BRIAN SHAW
and
ASHLEIGH KERRYN SHAW
versus
REGISTRAR GENERAL OF CITIZENSHIP
and
PRINCIPAL DIRECTOR OF IMMIGRATION
and
ATTORNEY GENERAL OF ZIMBABWE N.O.
and
THE MINISTER OF HOME AFFAIRS N.O.

HIGH COURT OF ZIMBABWE
KWENDA J
HARARE, 6 March 2019 & 25 March 2022

Court Application

R Mugabe, for the applicants
S Machiridza, for 1st respondent
L C Ndoro, for the 2nd and 3rd respondents
No appearance for 4th respondent

KWENDA J: This is a court application for orders confirming that the applicants are citizens of Zimbabwe by birth with rights, privileges and benefits of citizenship; that for the avoidance of doubt, they are each entitled to Zimbabwean residence, national identity card and a passport and that they shall not be required to renounce their South African citizenship before enjoying the said rights and privileges. They also seek an order for costs absolved on a legal practitioner client scale against the respondents jointly and severally, one paying the others to be absolved. The respondents are the Registrar General of Citizenship in Zimbabwe, Principal Director of Immigration, the Attorney General and the Minister of Home Affairs who are all cited in their stated official capacities.

The first applicant is a documented permanent resident of Zimbabwe born in the Johannesburg, South Africa on 5 December 1945. He was born to the marriage of Bernard James Shaw (father) and Cornelia Johanna Cathrina Roux (mother). At the time of the first applicant's birth his father was a citizen of Botswana by birth and his mother, a Zimbabwean citizen. born in Insiza district, Zimbabwe. The first applicant married Isobel Shaw (nee Watt)

a Zimbabwean national on the 27 March 1971 and the marriage subsists. The first applicant's Zimbabwean permanent residence status is duly endorsed on his South African passport.

The second applicant is the first applicant's daughter born on 14 May 1986 at the Avenues Clinic in Harare, Zimbabwe. Her mother is Isobel Show (nee Watt) who, as stated above, is a citizen of Zimbabwe. She is a South African citizen. She holds a Zimbabwean national identity card issued by the first respondent but it records that she is alien.

All the above facts which the applicants rely on are backed by supporting documents in the form of birth certificates, marriage certificates and title deeds, as the case may be.

Both applicants aver that they are citizens of Zimbabwe by operation of s 36 of the Constitution of Zimbabwe. The first respondent steadfastly refused to recognise them as citizens of this country and denies them the rights, privileges and benefits of Zimbabwean citizen ship. Among other deprivations, the first respondent has refused to issue a Zimbabwean National Identity card to the first respondent who is, for that reason, unable to register as a voter. The second respondent has unlawfully restricted the first applicant's entry and both applicants' movement in Zimbabwe, treating them as foreigners when in actual fact they are citizens of Zimbabwe. The first respondent requires the applicants to renounce South African citizenship before granting them full rights, privileges and benefits of citizenship of Zimbabwe.

In opposing the application, the first respondent submitted that the first applicant's papers fall short of proving that his mother his mother was a Zimbabwean citizen and that she was ordinarily resident in Zimbabwe. He second respondent also opposed the application, putting the first applicant to the proof that his mother was ordinarily resident in Zimbabwe at the time of his birth. Both, the first and second respondents have not opposed second applicant's application. Second respondent avers that he is willing to accord the applicants permanent residence status.

The first applicant successfully sought leave to file a supplementary answering affidavit and with it, further evidence. Leave was granted by order of this court dated 5 October 2017 under case number HC 8432/17. He submitted evidence in the form of a birth certificate of his sister, one Brenda Daphne Shaw, who was born at Umvuma, Zimbabwe as well as proof that his parents were farmers in Zimbabwe by way of a Deed of Grant number 171/64 issued to his mother for Hereford Farm situated in Darwin. He also averred in the answering affidavit, that at some stage his mother went to South Africa to pursue secretarial studies but did not set up permanent residence in South Africa or relocate from Zimbabwe (then Southern Rhodesia).

She therefore remained normally resident in Zimbabwe and returned to Zimbabwe permanently in December 1945.

The legal position that the right to citizenship by birth is sacrosanct and cannot be taken away was settled by the Supreme Court in the constitutional matter of *Mutumwa Dziva Mawere* v *Registrar General and Ors* CCZ 4/15. In that case Mutumwa Dziva Mawere was born in Zimbabwe in 1960 and both of his parents were also born in Zimbabwe. In 2002 he acquired citizenship of South Africa by registration. In order to register as a voter in national elections that were scheduled to take place in 2013, he approached the offices of the first respondent in order to procure a duplicate national identity document, having lost the original. He was advised that for as long as he remained a South African citizen, he would not be eligible for a Zimbabwean national identity document. He accordingly sought a *declaratur* that, being a citizen by birth, he was entitled to dual citizenship and that the law did not require of him to renounce his foreign citizenship before he could be issued with a Zimbabwean national identity document. Before the enactment of the 2013 Constitution, the law prohibited dual citizenship. In terms of the law then in operation, the applicant would have been required to renounce his South African citizenship before he could be eligible for Zimbabwean citizenship. Only then would he have been eligible for a Zimbabwean national identity card.

The Supreme Court held that the Constitution is the supreme law of the land and that any law, practice, custom or conduct inconsistent with it, is invalid to the extent of the inconsistency. The obligations imposed by the Constitution are binding on every person, including the State and all its organs at every level. In interpreting the Constitution, 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 meaning of a right or freedom guaranteed by a constitution must be ascertained by an analysis of the purpose of such guarantee and that such purpose must be sought, *inter alia*, in the character, larger objects, historical origins of the concepts enshrined in the Constitution and in the language in which the concepts are expressed.

The provisions of Chapter 3 of the Constitution (which deals with citizenship) must be read together. Section 36 is not made subject to any other section in the Constitution. 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 the person's birth, was a Zimbabwean citizen, is a Zimbabwean citizen and is not obliged to do anything further to qualify for Zimbabwean citizenship. Citizenship by registration may be revoked under s 38. Under 39, citizenship by

birth may be revoked only if such citizenship was acquired by false representation or where it is established that a child below fifteen years of age, who is presumed in terms of s 36(3) of the Constitution to be a citizen by birth, is a citizen of another country. The section does not provide for the revocation of the citizenship of a person who born in Zimbabwe to a Zimbabwean parent and the necessary corollary is that citizenship acquired in terms of s 36(1) cannot be revoked by the State under any circumstances.

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 organisation.

(3) A child found in Zimbabwe who is, or appears to be, less than fifteen years of age, and whose nationality and parents are not known, is presumed to be a Zimbabwean citizen by birth"

The first applicant relies on s 36(2) of the Constitution. He is eligible for citizenship of Zimbabwe irrespective of the fact that he was born outside the country. His mother was a citizen of Zimbabwe who was ordinarily resident in Zimbabwe. He has argued that his mother was ordinarily resident in Zimbabwe and she stayed in South Africa for the purposes of study only with no intention to relocate. The Citizenship of Zimbabwe Act [*Chapter 4:01*] in s 2 stipulates that a person is said to be ordinarily resident in Zimbabwe if he has lawfully and voluntarily established his usual place of residence in Zimbabwe, otherwise than as a visitor, with the intention of remaining therein. The court is therefore supposed to establish the State of mind of the parent from the evidence available. In this case the inquiry is whether on the date of the first applicant, his mother had ceased to be ordinarily resident in Zimbabwe.

In South Africa the courts have interpreted the concept of residence to mean the place where a person would return from his or her wanderings and that would most aptly be referred to as his or her true home. In my view the observations and the cases cited by LYNETTE OLIVIER in an article 'Residence based taxation" published in the Republic of South Africa *Budget Review 2000* 84 offer useful insights into the concept 'ordinarily resident' despite the fact that they were made in the context of taxation.

> "*Cohen* v *CIR* 13 SATC 362 371: "[H]is ordinary residence would be the country to which he would naturally as a matter of fact return form his wanderings, as contrasted with other lands it might be called his usual or principal residence and would be described more aptly than other countries as his real home." This approach was confirmed in *CIR* v *Kuttel 1992* 3 SA 242 (A). See also *Soldier* v *COT* 1943 SR 130. A similar approach is followed in Canada. The leading Canadian case on the subject is *Thompson* v *Minister of National Revenue* 2 DTC 812 (SCC). In this case it was held that a person is ordinarily resident in the place "where in the settled routine of his life he regularly, normally or customarily lives" or "at which he in mind and in fact settles into or maintains or centralises his ordinary mode of living with its accessories in social relations, interest and conveniences". The leading English case on the subject is *Shah* v *Barnet London Borough Council and Other Appeals* 1983 1 ALL ER 226 (HL) 234b-c where it was confirmed that the natural and ordinary meaning of "ordinarily resident" was "that a person must be habitually and normally resident here, apart from temporary or occasional absences of long or short duration". The precise difference between "residence" and "ordinarily resident" does not seem clear cut. De Koker *Silke on South African Income Tax* par 14.42 suggests that both refer to more than occasional visits to a particular country. Although the writer does not distinguish further between the two concepts, the inference is drawn that residence refers to visits with some degree of continuity, whereas ordinary residence refers to a permanent place of abode, where the taxpayer's belongings are stored, which were left for temporary absences and to which he or she regularly returned after such absences: *Cf'H* v *COT* 23 SATC 292."

A person may therefore be a resident of Zimbabwe even if he or she is not physically present in the country as long as he genuinely considers his absence as temporary and regards the country as his or her real home. Such person would therefore be still ordinarily resident in Zimbabwe irrespective of his temporary absence for a short or long period. Whether or not the first applicant's mother was ordinarily resident in Zimbabwe is a fact to be inferred from the totality of the evidence placed before the Court. It appears from the *Mutumwa Dziva Mawere* v *Registrar General and Ors* case, *supra,* that a person can be ordinarily resident in Zimbabwe and another jurisdiction concurrently.

The facts relied upon by the applicants are not disputed. All the respondents asked for was more evidence which the applicants have placed before the court. The first applicant's mother was a citizen of Zimbabwe by birth and she considered Zimbabwe as her permanent home despite her wanderings to South Africa. After completing her course, she returned to her farm in Zimbabwe. The first applicant is therefore a citizen of Zimbabwe by operation of s 36 (2) of the Constitution.

Second applicants' situation is clearer. Having been born in Zimbabwe to a Zimbabwean mother, she is a citizen by operation of s 36(1) of the Constitution. Identifying her as an alien has deprived her of unqualified full benefits of citizenship.

In the result I order as follows: -

1. The applicants are both and each citizens of Zimbabwe by birth and are entitled to all rights, privileges and benefits and subject to the duties and obligations of citizenship.

2. Paragraph 1 is not conditional upon renunciation of their South African citizenship.

3. There shall be no order as to costs.

Tafadzwa Ralph Mugabe, applicant's legal practitioners
Thondhlanga & Associates, first respondents' legal practitioners
Attorney General of Zimbabwe Civil Division, second and third respondents' legal practitioners