

REPUBLIC OF NAMIBIA



HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

JUDGMENT

Case No: HC-MD-CIV-MOT-GEN-2022/00373

In the matter between:

CLEMENT NGONOMO

APPLICANT

and

**MINISTER OF HOME AFFAIRS, IMMIGRATION,
SAFETY AND SECURITY**

1ST RESPONDENT

**EXECUTIVE DIRECTOR: MINISTRY OF HOME AFFAIRS
IMMIGRATION, SAFETY AND SECURITY
RESPONDENT**

2ND

Neutral citation: *Ngonomo v Minister of Home Affairs, Immigration, Safety and Security* (HC-MD-CIV-MOT-GEN-2022/00373) [2023] NAHCMD 660 (17 October 2023)

Coram: CLAASEN J

Heard: 13 June 2022

Delivered: 17 October 2023

Flynote: Citizenship – Article 4(1)(b) of the Constitution of the Republic of Namibia – Applicant alleging that he is a Namibian citizen by birth on account that his parents were ordinarily resident in Namibia at the time of his birth – Requirements – Court finding that applicant has not established that his parents

were ordinarily resident in Namibia at the time of his birth – Nor has applicant satisfied the court that he was indeed born in Namibia – Applicant's application to order the respondents to issue him with a Namibian passport is dismissed.

Summary: The applicant avers that he was born in Katima Mulilo. He also avers that his parents resided in Namibia at the time of his birth and that he lived most of his childhood in and around Katima Mulilo. His father has passed away during November 2009 and his mother resides in Zambia. It is his case that around 2003, the first respondent announced that Cabinet decided to grant citizenship to persons from Angola, Zambia and Botswana who has lived in Namibia since the late 1970 to 1990 and who regard Namibia as their only country. The applicant has a duplicate abridged birth certificate, a Namibian identity document and has had 3 Namibian passports. During 2020 when he applied again, the respondents refused to renew his passport and informed him that it was conducting an investigation into his Namibian citizenship status. The Applicant also offered that his parents registered him in Zambia and he was given a N.R.C number, but labelled it as a form of identity which was politically driven.

Held that – The respondents denied material allegations as to his country of birth and produced positive evidence to the contrary. The *Plascon Evans* rule dictates that in respect of those facts the respondents' version prevails, unless it is implausible or untenable in the context of the facts as a whole, which was not the case herein.

Held further that - Apart from naming a town in Namibia there was no details as to whether it was in hospital or at home or any place else. The same goes for the averments that his parents were residing in Namibia and that he lived most of his childhood in and around Katima Mulilo. He advanced no evidence of a residential address or village name, nor the name of any school that he attended in Katima Mulilo, which could be verified.

Held further that – The applicant has not established that his parents were ordinarily resident in Namibia at the time of his birth, nor has he satisfied the court, on the facts, that he was indeed born in Namibia.

ORDER

1. The applicant's application is dismissed.
 2. The applicant is ordered to pay the respondents' cost of suit
 3. The matter is removed from the roll and is regarded finalized.
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JUDGMENT

CLAASEN J:

Introduction

[1] This is an application for an order to direct the first and second respondents to issue a Namibian passport to the applicant within thirty days from the date of the order and order the respondents to pay the costs of the application. The application was opposed by the respondents.

Background

[2] The applicant deposed in his founding papers that he was born on 10 February 1971 in Katima Mulilo and that his parents, who were Zambian nationals, resided in Namibia at the time of his birth. He thus, lived in and around Katima Mulilo for the most of his childhood. His father passed away during November 2009 and his mother, Ms Fellunda Kasemba, resides in Zambia. He deposed that he has always remained in Namibia and regards Namibia as his permanent home.

[3] It is his case that around 2003, the first respondent announced that Cabinet decided to grant citizenship to persons from Angola, Zambia and Botswana who has lived in Namibia since the late 1970 to 1990 and who regard Namibia as their only country.

[4] The applicant is currently the holder of a duplicate abridged birth certificate, as well as a Namibian identity document which he obtained in 2007. He says that he lost his original identity document. He avers that, to the best of his recollection,

he was issued with his first Namibian passport during the year of 2002, which passport he says he renewed in 2007, 2011, and again in 2015.

[5] On 15 September 2020, he applied for renewal of his passport. Upon following up on the application, an official informed him that their Office is carrying out an investigation to verify his fingerprints. Five months had gone by and he enquired again, but to no avail.

[6] During January 2021, two officials summoned him to their Office and interrogated him about his Namibian citizenship. He referred them to all the previous Namibian passports that had been issued to him. They informed him that there is a pending investigation into his citizenship. During the next month they went to his house and seized his family's personal documents, but these had since been returned after a court order.

[7] On 21 April 2021, these officials summoned him again and demanded that he makes an affidavit regarding his citizenship status, but his legal representative objected thereto. On 23 April 2021 he was arrested and charged in the district court the next day, although the complete charge sheet was only availed to his legal representative on 28 April 2021. The said charge was formulated as making a false representation or committing a fraudulent act for the purposes of entering or remaining in Namibia. He approached this court for a *rule nisi* to grant the arrest unlawful, which was confirmed on the return day. On 10 May 2021 the court withdrew the criminal charge against him.

[8] During November 2021, he followed up on the renewal of his passport and was informed that he is still under investigation. Dissatisfied with that response, he instructed legal practitioners to enquire about the matter. He deposed that he lost his job at Air Namibia as an aircraft maintenance officer during the liquidation of that company and is in dire need to support his family and pay his mortgage.

Respondents' position

[9] The answering affidavit was deposed to by the first respondent, with confirmatory affidavits by the second respondent and the Director for the National

Population Register, Identification and Production in the Ministry of Home Affairs, Immigration, Safety and Security, Ms Tuliki Munyika. The respondents assert that the Office is engaged in ongoing investigations surrounding the issuance and acquisition of the applicant's Namibian identity card, which is suspected to have been obtained in a fraudulent manner. The respondents' stance is that the applicant's passport cannot be renewed whilst his citizenship is disputed.

[10] As regards the arrest of the applicant is concerned, the respondents asserted that a decision was made for the criminal case to be withdrawn and to engage the Zambian Government through international diplomatic channels because of a suspicion that the applicant is a Zambian national. Thus, the case was withdrawn pending finalization of the investigations as that could take long.

[11] The respondents also contended that, during February 2022, two employees travelled to Zambia. During the visit they consulted with the Department of National Registration, Passport and Citizenship in the Republic of Zambia. The purpose was to ascertain whether the applicant and his sister, Iscah Ngomono, were born in Namibia or Zambia. In respect of the applicant, the said department issued a letter indicative thereof that the applicant is a bona fide Zambian by birth and was born on 10 February 1971 in Malhala Village Lundanzi district. Furthermore, that he is a holder of a green NRC number 512619/11/1 issued on 15 October 1987. Thus, the respondents contended that it is not possible for one person to be born in two countries but also that dual citizenship is not recognized in Namibia.

[12] The respondents furthermore accused the applicant of making bare contentions without substance in that the essential facts regarding his childhood, where he schooled and for what periods he resided at specific places in Namibia are lacking. The respondents asserted that there is no record of his permanent stay in Namibia prior to 2007 when he was issued with a duplicate abridged certificate of birth. In a similar fashion the respondents faulted the applicant for not naming the place and country where his father passed.

[13] The respondents denied the existence of the cabinet decision made in 2003 on which the applicant placed reliance and criticized the applicant for not attaching same. The respondents also pointed out that the applicant gave his mother's name

as one Ms Fellona Napidikwa on his application for an identity document, but that name is different to the name of his mother, as written on the baptism certificate given by the applicant. That name was indicated as Winfreda Naumba.

[14] The Director of the National Directorate for the National Population Register, Identification and Production verified that the birth notification forms and the birth certificate for the applicant could not be traced in the Population Register. That finding compelled the Office to investigate further.

[15] Based on the duplicate abridged birth certificate, the applicant's birth entry number is '0053/91/4569.' The respondents asserted that number to constitute a unique identifier for any given person. For starters, the '91' in this number, indicates the year of registration of the birth of a person. The applicant averred that his birth was registered that year on the basis of a cabinet decision, thus, in the respondents' system the birth entry number should have contained '2003' and not '91'. The respondents' also explained that it assigned unique codes to the various birth registration offices across the country. That code is comprised of the first four digits in a given birth entry number. In the respondents' case that the code in his number was allocated to the Kavango region and not to Katima Mulilo, where the applicant asserted that he was born.

[16] Furthermore, the respondents asserted that the last digits in that number represents the number of births in that region. It was contended that in the Kavango region, the number of births for the year 1991 was 1613, thus the last four digits could not come to 4569, as it was in the applicant's number. Additionally, the respondents asserted that it cross-checked the records in the Zambezi region and that the specific birth entry number does not exist in any of the Ministry's database at all. That formed the basis for the respondents' contention that the applicant obtained national documents in a dubious manner.

Replying affidavit

[17] The applicant also filed a replying affidavit wherein he inter alia laments that the confirmatory affidavits are vague and that no confirmatory affidavits were received as regards the information received from Zambia. He contended that the

information from Zambia is unreliable as one of the documents indicates his birth place as Mahala village in Zambia and another indicates it to be Makeni, Lusaka Zambia.

[18] He furthermore clarified that the mother's surname in his baptism certificate is his step mother and not his biological mother. He repeated that he was born in Namibia and pointed to a 'statement under oath' from his biological mother. He reiterated that he was born in Namibia and according to his mother, she took him to Zambia. He asserted that he grew up in his father's custody where he did primary and tertiary education and decided to come home in 1989. He asserted that he applied for a birth certificate around 2001 and later a passport and at that time lived in Katutura, Windhoek.

Summary of Arguments

[19] The argument made on behalf of the applicant is that there is no reason in law for the respondents not to renew his passport. That is because he complied with the applicable requirements, which are listed on the official website of the Ministry of Home Affairs, Immigration, Safety and Security. Furthermore, it was emphasized that the applicant was issued with a Namibian duplicate birth certificate and a Namibian national identity card. That constituted sufficient evidence that is a Namibian citizen and has caused a legitimate expectation on the applicant's part.

[20] Counsel for the applicant submitted that the applicant cannot answer for birth entry number as that comes from the respondents. As regards the allegation that the applicant obtained his national documents in a dubious manner, the contention was there was no evidence of a so-called syndicate of its officials charged with fraud and thus there was no evidence to substantiate that. As such, there was no misrepresentation or dishonesty on the part of the applicant in these national documents. Given the prejudice suffered by the applicant on account of the respondents' refusal counsel urged the court to direct the administrative functionary to perform their duty and issue the passport.

[21] The central thread in the respondents' argument was that the applicant has not satisfied the applicable requirements. Not only has the applicant not provided

proof of the purported cabined decision of 2003 on which he rides, but even if there was such decision, he would still have to meet the criteria of article 4(1)(b) of the Constitution and the information was scant to say the least. Emphasis was also placed on the fact that the applicant gave contradictory information in his replying papers as to the year in which he applied for a passport. Furthermore, that he deposed in his founding affidavit that he remained in Namibia whereas in the replying affidavit he deposed that he returned to Namibia in 1998.

[22] Counsel for the respondents also emphasized that the investigations revealed a telling tale in many respects. On the Namibian front is the fact that the applicant's birth entry number does not correspond to the content of his averments nor was it in the system. Furthermore, that the respondents are in possession of the Zambian authorities' letters that show the applicant was born in Zambia. She also referred to the applicant, being the holder of a green card in Zambia, which he called a N.R.C. number that was allocated to him. According to her the green card emanated from the Citizenship of Zambia Act No 33 of 2016 and that s15(2) provides that a person who is a citizen by birth shall obtain a National Registration Card upon evidence of registerable age in accordance with the Zambia's National Registration Act No 19 of 1964. She concluded that there can be no legitimate expectation as the applicant has not shown that he met the original requirements and prayed for a dismissal with costs.

Analysis

[23] In the present matter, the applicant seeks an order to direct the respondents to issue him with a Namibian passport, and essentially relies on article 4(1)(b) of the Namibian Constitution ("the Constitution").

[24] In so far as it is relevant to the present dispute, article 4 reads as follows:

'Acquisition and Loss of Citizenship

1. The following persons shall be citizens of Namibia by birth:
 - (a) those born in Namibia before the date of Independence whose fathers or mothers would have been Namibian citizens at the time of the birth of such persons, if this Constitution had been in force at that time; and

(b) those born in Namibia before the date of Independence, who are not Namibian citizens under Sub-Article (a) hereof, and whose fathers or mothers were ordinarily resident in Namibia at the time of the birth of such persons: provided that their fathers or mothers were not then persons:

(aa) who were enjoying diplomatic immunity in Namibia under any law relating to diplomatic privileges; or

(bb) who were career representatives of another country; or

(cc) who were members of any police, military or security unit seconded for service within Namibia by the Government of another country: provided further that this Sub-Article shall not apply to persons claiming citizenship of Namibia by birth if such persons were ordinarily resident in Namibia at the date of Independence and had been so resident for a continuous period of not less than five (5) years prior to such date, or if the fathers or mothers of such persons claiming citizenship were ordinarily resident in Namibia at the date of the birth of such persons and had been so resident for a continuous period of not less than five (5) years prior to such date;

(c) ...'

[25] The crux of the dispute was whether the applicant could persuade the court that he meet the requirements in article 4(1)(b) of the Constitution, namely that he was indeed born in Namibia to parents who, at the time of his birth, were ordinarily resident in Namibia.

[26] The term 'ordinarily resident' is also germane to this matter. In *De Wilde v Minister of Home Affairs*¹ it was interpreted as follows:

[70] In determining whether or not a person is ordinarily resident as contemplated by 4(1)(d), each case must be considered on its facts. As Ramsbottom J observed in *Biro v Minister of the Interior* 1957 (1) SA 234 (T) (at 239H), the phrase ordinarily resident is not a technical expression - it must be interpreted in the context in which it is used. Key considerations will include whether the person concerned normally lives in Namibia, and is therefore not merely visiting Namibia, and whether the person has no immediate intention of permanent departure. Moreover, proof of ordinary residence will require more than a person's mere say-so. The intention to make Namibia one's habitual home must be established by facts which are capable of objective proof. Evidence will thus need to be led to show that the person is indeed normally resident in Namibia. Such

¹ *De Wilde v Minister of Home Affairs* (SA 48-2015) [2016] NASC (23 June 2016).

evidence will include the person's place of residence, the period of residence in Namibia, as well as his or her livelihood, and other relevant factors.'

[27] This court also has to be mindful of the facts as raised in the papers. Although there are some common cause facts, there are also pertinent facts placed in dispute. When affidavits are indicative of factual disputes, the court has to carefully scrutinize the papers. In this regard, it has been stated in *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another*:²

'[12] Recognising that the truth almost always lies beyond mere linguistic determination the courts have said that an applicant who seeks final relief on motion must, in the event of conflict, accept the version set up by his opponent unless the latter's allegations are, in the opinion of the court, not such as to raise a real, genuine or bona fide dispute of fact or are so far-fetched or clearly untenable that the court is justified in rejecting them merely on the papers: *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E - 635C. See also the analysis by Davis J in *Ripoll-Dausa v Middleton NO and Others* 2005 (3) SA 141 (C) at 151A - 153C with which I respectfully agree...'

[28] I proceed to the facts that were not disputed:

- (a) the applicant's date of birth is 10 February 1971;
- (b) the applicant has been issued with a Namibian duplicate abridged birth certificate, a Namibian identity document and a Namibian passport, which had been renewed on a few occasions.
- (c) the applicant has also been registered in Zambia and was allocated a N.R.C number 512619/11/1 in Zambia.

[29] What emanated from the respondents' side on the applicant's country of birth can hardly be made of as nothing or be rejected as clearly untenable. It is not uncommon for countries to ask for mutual assistance and in this case the respondents are in possession of documents of Zambian origin that the applicant was born in Zambia. The discrepancy in the name of the place of birth is noted. Had it stood alone it would not be reliable. However, it does not stand in isolation as there is also the Zambian national registration card number and that the fact that a Namibian contingent visited the officials in Zambia and saw the necessary records.

² *Wightman t/a JW Construction v Headfour (Pty) Ltd and Another* 2008 (3) SA 371 SCA.

One of these officials filed a confirmatory affidavit. The said official also verified the Namibian records and found that the applicant's birth entry number does not exist in its records and that the said number does not correspond to the information given by the applicant.

[30] It is legally impermissible for Namibians to have dual citizenship, which is ultimately what the investigation appears to point to. Instead of a solid refutation on that front, the applicant came forth with a hollow shell of factual information. Apart from naming a town in Namibia, where he was ostensibly born, there was no shred of detail as to whether it was at home or in hospital, a village or any other site in Katima Mulilo. The court is mindful that the applicant would have had to turn to his mother, who he says is still alive, or other sources for that information. Although the applicant has tendered a handwritten document by his 'mother', in reply, it is equally scant and more importantly does not constitute a commissioned affidavit.

[31] The same can be said about the averments that his parents were residing in Namibia at the time of his birth and that he lived most of his childhood in and around Katima Mulilo. He advanced no specific evidence as to a residential address, no name of a primary or high school that he attended in Katima Mulilo when he grew up. Nor is there any evidence as regards the specific auspices under which his mother and father parents resided in Namibia at the time. That hardly satisfies the court that they were ordinarily resident in Namibia at the material time.

[32] Belatedly, the applicant, in his replying affidavit, offered a bit more information as to his early years, such as that he resided in Katutura, Windhoek and had moved to his father and 'returned home' in 1989. Some of these facts contradicted earlier information and it does not bode well to come forth with critical information in reply, offering no chance for the respondents to deal with that. It is trite that all the allegations on which an applicant relies must be set out in the founding affidavit. Save for exceptional circumstances, an applicant cannot adduce supporting facts in a replying affidavit. In this regard, I concur with Usiku J in *Chibanguza v Minister of Home Affairs, Immigration, Safety and Security*³ wherein it was stated that:

³ *Chibanguza v Minister of Home Affairs, Immigration, Safety and Security* HC-MD-CIV-MOT-GEN-2021/00398) [2022] NAHCMD 662 (06 December 2022).

'It is trite that, an applicant is obliged to make his case and produce all relevant evidence he desires to use in support of his application, in his affidavits, filed with the notice of motion and is not permitted to supplement it in his replying affidavits.⁴ In my opinion, the averments as to when the applicant's parents alleged came to Namibia, where the applicant's father allegedly worked and when he left Namibia ought to have accompanied the founding affidavit, to enable the respondent to consider them and reply thereto. No exceptional circumstances have been set out for their reception at the replying-affidavit stage.'

[33] Nothing turns on the withdrawal of the applicant's criminal case in the lower courts. A withdrawal of a criminal case is not indicative of a final acquittal on the merits. Furthermore, a criminal case can only be withdrawn as long as an accused has not pleaded, which confirms that the merits of the matter has not been entered into or adjudged by that court.

[34] It also has to be considered that when an applicant seeks final relief on notice of motion, the *Plascon Evans*⁵ rule applies. In this matter the respondents denied material allegations as to the country of birth and produced positive evidence to the contrary. Thus, insofar as there is a dispute of fact, the respondent's version prevails, unless it is implausible or untenable in the context of the facts as a whole, which was not the case herein. By virtue of its decision to have opted for motion proceedings, in the face of a dispute on material facts, the applicant made his bed.

[35] In the final analysis the applicant has not established that his parents were ordinarily resident in Namibia at the time of his birth, nor has he satisfied the court, on the facts, that he was indeed born in Namibia.

[36] In the result, the following order is made:

1. The applicant's application is dismissed.
2. The applicant is ordered to pay the respondents' cost of suit.
3. The matter is removed from the roll and is regarded finalized.

⁴ *Stipp v Shade Centre* 2007 (2) NR 627 at 634 F-J.

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*. 1984 ZASCA 51 634E-635 E-C.

C CLAASEN

Judge

APPEARANCES

APPLICANT: Ms L Ihalwa (with her K Gaeb)
Sisa Namanje & Co Inc, Windhoek

RESPONDENT: A Makemba
Of Office of the Government Attorney, Windhoek