

NICOLLETE JANE MARSH
and
JAMES MICHAEL EVANS
and
GUY HUNTLY EVANS
and
LLOYD DAVID POWELL STEVENS
and
SEAN LEE MULLENS
and
FAYZAL GIRACH
versus
REGISTRAR GENERAL OF CITIZENSHIP
and
PRINCIPAL DIRECTOR OF IMMIGRATION
and
THE ATTORNEY GENERAL OF ZIMBABWE
and
THE MINISTER OF HOME AFFAIRS
and
THE MINISTER OF FOREIGN AFFAIRS

HIGH COURT OF ZIMBABWE
CHIRAWU-MUGOMBA J
HARARE, 11, 22, 23, 24 & 31st October 2018

Opposed Matter

T R Mugabe for the 1st - 6th applicants
Mr Ndoro, for the 1st & 4th respondents
No appearance for the 2nd, 3rd & 5th respondent

CHIRAWU-MUGOMBA J: The right to citizenship is one of the most fundamental rights of any human being. In terms of the 2013 Constitution a citizen has rights but also responsibilities. The rights as per section 35(3) (a-b) include the right to the protection of the State wherever they may be; to passports and other travel documents and to birth certificates and other identity documents issued by the State. In addition other rights bestowed upon

citizens are in terms of section 66 of the Constitution these being; - the right to enter Zimbabwe, immunity from expulsion from Zimbabwe and the right to a passport and or other travel document. In addition other rights are freedom of movement within Zimbabwe, the right to reside in any part of Zimbabwe and the right to leave Zimbabwe. That is why citizenship unlike nationality is considered a legal or juristic concept. In this matter, the first to the sixth applicants seek a declaratur. At the hearing, *T.R Mugabe* indicated that the second and third applicants were no longer pursuing the matter and that leaves only the first, fourth, fifth and sixth applicants. Nonetheless, I will set out the relief sought by the six applicants individually and jointly as follows;-

1. It is declared that the 1st applicant Nicollete Jane Marsh is a citizen of Zimbabwe by birth as contemplated by section 36 (1) of the Constitution of Zimbabwe, 2013 with all rights, duties and entitlements attendant thereto including but not limited to a Zimbabwean passport.
2. It is declared that the 2nd applicant James Michael Evans is a citizen of Zimbabwe by birth as contemplated by section 36 (1) of the Constitution of Zimbabwe, 2013 with all rights, duties and entitlements attendant thereto including but not limited to a Zimbabwean passport.
3. It is declared that the 3rd applicant Guy Huntly Evans is a citizen of Zimbabwe by birth as contemplated by section 36 (1) of the Constitution of Zimbabwe, 2013 with all rights, duties and entitlements attendant thereto including but not limited to a Zimbabwean passport.
4. It is declared that the 4th applicant Lloyd David Powell Stevens is a citizen of Zimbabwe by birth as contemplated by section 36 (1) of the Constitution of Zimbabwe, 2013 with all rights, duties and entitlements attendant thereto including but not limited to a Zimbabwean passport.
5. It is declared that the 5th applicant Sean Lee Mullens is a citizen of Zimbabwe by birth as contemplated by section 36 (1) of the Constitution of Zimbabwe, 2013 with all rights, duties and entitlements attendant thereto including but not limited to a Zimbabwean passport.

6. It is declared that the 6th applicant Fayzal Girach is a citizen of Zimbabwe by birth as contemplated by section 36 (1) of the Constitution of Zimbabwe, 2013 with all rights, duties and entitlements attendant thereto including but not limited to a Zimbabwean passport.
7. The 1st respondent shall forthwith and upon sight of this order issue the 1st -6th applicants with Zimbabwean identity cards and passports respectively.
8. 5th respondent, with the co-operation of 1st and 4th respondent shall establish citizenship desks at the foreign consulates of Zimbabwe for purposes of accepting, verifying and issuing citizenship documents to Zimbabwean citizens abroad.
9. 1st -6th Applicants' legal counsel are granted leave to serve this order; and
10. Costs of this application on an attorney and client scale to be borne by the 1st respondent.

Below are the facts pertaining to each of the four applicants as stated in their founding affidavits and as amplified in the submissions by *T.R Mugabe* at the hearing. I digress however to comment on the numbering or sequencing of annexures. I have noted that many legal practitioners do not take cognisance of the importance of sequencing of annexures. There is no prescribed format in so far as using either alphabetical order or numbers is concerned. If numbers, the sequence should flow from one to whatever number. Legal practitioners could also use numbering such as 1.1 or 1.2. In the notice of opposition, the sequence should start from the next number after the last number in the court application. For instance if the last annexure in the court application is 9, the next one in the notice of opposition should be 10. If using letters and the last letter is 'K', in the notice of opposition the next annexure should be 'L'. The importance of sequencing is that when court documents are paginated, each annexure should be a standalone rather than ending up with two annexures marked 'A'. When writing a judgement, no one should be left with questions as to which annexure 'A' is being referred to since there will only be one such. In this matter the affidavits are fraught with annexures that are not properly sequenced. For each applicant, there is annexures A, B and C as applicable. In some instances, the alleged annexures are missing. In the case of the first applicant, there is reference to annexure 'F' but there is no such annexure attached to her affidavit.

Nicollete Jane Marsh (1st applicant)

She was born in Masvingo on 25 January 1970. Her father Robert Ballington Marsh was born in South Africa. Her mother Anna Elizabeth Landman was born in Shurugwi on 1 August 1942. At the time of her birth, her mother was a citizen of the then Southern Rhodesia. She (applicant) is now a citizen of Australia. She once held a Zimbabwean identity card and passport but upon its expiry, she sought renewal at the Zimbabwean Embassy in Australia and she was advised to visit the citizenship office in Harare for confirmation of citizenship and renewal of her passport. She sought through her legal practitioner confirmation of her citizenship status to no avail.

Lloyd David Powell Stevens (4th applicant)

He was born in Kwekwe on 6 September 1980. His father David Powell Stevens was born in Zimbabwe and his mother Elizabeth Ferreira was born in England on 11 September 1961. At the time of his birth, his father was a citizen of Zimbabwe. The fourth applicant is now a citizen of Ireland. He sought confirmation of his citizenship status through the Zimbabwean Embassy in Britain but was advised to visit the Citizenship office in Harare to seek confirmation and to have his passport renewed. He sought through his legal practitioner confirmation of his citizenship status but to no avail.

Sean Lee Mullens (5th applicant)

He was born in Poole, United Kingdom on 21 March 1979. His father Alexander Gordon John Batte was born in Rusape whilst his mother Sherron Susan Batte was born in the United Kingdom. At the time of his birth, his father was a citizen of Zimbabwe and both his parents were ordinarily resident in Zimbabwe. In support of his contention, the fifth applicant attached the residence permit of his grandfather one Kenneth Brian Downs who came to Zimbabwe with fifth applicant's mother around 1971 when she was a minor. He also claimed to have attached extracts from his mother's passport which contains her residence permit with fifth applicant and his siblings as dependants. He also attached a reference letter from the City of Salisbury dated 30 November 1981 showing her employment and further he attached a divorce order issued by the then General Division of the High Court of Rhodesia dated 19 August. Fifth applicant is now a citizen of the United Kingdom. He sought to obtain the confirmation status through the Citizenship office in Harare and issuance of a passport but

to no avail. He through his legal practitioner also sought confirmation but to no avail. The first respondent requires him to produce more evidence in addition to that already provided.

Fayzal Girach (6th applicant)

He was born in Zimbabwe on 19 March 1966. He previously held a citizen identity card and passport but was made to surrender same by the first respondent on the basis that he had lost his citizenship by default on 13 July 2005. His father Ismail Dawood Girach was born in India and his mother Halima Mamad Hussein was born in Mozambique. At the time of his birth, both parents had Rhodesian identity cards and were to the best of his knowledge and belief citizens of Zimbabwe. The sixth applicant is now a citizen of the United Kingdom. He sought to confirm his citizenship status through the Zimbabwean Embassy in Britain but to no avail. He was advised to visit the Citizenship office in Harare for confirmation of citizenship and renewal of his passport. He contends that he is a Zimbabwean citizen by birth. The 1st respondent now requires him to tender proof of his parent's citizenship status.

The position of 1st and 4th respondents

The position of the first and fourth respondents as amplified by *Mr Ndoro* at the hearing is that they are opposed to the relief sought. At the hearing however, *Mr Ndoro* submitted that the first and fourth respondents were no longer opposed to paragraph 8 of the draft order but he was unable to state how this could be an order 'by consent' in the absence of the views of the fifth respondent. For the first applicant, the position is as follows: - she has never approached the first respondent's office regarding the issue of her citizenship hence she cannot allege that she was refused assistance. It has not been verified if her mother was a citizen of Zimbabwe at the time of her birth as he has not attached any proof of her mother's citizenship status at the time of her birth. The first respondent is not aware of whether or not the first applicant visited the Zimbabwean Embassy in Australia. One cannot tell if she is a citizen of Zimbabwe by virtue of the fact that the documents attached to her application do not show that her mother was citizen of Zimbabwe at the time of the first applicant's birth. This key requirement can only be proved if she is interviewed and such documents as a passport, identity document or citizenship certificate of her parent is produced. In addition, it is not feasible to allow people to confirm citizenship status at Zimbabwean embassies as these are manned by officers from a different Ministry. In short, the first applicant is not

being denied citizenship documents but must come to the first respondent's office personally for verification.

The responses for the fourth to the sixth respondents were almost similar except in relation to the personal circumstances for each applicant. For the fourth applicant, it has not been verified if his father was a citizen of Zimbabwe at the time of applicant's birth as no proof was attached to the application. For the sixth respondent, he was born outside Zimbabwe. His birth was not registered in Zimbabwe for him to claim citizenship. The residence permit does not confirm the citizenship status of the fifth applicant at the time that he was born. In relation to the sixth applicant, he failed to produce proof that at the time of his birth, his parents were citizens of Zimbabwe because according to the records, there was no such information.

Merits

The law relating to citizenship by birth is partly set out in section 36 (1) of the Constitution 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

Contrary to the assertion by *T.R Mugabe*, the issue of dual citizenship is a non-issue in this matter. The first and fourth respondents have properly stated that this issue has been settled in our law in *Whitehead vs. Registrar –General and others* 2015(1) ZLR 582; *Mawere vs. Registrar –General and others* 2013(1) ZLR 578 and *Madzimbamuto vs. Registrar-General and Others* 2014 (1) ZLR 801. What is at stake is the interpretation of whether or not the applicants' parents (either the mother or the father) were citizens of Zimbabwe that would entitle them to citizenship by birth. It is a different matter altogether for the fifth applicant who seeks relief under section 36 (1) of the Constitution and yet he was not born in Zimbabwe. *T.R Mugabe* stated that there was a typographical error and that in respect of the fifth respondent, an order is sought in terms of section 36 (2) (a) of the Constitution. He therefore sought an amendment of the draft order. An analysis of the fifth applicant's affidavit shows that he was relying on the residence of his parents and therefore I see no prejudice in allowing the amendment to the draft order.

As aptly stated by GARWE JA in the *Mawere* case,

‘Section 36 is not made subject to any other section in the Constitution. It stands alone. The ordinary grammatical meaning of the section is clear and allows of no ambiguity. A person born in Zimbabwe to a parent who, at the time of birth was a Zimbabwean citizen, is a Zimbabwean citizen. The section does not oblige a person in this category to do anything further to qualify for Zimbabwean citizenship’.

The court also considered the issue relating to the interpretation of the Constitution as follows:-

In *Rattigan & Others v Chief Immigration Officer & Others* 1994(2) ZLR 54(S), 57, GUBBAY CJ remarked:

“What is to be avoided is the imparting of a narrow, artificial, rigid and pedantic interpretation; to be preferred is one which serves the interest of the Constitution and best carries out its objects and promotes its purpose. All relevant provisions are to be considered as a whole and where rights and freedoms are conferred on persons, derogations therefrom, as far as the language permits, should be narrowly and strictly construed.”

The impact of this is that the interpretation should lean more in favour of finding that a person is a citizen by birth.

To qualify as a citizen by birth under section 36 (1) (a), an applicant born in Zimbabwe has to rely on the citizenship of their mother or father. In my view, the documents that would be required by the applicant’s mother or father to prove citizenship is by way of a Zimbabwean passport or birth certificate or a national identity card. This is because as stated earlier, citizenship is a legal or judicial concept. Therefore it is the status of an applicant’s parent that carries the day. Section 36 (2) (a) is however in my view different in that an applicant born outside Zimbabwe must rely on the fact that their parent is a Zimbabwean citizen which as pointed to may be shown through a birth certificate, passport or national identity card. However **in addition**, they must show that at the **time they were born, their parent was ordinarily resident in Zimbabwe. (Emphasis mine)**. If an applicant’s parent was a citizen of Zimbabwe and they have passed on this citizenship, in terms of section 43(1), ‘Every person who, immediately before the publication date, was a Zimbabwean citizen continues to be a Zimbabwean after that date.’ The publication date is the 22nd of May 2013 when certain parts of the Constitution came into effect.

The first applicant attached to her application a copy of her mother’s birth certificate indicating that she (her mother) was born in Shurugwi. The first applicant’s circumstances therefore are such that she qualifies for citizenship on the basis of being Zimbabwean by birth. Such citizenship can only be revoked only in terms of section 39 (2) (a) of the Constitution. The first applicant has met the requirements of section 36 (1) (a) of the Constitution.

The fourth applicant attached a copy of his birth certificate showing that he was born in Zimbabwe. He also attached a paper copy of his application for a national identity document. He has not stated what happened to the original metal identity document. In paragraph 12 of his affidavit, he stated that he had attached annexure B being a copy of his father's birth certificate. There is no such attachment. He claimed in paragraph 14 that at the time of his birth, his father was a citizen of Zimbabwe. He has however not attached any documentation to show why this court should consider his father as being a citizen of Zimbabwe at the time of his birth. I do not read the fourth applicant's affidavit as relying on the fact that as at 22 May 2013, he was a citizen of Zimbabwe which would put him within the purview of section 43 (1) of the Constitution. Instead he has relied on his own father's citizenship. The fourth applicant has fallen foul of the adage, s/he who avers must prove. He has therefore failed to meet the requirements of section 36 (1) (a) of the Constitution. My finding will not render him stateless as he holds the citizenship of the Republic of Ireland.

The fifth applicant changed his name through a notarial deed from Sean Lee Batte to Sean Lee Mullens. In support of his assertion that one of his parents was ordinarily resident in Zimbabwe at the time of his birth which is 21 March 1979, he attached his father's birth certificate which shows that he (his father) was born in Rusape. He purported to have attached a residence permit of his grandfather one Kenneth Brian Downs who came to Zimbabwe with the fifth applicant's mother but there was no such attachment. He also purported to have attached a copy of his mother's old passport which contains her Zimbabwean residence permit with him and his siblings as dependants. There was no such attachment. He also attached a letter from the City of Salisbury dated 30 November 1981 which shows his mother's residence. An analysis of the letter shows that the fifth applicant's mother was employed from 1 of November 1979 to the 30 November 1981. The fifth applicant also attached a copy of a decree of divorce and other ancillary relief dated 19 August 1981 between his mother and mother. To note however is the fact that the critical time period as per section 36 (2) (a) is the time of birth and that is the time when an applicant's parent on whom they are relying on to get citizenship by birth should have been ordinarily resident in Zimbabwe. Proof of ordinarily being resident is a matter of fact. I do not read the 5th applicant's affidavit as relying on the fact that as at 22 May 2013, he was a citizen of Zimbabwe which would put him within the purview of section 43 (1) of the

Constitution. Instead he has relied on his own parents' residence. In my view, the fifth applicant has not shown how his mother or father can be said to have been ordinarily resident in Zimbabwe as at 21 March 1979. The fifth applicant has therefore failed to meet the requirements of section 36 (2) (a) of the Constitution. My finding will not render him stateless since he also holds the citizenship of the United Kingdom.

The sixth applicant attached a copy of his birth certificate which shows he was born in Zimbabwe. He places reliance on the fact that his parents had Rhodesian citizen identity cards. He has not attached copies of these documents and has instead placed the onus on the 1st respondent to avail the documents. And yet it is trite that s/he who avers must prove. I did not read the sixth applicant's affidavit to make reference to the fact that he relies on section 43 (1) of the Constitution. The issue of dual citizenship is already settled in our jurisdiction. He is not seeking an order that the actions by the first respondent of 'terminating' his citizenship be declared unlawful. The order he seeks as per the draft is that he be declared a citizen by birth due to the fact that at the time of his birth, his parents were Zimbabwean citizens. Again the sixth applicant has failed to meet the requirements of section 36 (1) (a) of the Constitution. My finding will not render him stateless since he also holds the citizenship of the United Kingdom.

The only applicant to now consider is the first applicant. She has detailed how the first respondent has made it a condition that she should travel to Harare for interviews. To that end, she avers that such a request is not reasonable especially in the era of I.C.T. Further that the fourth respondent through various diplomatic missions has been an agent of the first respondent in such matters and should continue to offer public services to citizens. She therefore seeks an order that the first to fourth respondents be compelled in conjunction with the fifth respondent to set up facilities that enable her as a citizen to assert and enjoy her constitutional right to access identity and travel documents. If this does not find favour with the court, she seeks an order that she be allowed to nominate a representative in Zimbabwe to submit her documents for purposes of verification and confirmation so that she only travels when confirmed.

The requirements imposed by the first respondent fall into the realm of administrative conduct. In terms of section 68 (1) of the Constitution, *'Every person has a right to administrative conduct that is lawful, prompt, efficient, reasonable, proportionate,*

impartial and both substantively and procedurally fair.' While there is no legal requirement that a person should travel physically to the office of the first respondent, it is recognised that there are certain administrative actions that may need to be taken in order to ensure that certain rights are met. For instance the right to a passport is not self-executing. One needs to complete a form, have fingerprints and a photograph taken and also sign the form. Such administrative action however should be scrutinised lest it is implemented in a draconian or drastic manner. Efficiency and promptness relate to the expeditiousness with which action should be taken. As per Feltoe¹, *'The adverse effects of administrative action must not completely outweigh its beneficial effects. When taking administrative action, administrators should always consider whether there are less drastic or oppressive means to accomplish the desired end'*. A number of enquiries have been suggested in Feltoe (*supra*) as follows;-

1. What is the importance of the end sought to be achieved by the measure?
2. Is the measure in question suitable or effective to achieve the desired aim?
3. It's the measure necessary in the sense that no lesser form of interference with the rights of a person or persons is possible to achieve the desired aim or is there an equally effective alternative measure that can be used?
4. Even though the measure is suitable to achieve the objective, does it place an excessive burden on a person or persons which is disproportionate in relation to the public interest at stake?

The requirement to travel to Harare for interviews falls short of the requirements of administrative conduct that is efficient, prompt and proportionate. It will place an undue financial burden on the first applicant.

With regard to the order sought to set up facilities that enable her as a citizen to assert and enjoy her constitutional right to access identity and travel documents, in my view granting such flies in the face of the doctrine of separation of powers. As stated in *Minister of Water and Environmental Affairs vs. Kloof Conservancy* (106/2015) [2015] ZASCA 177,

“The Constitutional Court has held in *Rail Commuters* para 107-108 that: 28

¹ A guide to administrative and local government law in Zimbabwe @page 25

‘It is quite clear that before it makes a declaratory order a court must consider all the relevant circumstances. A declaratory order is a flexible remedy which can assist in clarifying legal and constitutional obligations in a manner which promotes the protection and enforcement of our Constitution and its values. Declaratory orders, of course, may be accompanied by other forms of relief, such as mandatory or prohibitory orders, but they may also stand on their own. In considering whether it is desirable to order mandatory or prohibitory relief in addition to the declaratory, a court will consider all the relevant circumstances. It should also be borne in mind that declaratory relief is of particular value in a constitutional democracy which enables courts to declare the law, on the one hand, but leave to the other arms of government, the Executive and the Legislature, the decision as to how best the law, once stated, should be observed.’

In my view, it is not the business of this court to determine how the respondents should go about ensuring that citizens obtain passports whilst abroad.

The matter has raised important constitutional issues in relation to section 36 (1) and (2) of the Constitution. I am not inclined to grant an order of costs on a punitive scale or any order as to costs for that matter. I will also for the avoidance of doubt dismiss the application by the second and third applicants who indicated that they are no longer desirous of pursuing their applications.

Disposition

It is ordered that:-

1. The application by the 2nd applicant be and is hereby dismissed with no order as to costs.
2. The application by the 3rd applicant be and is hereby dismissed with no order as to costs
3. The application by the 4th applicant be and is hereby dismissed with no order as to costs
4. The application by the 5th applicant be and is hereby dismissed with no order as to costs.
5. The application by the 6th applicant be and is hereby dismissed with no order as to costs.
6. The 1st applicant, Nicollete Jane Marsh born on the 25th of January 1970 is a citizen of Zimbabwe by birth in terms of Section 36 (1) of the Constitution of Zimbabwe Amendment (No. 20) Act 2013.

7. The 1st respondent is interdicted from demanding of the 1st applicant that she be interviewed in person before being issued with a Zimbabwean passport and national identity card.
8. There shall be no order as to costs in respect of the 1st applicant.

T.R.M Legal Counsel, Applicants' legal practitioners
Thondhlanga and Associates, 1st & 4th respondent's legal practitioners