

REPORTABLE (57)

Judgment No. SC 63/03
Civil Application No. 220/03

**Rosa Mudyanduna V
(1) Owen Vincent Mukombero (2) Chief Immigration
Officer & (3) The Minister Of Home Affairs**

SUPREME COURT OF ZIMBABWE
CHIDYAUSSIKU CJ, SANDURA JA, CHEDA JA, MALABA JA & GWAUNZA JA
HARARE, NOVEMBER 6, 2003 & 13 MAY 2004

C Chinyama, for the applicant

C R Mudenda, for the respondents

GWAUNZA JA: The applicant alleges that her right to freedom of movement, guaranteed under s 22 of the Constitution of Zimbabwe has been violated by the first, second and third respondents' refusal to grant her husband a permanent residence permit. The husband is a Nigerian national. The applicant therefore seeks an order:

- (a) declaring that her rights under s 22 (1) of the Constitution of Zimbabwe, to freedom of movement, have been contravened by the actions of the first and second respondents;
- (b) compelling the first respondent to issue her husband, within thirty days hereof, such written authority as is necessary to enable him to remain and work in Zimbabwe on the same standing as any permanent resident; and
- (c) that the costs of the application be borne by the first respondent.

The application is opposed by the respondents, who charge that the applicant's marriage to her alien husband was one of convenience, entered into solely for the purpose of ensuring that the said husband evaded immigration laws in terms of which he had already been denied an employment permit. They also aver that the interests of the State (in denying the applicant's husband a residence permit) take precedence over the applicant's rights and that, in any case, a 1996 amendment to the Constitution had "disapproved" Court judgments that had granted the same relief as that being sought *in casu*.

The following facts are either common cause or not disputed. The applicant was born in Shurugwi and is a citizen of Zimbabwe. On 3 August 2001 she contracted a civil marriage with Kingsley Madueke, ("Kingsley") a Nigerian national, at Harare. Prior to this marriage Kingsley had, in 2000, visited Zimbabwe for the first time and unsuccessfully applied for an employment permit. He went back to Nigeria but, before doing so, had met and befriended the applicant. According to the applicant, the two maintained contact through the telephone while Kingsley was in Nigeria. In this way, their contact developed into a love relationship, which culminated in Kingsley's return to Zimbabwe on 26 July 2001, on a visitor's permit. The applicant avers that during their telephonic communication, the two agreed to marry and proceeded to make plans for this eventuality. As a result, within days of Kingsley's arrival in Zimbabwe he paid *lobola* to the applicant's parents, thereby marrying her according to custom. The two then solemnised their marriage according to civil rights as already indicated, on 3 August 2001.

On 20 August 2001 Kingsley submitted an application for a residence permit. On 12 November 2001 he received notification from the Department of Immigration that his application had been turned down.

He was advised in the same letter that the relevant Immigration regulations did not oblige the Immigration office to give reasons for its refusal to grant the residence permit. He could, however within twenty-one days appeal against such refusal, to the Chief Immigration Officer. He did not do this however, but left it to the applicant to take up the matter on his behalf. She wrote a letter dated 4 October 2002 to the second respondent "appealing" against his office's refusal to grant her husband the residence permit in question. She stated in that letter that as a Zimbabwean citizen it was her right to be allowed to live with her husband in Zimbabwe. By letter addressed to the applicant and dated 9 May 2003, the Secretary for Home Affairs advised her that the appeal to the Minister had been unsuccessful. No reasons for the Minister's decision were given, nor did the Minister declare Kingsley a prohibited immigrant.

The applicant was aggrieved by the decision and decided to take the matter first to the High Court and then having withdrawn that application, to this Court. Another application filed on an urgent basis in the High Court, in which the applicant sought to bar the respondents from deporting her husband pending the decision of this Court *in casu*, was ruled not to be urgent. It would appear this matter was, at the time this application was argued before this Court, still pending.

It is not disputed that the applicant bore a child on 22 April 2003. The respondents initially disputed that the child was fathered by Kingsley but as indicated below, later withdrew the allegation.

The applicant denies her marriage was one of convenience and avers that at the time she married her husband, she had no knowledge of him having previously and unsuccessfully applied for an employment permit. She took offence at the respondents' allegation that Kingsley was not the father of the

child that she bore on 22 April 2003. She avers she had not been able to obtain a birth certificate for the child, due to the fact that its father, Kingsley's, passport, had been impounded by the second respondent. With the consent of the respondents, the applicant's counsel, Mr *Chinyama* submitted to the Court a birth confirmation record issued by the Harare Central Hospital, which showed that the applicant had indeed given birth to a baby boy on the date in question. The certificate also gives the applicant's married name as "Madueke". In the light of this evidence the respondents' counsel withdrew the allegation concerning the paternity of the child.

It is argued on behalf of the applicant that contrary to the respondents' assertions, the marriage between her and Kingsley was entered into with the parties' mutual intention to stay together as husband and wife. The marriage, it is also contended, was in any case valid at law and could only be set aside through divorce. The applicant contends in addition that the child born of the marriage was further proof of the parties' intention to contract a valid marriage. Also, that the courts generally lean in favour of a marriage from which a child has been born. Lastly, the applicant contends in response to the respondents' assertion that the rights of an alien are not absolute, that her application was not premised on the rights of an alien, but on her fundamental right as a citizen wife, to freedom of movement.

In this respect Mr *Chinyama* for the applicant, contends as follows in his heads of argument:

"The point made by the applicant here is that, the refusal by the respondents to give a permanent residence permit to Kingsley Madueke, her husband circumscribe (*sic*) her fundamental right as a citizen to freedom of movement. If her husband is ordered to leave the country, the applicant's right to live in Zimbabwe will be directly affected in that in order for her to maintain the marriage, she has to follow her alien husband. Her husband's fate in the country has a bearing on her freedom

of movement. Applicant and her husband share the common desire to establish matrimonial (a) bode in Zimbabwe"

Apart from the allegation, now withdrawn, that Kingsley was not the father of the applicant's child, the respondents advanced three grounds for the argument that the marriage between the applicant and Kingsley was one of convenience *viz* -

- (i) that the applicant's husband was of no fixed abode and that the parties did not live together as husband and wife;
- (ii) that it was "impossible" for all customary rites and a marriage to be solemnised within a period of eight days; and
- (iii) that the applicant is far older than her husband.

The respondents also allege that the applicant's husband has gone underground and that there is no document to explain his presence in Zimbabwe.

The applicant disputes the first two grounds, and puts the respondents to the proof thereof. The ground concerning the difference in the applicant's and Kingsley's ages – (the applicant being five years older) was raised for the first time in the respondent's heads of argument. The applicant thus did not have an opportunity to respond to it.

It is an established principle of our law that a marriage will be regarded as one of convenience if:

- (i) it was entered into primarily for a purpose extraneous to marriage, for instance to evade immigration laws; and

- (ii) there was no intention on the part of the couple concerned to live together as man and wife.

(See *Jesse v Chief Immigration Officer & Ors* 1996 (2) ZLR 720 (H), *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54(S), and *Hambly v Chief Immigration Officer* 1995 (2) ZLR 431 (H)). The Court held in *Jesse v Chief Immigration Officer & Ors supra* that the second ingredient is as important as the first and both must be proved. This Court re-stated this position in *Kohlhaas v Chief Immigration Officer and Anor* 1997 (2) ZLR 441 (S) at 445 F-G, 1998 (6) BCLR 751 where it was stated:

“Each ingredient is of equal importance. Proof of the first alone will not suffice (to establish that the marriage is one of convenience).”

It is also trite that the *onus* of proving, on a balance of probabilities, that a marriage is one of convenience lies on the party who so alleges. *In casu* such *onus* rests on the respondents. The applicant avers the respondents have not discharged this burden.

I will now turn to the evidence placed before the court and determine whether or not the respondents have discharged this burden and proved their case on a balance of probabilities.

The applicant's evidence is that she entered into the marriage with Kingsley, fully intending to live with him as husband and wife. On the evidence before the Court, she did cohabit with Kingsley, and proceeded to bear him a child. This would tend to disprove the respondents' allegation that Kingsley is of no fixed abode and that therefore the parties do not live together as husband and wife. The respondents have not revealed the nature of the investigations that they allege established this fact, save for a registered envelope addressed to the applicant's husband, which was returned undelivered and with the notation

“unclaimed” on it. The respondents have not indicated what the contents of the returned envelope were. The applicant denies knowledge of the “unclaimed” item and avers she was never approached by immigration officials over her husband’s whereabouts. Her evidence is simply that he has not gone underground.

I take the view that Kingsley’s disappearing act, if such it was, was related more to his expired visitor’s visa (and therefore fear of discovery), than the fact that his marriage to the applicant was one of convenience. That he may not have been found at home by immigration officers, and that he did not claim a registered article, do not of themselves suggest that he and the applicant did not live together as husband and wife.

The other ground cited by the respondents for their assertion that the marriage was one of convenience was that it was simply “impossible” for the two to have attended to all the preliminary details related to the marriage ceremonies – one customary, one civil – that were conducted within a space of eight days after Kingsley’s return to Zimbabwe. I am not persuaded there is merit in this argument. The applicant’s assertion that these details were negotiated over the telephone while Kingsley was still in Nigeria is not, in my view, farfetched. In this era of advanced communication technology, it is quite possible, with speed and ease, to communicate and even exchange documents with someone in another country. While it may be the norm that marriages, especially where they entail the observance of customary rites, take time to arrange, there is nothing unusual in parties intending to marry but separated geographically, attending to these arrangements through the telephone or other means of modern communication. Nor is it a requirement that these matters be attended to physically by one or the other of the parties.

Whatever the respondents' view of this arrangement, there is *in casu* a marriage certificate attesting to the fact that a marriage was indeed solemnised between the applicant and Kingsley. There is a supporting affidavit from her brother to the effect that *lobola* was charged and paid by Kingsley as part of the customary marriage ceremony. I do not understand the respondents to say the marriage certificate itself is a forgery. The assumption therefore is that the respondents accept that the applicant and her husband did go through the motions that are requisite for the solemnisation of a valid civil marriage. That they did so in my view negates the argument that it was not possible to arrange for such a ceremony in the space of eight days. In any case, the period within which a marriage is arranged and contracted is not the decisive factor in the determination of whether or not such a marriage was one of convenience. It is rather, the purpose for which it is contracted, and what happens thereafter. There is evidence *in casu* in the person of the child born to the two that the parties thereafter lived together as husband and wife.

There is authority to the effect that the presumption in favour of a valid marriage (*semper praesumitur pro matrimonio*) is strengthened where a child has been born to the parties concerned. For then an additional consideration comes into play, and that is the legitimacy of the child. In *Jesse v Chief Immigration Officer supra* the learned judge observed that the courts will not lightly assume that a marriage is one of convenience, especially where there is a child of the marriage and a consequence of declaring the marriage invalid would be to make the child illegitimate

Although only raised in the respondents' heads of argument, the fact that the applicant is some five years older than her husband is contended by the respondents to be a further indication of the marriage having been one of convenience. This argument I find has no merit, since it is premised only on the

societal perception and attitude that a man must be older than his wife, not the other way round. Although admittedly not the norm, there are likely to be many marriages in Zimbabwe, and elsewhere, in which the man is younger than his wife. That *per se* does not suggest that the marriage was entered into for reasons other than those for which marriages are normally contracted. Conversely, the fact that a man marries a woman who is younger than him does not by that fact alone establish that such marriage is not one of convenience. It is conceivable that some such marriages may indeed be marriages of convenience.

When all is told, I find that the respondents have failed to discharge the *onus* of proving that the two ingredients of a marriage of convenience exist *in casu*. I am satisfied the marriage was not contracted for a purpose extraneous to marriage, and that the parties went into it with the full intention of living together as husband and wife.

Does this then entitle the applicant to the relief sought?

The respondent's counsel correctly acknowledges the fact that our courts have in a number of decisions recognised and upheld the constitutional right of a female citizen of Zimbabwe to have her husband reside with her in Zimbabwe, unless the marriage is one of pure convenience. See among others, *Rattigan & Ors v Chief Immigration Officer & Ors* 1994 (2) ZLR 54 (S), *Hambly v Chief Immigration Officer* 1995, (2) ZLR 431 (H), *Salem v Chief Immigration Officer & Anor* 1994 (2) ZLR 287 (S). I have already found that the marriage *in casu* was not one of convenience, a finding which, on the authority of the cases cited, would entitle the applicant to the relief sought.

The respondents, however, give two other grounds for opposing the relief sought by the applicant. It is contended for the respondents firstly, that the

legal status of the applicant's husband has not changed by virtue of his marriage to the applicant, and that therefore he is an alien subject to the restrictions imposed on such people. Secondly, it is contended that even if the marriage in question was not one of convenience, the *Rattigan* and *Salem* decisions *supra* have been "disapproved" by s 8(1) of the Constitution of Zimbabwe Amendment Act No. 14 of 1996. This amendment, it is argued, is couched in such a way as to deny both men and women citizens the right to confer residency on their foreign spouses.

I will consider these arguments separately.

It is not in dispute that the applicant's husband was denied the residence permit that he applied for after his marriage to the applicant. It is also not in dispute that the reasons for such a denial were not disclosed to him. Apart from the *declarator* concerning the infringement of her constitutional right to freedom of movement, the applicant now petitions this Court for the same relief that was denied her husband, but she does so on a different basis altogether.

The applicant's entitlement under s 22 (1) of the Constitution is, in terms of subs (3) para (a) of the same section, not absolute. Her enjoyment of the right in question can be restricted in the interests of defence, public safety, public order, public morality or public health. This means that her entitlement must be balanced against these State interests. It is contended for the respondents that the right of a State to regulate the entry and residence of aliens within its borders is a principle of international law and that at times the interests of the State in protecting its citizens take precedence over individual constitutional rights.

The question therefore is whether the interests of the State *in casu* are such as to take precedence over the applicant's right to freedom of movement.

There is nothing in the papers before the Court to indicate that the applicant and her husband were advised that the refusal by the respondents to grant the latter a residence permit was linked to the need to protect any State interest. The issue was raised for the first time in the respondents' opposing affidavit. The only communication received by the applicant directly from the Minister's office, before then, was a letter from the Secretary of Home Affairs, which read as follows;

"Please be advised that the appeal for resident (*sic*) for Kingsley Madueke has been unsuccessful. The Minister of Home Affairs has not approved the appeal. By this letter the Chief Immigration Officer is being informed of this decision."

Subsection (3) of s 14 of the Immigration Act [Chapter 4:02] confers on an immigration officer the power to apply to the third respondent, who is the responsible Minister, for a declaration that an alien is a prohibited person. This he does where in his opinion the alien in question is likely to become a "public charge" by reason of infirmity or lack of means to support himself. In terms of subs (4) of the same section the immigration officer is obliged to notify the alien concerned of his intention to apply to the Minister and to give him an opportunity to make any representations. Neither the applicant nor the respondents assert any of this was done in respect of Kingsley. As a result, there is no evidence to suggest that the Minister declared Kingsley a prohibited immigrant, nor that he caused written notice of this fact to be transmitted to Kingsley, as required by subs (6) of s 14 of the Act. Such a certificate from the Minister would have given an indication of the basis upon which Kingsley was considered to be an undesirable visitor to the country.

Further to the letter from his office, the Minister did not, as required in terms of s 22(2) of the Act, issue a certificate stating that the disclosure of his reasons for dismissing the appeal for a residence permit would not be in the public interest.

The sum effect of all this was to leave it to the applicant, her husband, and ultimately this Court, to speculate as to what the interest was that the State sought to protect by denying the applicant's husband a residence permit.

It is trite, as contended for the respondents, that a sovereign State can exclude aliens for any or for no reason at all. See *Maluleke v Minister of Internal Affairs* 1981 (1) SA 707 (BSC). I am, however, satisfied, on a proper interpretation of s 22(3)(a), that where such exclusion has the direct consequence of interfering with a constitutional right enjoyed by one of the State's own citizens, such denial must be shown to have been justified in the interests of defence, public safety, public order, public morality or public health.

As long as the interest that the State seeks to protect by excluding the applicant's husband has not been disclosed, the Court is not in a position to be able to balance such interest against a constitutional right, properly proven as the applicant's has been *in casu*, in order to arrive at an informed determination on the matter.

The respondent has therefore not persuaded this Court that the State's interest, whatever its nature, should take precedence over the applicant's individual right to freedom of movement.

The respondents contend finally that the *Rattigan* and *Salem* cases *supra* have been “disapproved” by s 8(1) of the Constitution of Zimbabwe Amendment (No. 14) Act 1996, which came into force on 6 December 1996. It amended 22(3)(d) of the Constitution, which now reads as follows:

“... Nothing contained in or done under the authority of any law shall be held to be in contravention of subsection (1) (i.e. the right to freedom of movement) to the extent that the law in question makes provision for ...

- (i) the imposition of restrictions on the movement or residence within Zimbabwe of any person who is neither a citizen of Zimbabwe nor regarded by virtue of a written law as permanently resident in Zimbabwe; or
- (ii) excluding or expelling from Zimbabwe any person who is not a citizen of Zimbabwe;

whether or not he is married or related to another person who is a citizen of or permanently resident in Zimbabwe.”

The amendment does not affect those who got married before December 1996.

This Court has had occasion to consider the meaning and effect of this amendment in *Kohlhaas v Chief Immigration Officer & Anor supra*. Whatever the intention of the legislature had been, GUBBAY CJ ruled that the new s 22(3)(d) did not nullify the *Rattigan* and *Salem* decisions *supra*. The learned author of the LRF publication “*Constitutional Law of Zimbabwe*”, G Linington, in my view correctly summarises the Court’s reasons for such a finding as follows at p 380:

“This was because both of those cases (i.e. *Rattigan* and *Salem*) were concerned with the right to freedom of movement of the citizen spouses. It was their rights that were being threatened. They had the right to live in Zimbabwe and these would be contravened if they were forced to leave Zimbabwe in order to be with their foreign spouses. The foreign spouses did not themselves have a constitutional right to live in Zimbabwe. That they were able to do so was entirely due to the fact that their expulsion would effectively interfere with the mobility rights of their Zimbabwean marriage partners. In the *Kohlhaas* case GUBBAY CJ said the effect of the amendment is merely to re-state the law in relation to the rights of non-citizens. It leaves untouched the rights of a citizen spouse.”

On the authority of the above and by the same token, the rights of the applicant *in casu*, to freedom of movement which is represented in one respect by the right to have her alien husband stay with her in Zimbabwe, have not been affected by the constitutional amendment in question.

It is pertinent at this juncture to mention that some of the respondents' averments suggest a failure to separate the applicant's rights from those of her husband. It is for instance argued that the applicant has come to this Court with dirty hands, since she knew that her husband had been denied residence and was therefore a prohibited immigrant. Marrying and co-habiting with a prohibited immigrant is not in itself an offence. The applicant has not been shown, on the one hand, to have committed an offence or otherwise fallen foul of the law, and on the other, to have attempted to seek the protection of the law. What the applicant seeks to do *in casu* is to assert her constitutional right to freedom of movement. That the assertion of such a right has the effect of granting to the husband the same relief that he had, on his own endeavour, failed to secure does not, in my view, make her hands dirty. She can thus not be said to have "dirty hands" in the sense that it is generally understood.

In all the circumstances, therefore, I am satisfied the applicant has proved her case and is entitled to the relief sought. It is accordingly ordered as follows -

1. The rights of the applicant under s 22(1) of the Constitution of Zimbabwe to freedom of movement, that is to say, the right to reside in any part of Zimbabwe has been contravened by the actions of the first and second respondents.

2. By virtue of the applicant's right under the aforementioned s 22(1) to have her husband residing with her in any part of Zimbabwe, it is hereby ordered that -

- (a) The first respondent issue to Kingsley Madueke, within thirty days hereof, such written authority as is necessary to enable him to remain in Zimbabwe on the same standing as any permanent resident;
- (b) The said Kingsley be accorded the same rights as are enjoyed by all permanent residents of Zimbabwe, including the right to engage in employment or other gainful activity in any part of Zimbabwe and that the first respondent impose no restriction upon such right; and
- (c) The costs of this application shall be paid by the respondents jointly and severally the one paying the others to be absolved.

CHIDYAUSIKU CJ: I agree.

SANDURA JA: I agree.

CHEDA JA: I agree.

MALABA JA: I agree.

Messrs Chinyama & Partners, applicant's legal practitioners

Civil Division of the Attorney-General's Office, respondents' legal practitioners