty signed at Windhoek in the Republic of Namibia on the 17th August, 1992; and

(b) he or she was ordinarily resident in Zimbabwe on the publication day.

In *Mawere v Registrar –General and ors*, 2013(1) ZLR 578, the court considered various judgements on the correct approach to constitutional interpretation- see *Rattigan & Others v Chief Immigration Officer & Others* 1994(2) ZLR 54(S), *Park – Ross and Another v Director: Office for Serious Economic Offences* 1995 (2) SA 148(C), *Government of the Republic of Namibia and Another v Cultura* 2000 and *Another* 1994(1) S.A. 407 (Nm S), *State v Zuma & Others* 1995 (2) SA 642 (CC), *Hewlett v Minister of Finance* 1981 ZLR 571, and *Minister of Home Affairs v Bickle & Others* 1984 (2) S.A. 439(ZS). Highlighting section 2 of the Constitution, GARWE JA with the concurrence of the court stated that the section is important as it, '*stipulates beyond doubt that anything done contrary to the provisions of the Constitution is invalid*'. In relation to s43, it was stated that:-

'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. 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.

The court held,

‘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.’

The court consequently made an order that the applicant who was born in Zimbabwe to Zimbabwean parents is a citizen of Zimbabwe by birth by virtue of section 36(1) of the 2013 Constitution.

Madzimbamuto v Registrar – General and ors, 2014(1) ZLR 801 (C) concerned an applicant who was a citizen of Zimbabwe by birth. One of his parents was a Zimbabwean by birth whilst the other was a South African by birth. He sought initially a declaratory order confirming his right to a Zimbabwean passport and other ancillary relief. He also sought an order for an endorsement in his South African passport with an unrestricted and indefinite residence permit. The 2nd respondent in that matter contended that since the applicant holds a South African passport he is an alien and thus entitling the 2nd respondent to govern his status in terms of the immigration regulations of 1998. While conceding that the applicant was entitled to dual citizenship, the 2nd respondent insisted that the applicant be treated as an alien if he enters Zimbabwe on a South African passport. ZIYAMBI JA (as she then was) with the concurrence of the court stated as follows:-

“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

The applicant was declared a citizen of Zimbabwe by birth with entitlement to dual citizenship. The 2nd respondent in that matter was ordered to endorse in the applicant's South Africa passport upon presentation thereof to him, the applicant's right to unrestricted and unconditional residence in Zimbabwe.

In *Whitehead v. Registrar-General of Citizenship and ors*, 2015(1) ZLR 582, the appellant was born in Zimbabwe (then Southern Rhodesia). His mother was born in Southern Rhodesia in 1917 and his father was born in South Africa. The appellant's Zimbabwean passport was confiscated by the Registrar-General on the basis that the appellant had not renounced his South African citizenship by descent. Appellant then obtained a South African passport. He was shortly afterwards declared an undesirable inhabitant or visitor to Zimbabwe. It was held that the appellant was born in Zimbabwe and, at the time he was born, both his parents were Zimbabwean citizens. The appellant was by operation of law, a citizen of Zimbabwe by birth. Such citizenship could not be revoked by the State except in circumstances provided for under s 39(2) of the Constitution. None of the factors applied to the appellant. Therefore a decision to revoke his citizenship or to declare him a prohibited immigrant was clearly unlawful. The fact that he also enjoyed South African citizenship or at some stage he was a prohibited immigrant was no longer relevant. He was a citizen by birth in terms of s36 (1) of the Constitution and entitled to all benefits of citizenship.

THE MERITS

At the hearing, I expressed disquiet on what I perceive as the scantiness of the applicant's founding affidavit. One would have thought that in a matter such as this that raises important constitutional questions, an applicant ought to give details upon which a court makes an informed decision. The applicant seemed unsure whether he was relying on the fact that he was made to 'renounce' his citizenship by birth status to that of citizen by registration.

Although born in Zimbabwe, the applicant cannot rely on provisions of section 36(1) of the Constitution that read as follows:-

“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) ...”

The applicant stated in his founding affidavit that his father was born in Zambia and that his mother was born in the United Kingdom. On that basis, the decisions in the *Mawere, Madzimbamuto and Whitehead* cases (*supra*) in which one or both parents were citizens of Zimbabwe are distinguishable. The applicant going by paragraph one of the amended draft order seeks an order that he be declared a citizen of Zimbabwe by birth.

Being disqualified from relying on s36 (1) of the Constitution, the applicant placed reliance on s43 (1) and 43(2). The applicant’s status as at the 22nd of May 2013 was that of a citizen by registration. A *declaratur* that he is a citizen by birth is the only legal way that entitles him to dual citizenship, that is citizenship of both Zimbabwe and the United Kingdom. I did not read the application before me as seeking a *declaratur* that the actions of the 3rd respondent under whose office the certificate of citizenship by registration was issued be declared unlawful. Therefore in the absence of the action being declared unlawful, the certificate of citizenship by registration stands. The applicant remains a citizen by registration. He has a permanent residence permit. I state so because the applicant never deposed to an answering affidavit refuting the assertion by the 2nd respondent that applicant has been granted permanent residence status.

Applicant averred that his father was a citizen of Zambia, a country that is part of SADC established by a treaty signed at Windhoek in the republic of Namibia on the 17th of August 1992. Apart from a copy of his own birth certificate which indicates that his father was born in Northern Rhodesia (now Zambia) there is no other evidence placed before the court by the applicant to show that his father was a citizen of Zambia. While it is accepted that the applicant was born in Zimbabwe, mere mention on a birth certificate that the applicant’s father was born in Zambia is not enough to satisfy the court that indeed he was a citizen of Zambia.

Section 43(2) has a further requirement in s43 (2) (b) that a person relying on s43 (2) (a) must have been ordinarily resident in Zimbabwe on the publication day. Whether or not someone is ordinarily resident is a factual issue.

In *W v W*, (2009) ZAWCHC 159, the court had occasion to discuss the meaning of ordinarily resident in a divorce action.

DAVIS J, stated as follows:-

"In this case the dispute turns on the meaning of the phrase "ordinarily resident". In Zwvssig v Zwvssia 1997(2) SA 467 at 470F the Court citing Dicey: The Conflict of Laws says:

"It is possible to be resident in a country despite a temporary absence and at least in some context to have two or more residences."

The Court also approved of the earlier *dictum* in Robinson v Commissioner of Taxes 1917 TPD 542 at 547-548;

"There are certain considerations which may afford a guide to its interpretation. In the first place it is not synonymous with domicile, nor is it necessarily permanent, nor is it exclusive, but on the other hand a mere passerby or a casual visitor is not resident, although in a sense he may be said to reside during the period of his visit. Perhaps the best general description of what is imported by residence is that it means a man's home or one of his homes for the time being; for exactly what period and what circumstances constitute home is a point on which it is impossible to lay down any clearly defined rule Again the maintenance of an establishment coupled with intermittent or occasional dwellings is sufficient to constitute residence.... It appears therefore that if a man sets up an establishment in a country and lives there at intervals he is resident in that country, however many similar residences he may have elsewhere." 470F.

The obviously sexist language employed by this dictum should not disturb its importance as a clear articulation of ordinary residence."

SCHREINER JA, in *Cohen v CIR* 1946 AD 174 at 185, H with reference to the meaning of ordinarily resident stated as follows:-

"His ordinary residence would be the country to which he would naturally as a matter of course return from his wanderings; as contrasted with other lands that might be called his usual principal residence and it would be described more aptly than other countries as his real home."

N.S and ors v. The Presiding officer of the Children's Court, (2018) ZAGGPJHC 59, the matter turned on the meaning of 'ordinarily resident' in the context of the Children's Act of South Africa. KATHREE-SETILOANE J stated as follows:-

The determination of whether a child is ordinarily resident in the area of the Children's Court is a factual question. The word "resides" has been interpreted by our courts in the context of establishing jurisdiction under the Children's Act of 1937 and 1960 respectively, to mean "the place where the child eats, drinks, or sleeps or where his family eats, sleeps and drinks".²

The words "resides" or "resident" connotes something broader than "ordinarily resident",³ which on a proper construction would mean "something more prolonged than a mere temporary stay"⁴. It need not, however, be permanent. In the context of tax law, our courts

² *Philips v Commissioner of Child Welfare, Bellville* 1956 (2) SA 330(C) at 334. *Gold v Commissioner of Child Welfare, Durban, and Another* 1978 (2) NPD 305 A.

³ *CIR v Kuttel* 1992 (3) SA 242 (A) at 247.

⁴ *Philips* at 334G-H

have interpreted “ordinarily resident” to be a person’s “home or one of his homes”,⁵ and “the country to which he would naturally as a matter of course return from his wanderings”.⁶

The mere fact that a person has permanent residency of a country does not mean that they are ordinarily resident. In my view, permanent residency status is a legal issue when someone is conferred with authority to live in a country on a permanent basis if they so wish. There is no proof placed before the court to satisfy the requirement that the applicant was ordinarily resident in Zimbabwe on the publication date, that is, the 22nd of May 2013.

COSTS

The applicant has sought costs on a legal practitioner to client scale against the respondents jointly and severally one paying the other to be absolved whilst the 1st, 2nd and 3rd respondents prayed for the dismissal of the applicant’s case with costs. It is trite that costs are at the discretion of the court. The manner in which the applicant has approached this matter is less than satisfactory. I will therefore make an order of costs against the applicant.

DISPOSITION

It is ordered as follows:-

1. The application be and is hereby dismissed with costs.

T.R.M. Legal Counsel, applicant’s legal practitioners

Thondhlanga and Associates, 1st and 3rd respondent’s legal practitioners

Civil Division of the Attorney-General’s Office, 2nd respondent’s legal practitioners

⁵ *Robinson v Commissioner of Taxes* 1917 TPD 542-548.

⁶ *Cohen v CIR* 1946 AD 174 at 185H.