

RORY VASHON WHEELER
versus
REGISTRAR GENERAL OF CITIZENSHIP
and
PRINCIPAL DIRECTOR IMMIGRATION
and
MINISTER OF HOME AFFAIRS AND CULTURAL HERITAGE

HIGH COURT OF ZIMBABWE
TAGU J
HARARE, 26 November 2019 & 4 March 2020

Opposed application

T R Mugabe, with *Machiridza*, for the applicant
P Nyamukapa, for the 1st, 2nd & 3rd respondents

TAGU J: This is an application for a declaration of the applicant's citizenship status, more particularly his status as a citizen of Zimbabwe by birth and the attendant rights that flow therefrom. The applicant insists that he is a citizen of Zimbabwe by birth while the first respondent insists that the applicant is a citizen of Zimbabwe by descent. The court is therefore being called upon to declare which of the two status applicant falls under. The order sought is couched in the following terms-

“IT IS DECLARED THAT

1. The applicant, RORY VASHON WHEELER is a citizen of Zimbabwe by birth in terms of s 36 (2) (a) of the Constitution of Zimbabwe, 2013 with all rights, duties and entitlements thereto including but not limited to a Zimbabwe passport, citizen national identity card and permanent residence in Zimbabwe and

CONSEQUENTLY

IT IS ORDERED THAT

2. The 1st respondent shall forthwith, and upon sight of this order issue the applicant with a Zimbabwean national identity card and a passport;
3. The 2nd respondent shall forthwith, and upon sight of this order endorse an unconditional permanent residence permit in the applicant's Australian passport;
4. The applicant's legal practitioners are granted leave to serve this order, and
5. Costs of this application on a legal practitioner and client scale to be borne by the 1st respondent."

The facts of the matter are that the applicant was born on 31 August 1985 at Wagga Wagga, Australia to parents David Hugh Wheeler and Tessa Mary Hunter Christie both born in Zimbabwe. His grandfather was born in England. His grandmother was born in South Africa. Both grandparents were Europeans. His father had been issued with a citizen national identity registration card, birth certificate and Zimbabwe permanent residence permit endorsed in his British passport. At the time of his birth his parents were citizens of Zimbabwe. The applicant grew up in Zimbabwe and travelled on his mother's passport until 31 July 2002. He then lived outside Zimbabwe since about 24 April 2000 when he and his sibling Heather left Zimbabwe with their mother and went to France and have been travelling on an Australian passport with a ten – year residence permit for France. His contention is that in terms of the laws of Zimbabwe and in particular the Constitution of Zimbabwe 2013 he is a citizen of this country and should be declared as such.

The applicant said further that on 9 January 2019 he engaged the Zimbabwe Registrar General of citizenship in a bid to assert his citizenship by birth as provided for by the Constitution. On 22 January 2019 the Zimbabwe Registrar of citizenship took issue with his parents' ordinary residence at the time of his birth. He submitted that the burden of proving what transpired at the time of his birth has been unfairly cast on him. He attempted to recover documents and all he could present was that his mother previously was issued with a Zimbabwean passport on 25 July 1981. During one such travel to Australia she gave birth to him in 1985. In 1986 his mother travelled back to Zimbabwe to register his birth and resided in Zimbabwe until 1991 when she travelled to France with him. Her passport expired in 1991 and she was issued with a replacement passport on 31 July 1992 in London which was the closest issuing authority to France. She travelled back to Zimbabwe with him at the end of 1992. They then left Zimbabwe on 24 April 2000 and have

resided in France since that time. Upon assessment the first respondent denied his claim of citizenship on the basis that he must prove the place of ordinary residence of his parents. He therefore claims that his parents' place of ordinary residence is Zimbabwe. He attached sworn testimonies of his father and a few acquaintances. He therefore has approached this court to confirm that indeed he is a citizen of Zimbabwe and that the first respondent be made to pay costs of this application because he has been put out of pocket in vindicating his rights since 2013.

In a letter dated 9 January 2019 to the first respondent the applicant's legal practitioners requested confirmation of citizenship of Zimbabwe by birth for the applicant stating among other things that the applicant is a citizen of Zimbabwe by birth by virtue of being born outside Zimbabwe to Zimbabwean citizens who, at the time of his birth were ordinarily resident in Zimbabwe as provided for in s 36 (2) of the Constitution of Zimbabwe 2013. In response to the request the first respondent by letter dated 22 January 2019 stated among other things that in terms of s 36 (2) of the Constitution of Zimbabwe Amendment No. 20 Act, people born outside Zimbabwe are citizens by birth if when they were born, either of their parents was a Zimbabwean citizen and **ordinarily** resident in Zimbabwe. The first respondent requested proof of ordinary residence in Zimbabwe. He submitted that the passport page with children's addition on the applicant's mother's passport was done through Zimbabwe Embassy in London which is prima facie evidence that the applicant's parents may have been residing outside Zimbabwe. He said further, that Zimbabwe passport was issued in 1997, long after the applicant was born in Australia in 1985. He therefore requested to have sight of the passport issued for the travel to Australia for applicant's birth in 1985 if parents were resident in Zimbabwe.

Upon being served with the present application the first respondent filed a notice of opposition. The first respondent maintained in his notice of opposition that s 36 (2) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013 provides that for a person born outside Zimbabwe, he/she is a citizen by birth if when he/she was born either of the parents was a Zimbabwean citizen and ordinarily resident in Zimbabwe. He said the onus to prove the two requirements is on the applicant failure of which can only be regarded as a citizen by descent and not by birth. He further contended that the reference number on the applicant's father's residence permit (3456/11) indicates that his father acquired his permanent residence status in 2011 a position which indicates that his father did not have permanent residence status previously. If he

was a permanent resident before and ordinarily resident in Zimbabwe surely the applicant could have attached such evidence. According to him the applicant is a citizen of Zimbabwe by descent. He averred further that the applicant did not exhaust domestic remedies in his quest for a declaration of his citizenship status. He was requested to produce a copy of mother's passport used to travel to Australia for his birth in 1985 to show that his parents were ordinarily resident in Zimbabwe but he did not respond to the request but he failed to do so. The applicant instead chose to produce a copy of his mother's passport issued in London in 1997 and not the passport which was valid at the time of his birth in 1985. Furthermore, the applicant attached sworn testimonies from acquaintances whose supporting affidavits do not confirm any legal position regarding residence. What is required as proof would be in the form of utility bill, school certificates or pay-slips. He concluded by saying it is premature to conclude that all the remedial processes have been exhausted to warrant the Honourable court's intervention. Hence the order for costs is opposed since there was no need for litigation before exhausting communication between the parties about the requirements needed to ascertain his claim for citizenship by birth.

The second respondent also opposed the application. Its contention being that the fact that applicant was born outside Zimbabwe to parents presently holding foreign nationality, it was necessary that applicant tenders evidence to support that at the distinct time of his birth, his parents were Zimbabwean citizens and ordinarily resident in Zimbabwe at the material time of his birth. This must be supported by authoritative documentary evidence. It said the applicant having been born in London to a mother, whose citizen passport was issued in London provides a strong indication they may not have been ordinarily resident in Zimbabwe. Further, the said passport, endorsed with applicant's names, issued seven years after his birth in London is not evidence of ordinary residence in Zimbabwe at the time of applicant's birth. It submitted even further that passport copies highlighting when applicant left the country, the residence status applicant held when he or his parents were living outside Zimbabwe for such protracted tenure, evidence of residence in and growing up in Zimbabwe are critical. What applicant provided are mere state of minds of the persons who gave supporting testimonials. It therefore asked the court to step in to provide appropriate interpretation of not so obvious provisions of the law and contentions that have not so far been elaborated in our courts.

Sections 36 and 37 of the Constitution defines who are citizens of Zimbabwe by birth and or descent respectively. Section 36 reads 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) any of their grandparents was a Zimbabwean citizen by birth or descent.
- (2) Persons born outside Zimbabwe are Zimbabwean citizens by birth if, when they were born, either of their parents was a Zimbabwean citizen and –
 - (a) ordinarily resident in Zimbabwe, or
 - (b) working outside Zimbabwe for the State or an international organization.
- (3)

Section 37 provides as follows-

“37. Citizenship by descent

Subject to s 36 (2), persons born outside Zimbabwe are Zimbabwean citizens by descent if, when they were born-

- (a) either of their parents or any of their grandparents was a Zimbabwean citizen by birth or descent, or
- (b) either of their parents was a Zimbabwean citizen by registration;

and the birth is registered in Zimbabwe in accordance with the law relating to the registration of birth.”

It is common cause that the applicant was born of Zimbabwean citizens. It is common cause that the applicant was born outside Zimbabwe. He was born at Wagga Wagga in Australia. The sole issue to be determined in this case is whether the applicant was born when either of his parents was ordinarily resident in Zimbabwe. If the applicant was born outside Zimbabwe when either of the parents were ordinarily resident in Zimbabwe, then the applicant is a citizen of Zimbabwe by birth. If he was born outside Zimbabwe when either of the parents was not ordinarily resident in Zimbabwe, then the applicant is a citizen of Zimbabwe by descent. The applicant contends that he is a citizen by birth. On the other hand, the respondents contend that the applicant is a citizen of Zimbabwe by descent. The question that begs the answer is where either of the applicant’s parents ordinarily resident in Zimbabwe at the time of his birth?

The phrase “ordinarily resident in Zimbabwe” on which the respondents base their opposition and upon which the instant application hinges, appears at least three times in the Constitution of Zimbabwe in ss 36 (2) (a), 43 (2) (b) and 91 (1) (c) is not defined therein. Further, the standard of proof, and or the type of evidence that proves ordinary residence, if at all any is required is likewise not provided for anywhere in Chapter 3 or any other part of the Constitution.

The applicant contends further that because respondents are the custodians of the civil and immigration documents they ought to have produced the rebutting evidence of the complete abandonment of residence of Zimbabwe by one or other of the applicant's parents. On the other hand, the respondents contend that the applicant ought to have produced evidence by way of utility bills, school reports, pay slips, and any other documents to prove that his parent(s) were ordinarily resident in Zimbabwe at the time of his birth.

While I agree with the applicant that respondents are custodians of civil and immigration documents, I beg to differ with the suggestion that the onus is on the respondents to produce documents to rebut the applicant's contention. It is settled law that he who alleges must prove his or her allegations. The applicant submitted that he is unable to produce what the authorities asked him to produce as evidence that his parents were ordinarily resident in Zimbabwe at the time of his birth. The applicant relied on the authorities of *Neha Patel v Registrar General & Ors* SC-888/18 and *Registrar General of Elections & Ors v Tsvangirai* SC- 30/02. However, the citations given did not yield any good results. The applicant provided wrong citations.

I however, tend to agree with the second respondent who submitted inter alia, that the applicant could have assisted the court by declaring the immigration status of his parents when they were in London at the material time of applicant's birth. The passport which he produced with applicant's names, issued seven years after his birth, in London, is not evidence of ordinary residence in Zimbabwe at the time of applicant's birth. The passport copies highlighting when applicant left the country, the residence status applicant held when he or his parents were living outside Zimbabwe for such protracted tenures, evidence of residence in and growing up in Zimbabwe are critical in deciding applicant's parents' place of ordinary residence as well as his citizenship at the time of his birth. To make his case even difficult is the fact that at the time of his birth neither of the applicant's parents were working outside Zimbabwe for the State or an international organization as contemplated in s 36 (2) (b) of the Constitution. At best what can only be said is that the applicant is a citizen of Zimbabwe by descent and not by birth. For these reasons the application for a declaratory order will fail.

IT IS ORDERED THAT

1. The application for a declaratory be and is hereby dismissed.

2. The applicant is ordered to pay respondents' costs on a legal practitioner and client scale.

TRM Legal Counsel, applicant's legal practitioners

Civil Division of the Attorney-General's office, 1st, 2nd and 3rd respondents' legal practitioners