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- B REGISTRAR-GENERAL v CHIRWA
- Supreme Court, Harare
- Gubbay CJ, McNally JA & Korsah JA
- C Civil appeal
- 10 & 24 June 1993
- D Court — judgment — binding nature of on persons not party to dispute — judgments in rem and in personam — distinction — judgment relating to status of person — judgment holding person to be a citizen

The Chief Immigration Officer, believing that the respondent had obtained his Zimbabwean passport by falsely declaring that he was born in this country, seized the passport and took steps to have the respondent deported. The respondent commenced an action in the High Court, as a result of which SANSOLE J held that the respondent had not obtained his passport by false pretences and declared him to be a citizen of Zimbabwe. In the meantime, the passport had been sent to the appellant Registrar, who refused to return it to the respondent on the ground that SANSOLE J's judgment was not binding on him.

- F Held, that judgments *in rem* are binding on all persons, whether or not they were parties to the original proceedings. Judgments which relate to the status of the person are examples of such judgments, and a judgment which determines a person's nationality is an example of a judgment determining his status. Consequently, SANSOLE J's judgment was binding on the appellant.

- G Cases cited:

*Koster Koöp Landbou Maatskappy Bpk v Wadee* 1960 (3) SA 197 (T)

*Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T)

*Ex p Welsh in re Est Keegan* 1943 WLD 147

*Amal Engng Union v Min of Labour* 1949 (3) SA 637 (A)

- H *Bater v Bater* [1906] P 209 (CA)

Ex p *Oxton* 1948 (1) SA 1011 (C)

*Salveson (or von Lorang) v Austrian Property Admin* [1927] AC 78 (HL); [1927] All ER Rep 78 (HL)

*Beardsley v Beardsley & Ors* [1899] 1 QB 746

*Radoyevitch v Radoyevitch* 1930 SC 619

B Q P Simelane for the appellant

R Makarau for the respondent

GUBBAY CJ: The issue in this appeal turns on whether a judgment of the High Court, declaring the respondent to be a citizen of Zimbabwe, is a judgment *in personam* and, therefore, only binding as between the immediate parties and those who were privy to it; or a judgment *in rem*, conclusive and binding in this country against all the world.

The events giving rise to the appeal were not in contention. They may be set out as follows.

In March 1986 the Chief Immigration Officer, acting upon a belief that the respondent had obtained the grant of a Zimbabwean passport as a result of a false representation of birth in the country, seized the passport and took steps to have the respondent deported. Maintaining his entitlement to the passport, the respondent commenced an action in the High Court (Case No. HH-1106-86), in which he sought (i) an interdict restraining the Chief Immigration Officer from removing or causing him to be removed from the country; and (ii) a declaration that he is a citizen of Zimbabwe. At the trial which followed, witnesses were called by both parties to testify to the dispute. SANSOLE J, who presided, held that the respondent had not obtained citizenship and the grant of a passport by deceptive means. Accordingly, he awarded him the relief claimed. No appeal was noted against the judgment which, of course, emanated from a court of competent jurisdiction.

When the respondent, armed with the judgment, requested the return of the passport, the Chief Immigration Officer advised that it had already been forwarded to the appellant and was in his custody. A subsequent approach made to the appellant to retrieve it met with no success.

Aggrieved by the appellant's adamant refusal to relinquish possession, the respondent once more put his faith in the High Court. He instituted proceedings by notice of motion for an order directing the appellant to release the passport forthwith.

- A In an opposing affidavit, the appellant contended that the passport was being retained because the respondent had obtained citizenship fraudulently. Consequently, he was not eligible to be accorded the privilege of holding a Zimbabwean passport. The appellant also complained that as Registrar General, whose legal responsibility it was to process applications for citizenship and to grant the same, he ought to have been cited as a party in the action brought against the Chief Immigration Officer or, at least, been afforded the opportunity to testify thereat.

- B Clearly, the appellant's defence rested solely on the ground that he was not bound by the declaration made by MR JUSTICE SANSOLE that the respondent was a citizen of Zimbabwe; and, being satisfied that the factual finding upon which such declaration was based was either erroneous or questionable, he was within his rights in deciding to retain the passport.

- C That stance would have been completely justified if the judgment of SANSOLE J fell into the class of a judgment *in personam* or a judgment *inter partes*, which may be a preferable description. If, on the other hand, the judgment was one which determined the status of the respondent — in the sense of his legal position in or with regard to the rest of the community — then it fell into the class of being a judgment *in rem*. See *Koster Koöperatiewe Landbou Maatskappy Bpk v Wadee* 1960 (3) SA 197 (T) at 199D-F; *Tshabalala v Johannesburg City Council* 1962 (4) SA 367 (T) at 368H-369A; *Jouberts Law of South Africa* vol 9 at para 366; *Halsbury's Laws of England* 4 ed vol 16 at para 1537. The effect of such a judgment is that, within the limits of the country, all persons, whether party to the proceedings or not, are estopped from asserting that the status of the person is other than that which the court has, in terms of the judgment, declared it to be.

- D This court was not referred in argument to a case — nor have my researches revealed any — which specifically holds that the declaration of a person's citizenship by a court of competent jurisdiction is a judgment *in rem*. Nonetheless, in deciding the point, guidance may be found from decided cases and commentaries in which examples of judgments *in rem* relating to status of the person are referred to. Such are:

- E (1) A judgment declaring whether persons are married or divorced. See Ex p *Welsh*: In re *Estate Keegan* 1943 TPD 147 at 149; *Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A) at 651; *Bater v Bater* [1906] P 209 at 217.

H

- (2) A judgment declaring the nullity of a marriage or its existence. See Ex p *Oxton* 1948 (1) SA 1011 (C) at 1015; *Salvesen (or von Lorang) v Austrian Property Administrator* [1927] All ER (Rep) 78 (HL) at 87B; [1927] AC 78. A
- (3) A judgment determining a person's domicile. See *Halsbury op cit* at para 1537. B
- (4) A judicial decree presuming a person's death. See Ex p *Welsh supra* at 149. B
- (5) A judgment establishing a will or creating the status of administrator. See *Beardsley v Beardsley & Ors* [1899] 1 QB 746 at 750. C
- (6) A judicial order relating to the custody of an infant. See *Spiro Conflict of Laws* at 218, citing the Scottish case of *Radoyevitch v Radoyevitch* 1930 SC 619 at 624. C
- (7) A judgment declaring a person to be mentally disordered. See *Tshabalala v Johannesburg City Council supra* at 369A. D
- (8) A judgment declaring a debtor insolvent or one rehabilitating him. See *Tshabalala v Johannesburg City Council supra* at 369A; *Halsbury op cit* at para 1523. E

Having regard to the above, I consider that *a fortiori* a judgment determining a person's nationality relates to a matter of status, and so is a judgment *in rem*.

I am supported in this view by the meaning attributed to "nationality" (in the sense of citizenship of a State) in *Words and Phrases* 2 ed vol 3 at 306, being: F

"... the status of membership of the collectivity of individuals whose acts, decisions and policy, are vouchsafed through the legal concept of the State representing those individuals ... It forms a continuing state of things and not a physical fact which occurs at a particular moment; a continuing legal relationship between the sovereign State on the one hand and the citizen on the other." G

It necessarily follows that the judgment of SANSOLE J, delivered on 27 October 1986, was binding on the appellant, even though he was not an actual party to those proceedings. H

- A I would add, in any event, that the appellant did not state that he was unaware of the institution of the action against the Chief Immigration Officer or the existence of the trial. It is more than likely that the Chief Immigration Officer impounded the respondent's passport in reliance upon information obtained through the offices of the appellant; and that the passport came into the appellant's possession at a fairly early stage of the litigation. In the light of such a situation it seems to me that it was open to the appellant to apply to have been joined as a party in the action or offer to testify on behalf of the Chief Immigration Officer. He did neither. B

- The appellant also pointed to the conditions upon which a Zimbabwean passport is issued; more especially, that it remains the property of the Government and may be "amended, withdrawn or cancelled at any time". He did not, however, depose that the respondent's passport had, in fact, been withdrawn or cancelled. Certainly notification, official or otherwise, to that effect was not claimed to have been given. The decision of the appellant to retain the passport in his custody was simply because in his opinion, the respondent was not a citizen — a conclusion which refused to take account of, or misunderstood, the binding nature of the judgment of SANSOLE J. C
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For these reasons I would dismiss the appeal with costs.

MCNALLY JA: I agree

- E
- KORSAH JA: I agree

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*Gambe, Chinyenze & Associates*, respondent's legal practitioners

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