

MICHELE DEAN VON MEMERTY  
versus  
REGISTRAR GENERAL OF CITIZENSHIP  
and  
PRINCIPAL DIRECTOR OF IMMGRATION  
and  
ATTORNEY GENERAL OF ZIMBABWE

HIGH COURT OF ZIMBABWE  
MUZOFA J  
HARARE, 21 March & 13 June 2019

### **Opposed Application**

*S Machiridza*, for the applicant  
*L.C Ndoro*, for the respondents

MUZOFA J: In this application, the applicant seeks the following relief as amended  
“IT IS DECLARED THAT:

1. It is declared that the applicant MICHELE DEAN VON MEMERTY 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 passport.

#### **Alternatively**

2. It is declared that the applicant MICHELE DEAN VON MEMERTY 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 passport

**CONSEQUENTLY**

**IT IS ORDERED THAT:**

3. The 1<sup>st</sup> respondent shall forthwith, and upon sight of this order issue the applicant with a confirmation of citizenship.
4. The 1<sup>st</sup> respondent shall forthwith, and upon sight of this order issue the applicant with a birth certificate, national identity document and passport reflecting that she is a citizen of Zimbabwe.
5. The 2<sup>nd</sup> Respondent shall forthwith, upon sight of this order issue the applicant with unconditional permanent residence permit in her Portuguese 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, the one paying the other to be absolved.
8. No relief is sought against the 3<sup>rd</sup> respondent."

The applicant's case as set out in the papers and amplified in oral submissions is that she requires a final and definitive statement as regards her status from this court because the first respondent has refused to entertain her request for confirmation of her status as a citizen of Zimbabwe by birth. She was born on 7 April 1961 in Kadoma to a Mozambican father and an English mother. She once held a Zimbabwean identity card and passport. She later renounced her Zimbabwean citizenship. She believes that, in terms of the Constitution she should be declared a citizen, since she is a citizen of Zimbabwe by birth. The applicant maintains that she did not lose her citizenship and she remains a citizen by birth which cannot be lost on the authority of *Madzimbamuto v The Registrar General and 3 Ors* CCZ 5/14 and *Whitehead v Registrar General of Citizenship and Others* SC 308/12.

The first and second respondents opposed the application. The third respondent did not file any opposition papers. The assumption is that the third respondent is prepared to abide by the court's decision. In any event no order is sought against the third respondent.

The first respondent raised a preliminary point that the application is not properly before the court, the application is premature. The applicant has not approached the first respondent and presented all the relevant documents for the first respondent to make a decision. In terms of s 85 of the Constitution there must be a violation of a right before the applicant approaches this court for recourse. In response to the preliminary point, the applicant maintained that she

approached the first respondent before filing this application but the first respondent refused to entertain her application. It was submitted that section 85 of the Constitution is not applicable in this matter. Section 85 of the Constitution provides enforcement mechanisms in respect of violations of rights in Chapter 4 of the Constitution. I agree with the submission there is no need to dwell further on the issue. The applicant grounded her right to approach this court on the Constitution that this is an application to enforce rights in Chapter 3 of the Constitution. In terms of the Constitution s 56 (1) thereof, the applicant has the right to the protection and benefit of the law and by virtue of s 69 (3) the applicant can access the court for the resolution of the dispute. There is a dispute between the parties as to whether the applicant is a citizen of Zimbabwe. Accordingly this Court in its exercise of its original jurisdiction provided in s 171(1) of the Constitution it can hear this matter.

The applicant indeed is endowed with the constitutional rights as set out in the oral submissions by counsel however they are not the basis of this application. The applicant's cause of action set out in the founding affidavit is the first respondent's conduct of rebuffing the applicant when she approached the office for confirmation of her citizenship. It is common cause that a case stands or falls on the founding affidavit. All the same, s42 of the Constitution gives power to the legislature to make provision for the regulation of matters relating and incidental to citizenship. Pursuant to that Constitutional provision the legislature enacted the Citizenship of Zimbabwe Act (Chapter 4:01). The office of the first respondent is a creature of the said statute which gives it the power to regulate the registration of citizens of Zimbabwe. To that extent, the first respondent has been clothed with the power and administrative authority to deal with matters on the registration of persons as citizens of Zimbabwe. This is the entry point in such matters. As a matter of procedure, an administrative body established to deal with matters, should be approached first before a litigant approaches this court in the exercise of their rights. Indeed the High Court has inherent jurisdiction to hear all civil and criminal matters throughout Zimbabwe. The High Court would therefore be a forum of jurisdiction that litigants can approach when there is a dispute and the Court will exercise its jurisdiction where it is clear that it should. However where domestic remedies are available the parties should exhaust the domestic remedies before approaching the court. Where they are not exhausted the court will want to know why it should exercise its jurisdiction and may insist that domestic remedies be exhausted first. The courts have interpreted s171(1) restrictively, that in the exercise of its inherent jurisdiction the High Court has to take into account other applicable constitutional provisions as well as legislation in force that places some breaks or limits on its jurisdiction

see *Stanley Machote v Zimbabwe Manpower Development Fund* HH 813/15, *Munodawafa v Masvingo District Administrator and Others* HH571/15

The issue for determination is whether this application is premature. In other words was it ripe to be placed before the court. As already stated the first respondent is the administrative body empowered to deal with the registration of citizens. There must therefore be proof placed before this court that the applicant approached the first respondent and either the application was dismissed or as alleged by the applicant the first respondent refused to entertain her application.

In her founding affidavit the applicant, said the first respondent has refused to entertain her request for confirmation of her citizen status. When pressed further that no such request was made to the first respondent, in her answering affidavit, the applicant averred that she expressed her intentions to the first respondent and such efforts were rebuffed. The applicant did not give further details as to when she approached the first respondent and what transpired. There is no proof that the applicant either in person or through some third party approached the first respondent with all the relevant documents seeking confirmation of her citizenship status. The applicant referred to a letter dated 22 March 2018 that she wrote to the first respondent which was not favoured with a response and her legal practitioners' follow up letter on the issue. The first respondent denied having received the letter. The letter by the applicant was written after the applicant filed this application. It therefore does not assist the applicant in this matter. There was no proof placed before this court that the applicant approached the first respondent and the first respondent refused to entertain her application. The wording of the letter by the applicant does not reveal that the applicant made any application prior to it; it was couched in the following terms,

**“Re: Confirmation of Citizenship of Zimbabwe and application for Zimbabwe Passport and identity card for Michele Dean Von Memerty”**

I wish to apply for a Zimbabwean passport. I am a Zimbabwean citizen by birth. When I was born, my father was a citizen of Mozambique. I presently hold a Portuguese passport.  
I would like to hold both Zimbabwean Passport and that of Portugal.”

There is no reference to what the applicant alleges in this application that the first respondent rebuffed her earlier attempts. It would be expected that the letter would speak for itself that it is a follow up to some efforts that were rebuffed by the first respondent. A reading of the letter shows that it is the request for confirmation of citizenship. The letter should have preceded this application for the matter to be ripe for litigation. In any event the letter does not

refer to any attachments of the documents showing that she is a citizen by birth, that her father was a citizen of Mozambique and that she was a holder of a Portuguese passport. I find nothing to show that the applicant exhausted the domestic remedies available to her in this matter. This is a matter that the court should not exercise its jurisdiction; the matter was not ripe for litigation at the time of issuing process.

The preliminary point has merit. The first respondent requested for costs on a higher scale because it was unnecessarily brought to court before it the applicant approached it for recourse. I agree with the first respondent, the applicant should have utilised the internal remedies before approaching this court for relief.

1. The preliminary point is upheld.
2. The applicant to pay costs of suit on a higher scale.

*Tafadzwa, Ralph Mugabe*, applicant's legal practitioners  
*Thondhlanga & Associates*, 1<sup>st</sup> respondent's legal practitioners