

CHRISTINA JANET VEITCH (NEE KINNAIRD)
versus
REGISTRAR GENERAL OF CITIZENSHIP
and
PRINCIPAL DIRECTOR OF IMMIGRATION
and
ATTORNEY GENERAL OF ZIMBABWE
and
MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE

HIGH COURT OF ZIMBABWE
MATHONSI J
HARARE, 6 June 2019 & 12 June 2019

Opposed Application

T. R Mugabe, for the applicant
Ms P Nyamukapa, for the respondents

MATHONSI J: This is an application for a declaration of citizenship by a 66 year old woman who was born in this country when it was still Southern Rhodesia on 1 May 1953 by parents of Scottish descent. The first respondent has refused to confirm her citizenship status and when she attended at the first respondent's offices in Kadoma on 19 April 2017 requesting to be issued with a plastic national identity card the officials at that office not only denied her one, they promptly confiscated her green national identity card waiting pass which had previously been issued to her. Subsequent efforts by her legal practitioners to persuade the first respondent to confirm her citizenship status and to issue her with a national identity card have come to naught, the first respondent insisting that she must prove her status and entitlement.

At the commencement of the hearing of the application, Mr *Mugabe* appearing for the applicant withdrew the application against the third respondent, the Attorney General, having seen the light a bit late that there was no legal foundation to cite the Attorney General in a suit against

the other respondents. Section 114 (4) of the Constitution provides for the functions of the Attorney General which include acting as the principal legal advisor to the Government and representing the Government in civil and constitutional proceedings. A legal representative cannot be a party to those proceedings at the same time.

Mr *Mugabe* also sought to make a few amendments to the application including submitting an amended draft order that the declaration of citizenship be made in terms of s 43 (3) of the Constitution. The original draft order had erroneously sought a declaration in terms of s 36 (1) of the Constitution, as case not made in the papers. Ms *Nyamukapa* for the respondents opposed the application for the submission of an amended draft order because, in her view, that amounted to prosecuting a new cause of action. She submitted that an application stands or fails on its founding affidavit and as such the applicant could not alter the basis of the declaration in the answering affidavit or draft order.

It soon became apparent that the opposition was without merit not only because the founding affidavit did not cite any section of the Constitution under which the declaration of citizenship was sought but also that the draft order is merely a draft. It did not contain a cause of action and the court is not bound to only grant an order as is sought in the draft order but that which would have been established in the application. When Ms *Nyamukapa*'s objection to the amendment could not be sustained she capitulated. In fact that was the end of any opposition to the application except for the issue of costs, which I shall deal with later.

John Walker Kinnaird and Mary Fraser Latona migrated to this country from Scotland separately between 1948 and 1949 as trainee tobacco farmer and child nurse respectively. Their courtship occurred in this country and they got married on 9 February 1952 at the then Salisbury. Their marriage was blessed with the applicant, born as I have said on 1 May 1953 at Salisbury and John Gerald Kinnaird, born on 5 October 1955. The couple is said to have lived in this country continuously until 1983 having acquired a farm in Kadoma where John Gerald Kinnaird still resides to this day.

Of course the applicant later got married, initially to Kevin Vivian Johnson, whom she divorced on 3 June 1987. She is the holder of a birth certificate issued by the first respondent on 21 May 1953 and was also issued with a national identity document on 22 May 1987 which clearly stated that she was a citizen of Zimbabwe. No wonder it came as a surprise to her when her national

identity document was seized by officials at Kadoma especially as her young brother John Gerald Kinnaird who had gone to that office with her for the same purpose had no problem at all. He was issued with a national identity card No. 32-082267 D OO CIT M on 30 March 2017. Other than that the applicant is a woman, it is not apparent why she was treated differently from her brother because their circumstances are exactly the same.

The first respondent's official position was that he had "found no trace" of the applicant's parent's citizenship status or proof of permanent residence at the time of her birth. He was therefore unable to confirm the applicant's citizenship and was simply not going to issue her with a national identity card until she produced proof of that status.

Mr *Mugabe* for the applicant submitted that the applicant is a citizen of Zimbabwe because she was born in Zimbabwe at a time when citizenship was regulated by the Southern Rhodesian Citizenship and British Nationality Act No. 13 of 1949. Section 6 (2) of that Act provided that a person born in Southern Rhodesia was a citizen without qualification. If that provision is read together with s 43 (1) of the Constitution it means that the applicant is indeed entitled to Zimbabwean citizenship, no matter what may have happened in between, what laws may have come into effect tending to take away that citizenship and to demand a renunciation of other potential citizenship.

Ms *Nyamukapa* submitted that s 43 (1) of the Constitution does not provide for citizenship by birth. She however conceded that it is a continuation clause and really had nothing more to say the moment an amendment was sought for the declaration to be made in terms of s 43 (1) instead of s 36 (1) of the Constitution. In terms of s 43 (1);

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

The new constitution was promulgated on 22 May 2013. The date of publication is therefore 22 May 2013. What is important is that a person who was a Zimbabwean citizen at the time of the introduction of the new constitution in 2013 continued to be such a citizen after that without further ado.

Once citizenship is conferred on an individual, it can duly be lost or revoked in terms of s 39. It provides:

"39 Revocation of citizenship

(1) Zimbabwean citizenship by registration may be revoked if-

- (a) The person concerned acquired the citizenship by fraud, false representation or concealment of a material fact; or
 - (b) during a war in which Zimbabwe was engaged, the person concerned unlawfully traded or communicated with an enemy or was engaged in or associated with any business that was knowingly carried on as to assist an enemy in that war.
- (2) Zimbabwean citizenship by birth may be revoked if-
- (a) The citizenship was acquired by fraud, false representation or concealment of a material fact by any person; or
 - (b) in the case of a person referred to in section 36 (3) the person's nationality or parentage becomes known, and reveals that the person was a citizen of another country.
- (3) Zimbabwean citizenship must not be revoked under this section if the person would be rendered stateless."

It has not been suggested in this case that if indeed the applicant was a Zimbabwean citizen at some point, such citizenship was ever revoked for any reason. Neither has it been suggested that there would be any cause for revocation. All that has happened in this case is that the first respondent has been intransigent and without conducting any meaningful investigation of the applicant's status, he has refused to accord her rights provided for in the Constitution. It is disappointing that the matter of such magnitude involving the constitutional rights of a fairly elderly person has been allowed to come this far without officialdom appearing to care. This has happened at a time when the government is on record for encouraging even foreigners to come and invest in Zimbabwe and has been pleading with those of our people who are in the diaspora to return and work for the development of the economy. Surely there is need for introspection within the first respondent's offices if government efforts are to bear fruits.

If indeed the applicant is not entitled to citizenship or is not a citizen, she must be told so and that conclusion can only be arrived at after thorough investigation of the case. It is not enough for officials who are employed and paid to handle citizenship issues to sit back and demand that those that seek assistance must do their work for them. As it is, a person who has been a citizen of this country all her life and has lived and worked in this country throughout having been given a Zimbabwean identity document clearly depicting her as a citizen, has had it taken away from her leaving her high and dry with nothing and for no discernable reason.

Section 2 of the Constitution makes it clear that the Constitution is the Supreme law of the country and that any law, practice, custom or conduct which is inconsistent with it is invalid to the extent of that inconsistency and that the constitution is binding on every person including the State

and its organs. In interpreting s 43 (1) in *Maware v The Registrar General & Ors* CCZA-15, the Constitutional Court stated at para 29 and 30;

“(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.”

In that case the court ruled that dual citizenship in respect of citizens by birth is not proscribed and exists by operation of law.

In *Madzimbamoto v The Registrar of Citizenship & Ors* CCZ 25-14 it was stated that even where regulations have been made in terms of which a holder of dual citizenship who presents a foreign passport upon entering Zimbabwe would be treated as an alien and made to apply for a residence permit, those regulations governing the conduct of the first respondent would not override the provisions of the Constitution granting a citizen a right to dual citizenship. By the same token, it must follow that it matters not that the first respondent has a custom or procedure requiring persons seeking confirmation of their citizenship to produce documents including their parent’s status, does not detract from the constitutional right conferred to a person by s 43 (1) of the Constitution to continue enjoying citizenship rights which subsisted prior to 22 May 2013.

That the applicant was a citizen of Zimbabwe immediately before 22 May 2013 when the Constitution came into effect cannot possibly be in doubt. I did not hear Ms *Nyamukapa* to dispute that the law which was in place when the applicant was born on 1 May 1953 conferred citizenship upon her by birth. Apart from that the first respondent himself confirmed her citizenship when he issued her with a national identity document as a citizen. Indeed citizenship was also extended to the applicant’s brother under the same circumstances. By virtue of the provisions of s 43 (1) the applicant is entitled to continue to be a Zimbabwean citizen.

Mr *Mugabe* submitted that the time has come for this court to penalise the first respondent with an award of costs against him on an adverse scale because, in a line of cases which he cited, the first respondent has been taken to court by citizens asserting their rights of citizenship and has lost. The courts have been generous with him by not awarding costs but he does not appear to have

learnt anything from that experience. Ms *Nyamukapa* took the view that each party should bear its own costs because the initial order sought by the applicant was for a declaration of citizenship in terms of s 36 (1) which has no application. That entitled the respondents to contest.

I agree that the costs should follow the result but I am also persuaded slightly by Ms *Nyamukapa*'s argument. The applicant has sought quite a number of amendments meaning that her application could have been drafted better. The respondents were entitled to test the correctness of her claim. Costs on the lower scale should meet the justice of the case.

In the result, it is ordered that:

1. It is declared that the applicant Christina Janet Veitch (nee Kinnaird) is a citizen of Zimbabwe in terms of s 43 (1) of the Constitution of Zimbabwe, 2013 with all rights, duties and entitlements attendant thereto including but not limited to a passport.
2. Consequently, the 1st respondent shall forthwith and upon sight of this order and payment of statutory fees issue the applicant with a Zimbabwean national identity card and passport.
3. The first respondent shall bear the costs of this application.

TRM Legal Counsel, applicant's legal practitioners
Civil Division of the Attorney General's Office, respondents' legal practitioners