

# **The *Madzimbamuto* Judgment of the Zimbabwean Constitutional Court - A missed opportunity to eradicate citizenship by descent**

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## **1 INTRODUCTION**

Citizenship is a fundamental right required to access other legal rights at the domestic level. The right to citizenship, how and on whom it is conferred, is based on policies that stem from the national prerogative. The granting and conferring of this status is thus dealt with in a variety of ways in different jurisdictions. One of the contentious issues involving citizenship is the differing status between citizenship by birth and citizenship by descent. Citizens by birth tend to be conferred with all the rights and duties, whereas citizens by descent are denied some important rights largely due to the fact that they were born on foreign soil.

This paper examines citizenship rights under the recent Constitution of Zimbabwe<sup>1</sup> (hereinafter referred to as the Constitution or the new Constitution) with particular focus on the variance in the rights conferred on citizenship by descent and that by birth under the said Constitution. It begins with a discussion and analysis of the case of *Madzimbamuto v The Registrar-General Home Affairs*<sup>2</sup> which was recently decided by the Constitutional Court of Zimbabwe. It must be noted that the Independence Constitution, popularly known as the Lancaster House Constitution of 1980 (LHC) did not permit dual citizenship. As such, the new Constitution actively departs from the LHC in expressly allowing dual citizenship. Significantly, this departure raises very important legal issues: firstly, clarification of who is eligible for dual

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<sup>1</sup> 2013.

<sup>2</sup> CCZ 5/14.

citizenship under the new Constitution (for instance what is the legal status of children born between one Zimbabwean citizen by birth and a South African citizen by birth). Secondly, the paper addresses the issue of purposive and substantive interpretation of rights in a manner that promotes the spirit and purpose of the Declaration of Rights. To this end, it discusses the contentious issues surrounding whether children of mixed Zimbabwean and South African parentage born outside Zimbabwe are eligible for dual citizenship upon entering Zimbabwe on a foreign passport or travel document. The paper draws some insights from the 2010 Constitution of Kenya, which is in many respects similar to the new 2013 Zimbabwean Constitution. The Kenyan Constitution is further of particular import as it paves the way forward on the African continent in dealing with the construction of citizenship by dealing with and doing away with the distinction between citizenship by birth and citizenship by descent as per its section 14.

## 2 CITIZENSHIP

As already indicated, citizenship is a fundamental right through which other legal rights at the domestic level are realised,<sup>3</sup> and the right is usually conferred based on policies that stem from the national prerogative.<sup>4</sup> The granting and conferring of this status is thus dealt with in a variety of ways in different jurisdictions. The International Court of Justice (ICJ) in the case of *Liechtenstein v Guatemala*<sup>5</sup> held that nationality (citizenship) is a "...legal bond having as its basis a social fact of attachment, genuine connection of existence, interest and sentiments together with the existence of reciprocal rights and duties".<sup>6</sup> Citizenship in the African context has been described as follows:

"If we look at the definition of citizenship in most African states, we will realize that the colonial state lives on, albeit with some reforms. My point is that in privileging the indigenous over the nonindigenous, we turned the colonial world upside down, but we did not change it. As a result, the native sat on the top of the political world designed by the settler. Indigeneity remained the test for rights."<sup>7</sup>

It follows that there are two main ways, based on indigeneity, in which one may acquire citizenship. Firstly citizenship (*jus soli*) acquired through the place of birth in a territory over

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<sup>3</sup> The legal rights at the domestic level accessed through citizenship include the right to vote, social security and freedom of movement and residency. See Currie and de Waal *The Bill of Rights Handbook* (2013).

<sup>4</sup> Aleinikoff and Klusmeyer *Access to Citizenship: Global Perspectives and Practices* (2001) 18.

<sup>5</sup> *Liechtenstein v Guatemala* ICJ 1955 International Court of Justice 23.

<sup>6</sup> *Ibid.*

<sup>7</sup> Mamdani "New Frontiers of Social Policy" 2005 Keynote Address Arusha Conference 10 <http://siteresources.worldbank.org/INTRANETSOCIALDEVELOPMENT/Resources/revisedMamdani.pdf> (accessed 29-06-2016).

which a state exercises its powers; and secondly via the bloodline (*jus sanguini*) where citizenship is a result of the nationality of one parent or other more distant ancestors, marital status and naturalisation.<sup>8</sup> It is an undeniable fact that, since the attribute of nationality is inherently part of the state's prerogative, legal conflicts are likely to emerge when citizens of one country develop a relationship either with the territory of another country or with some of its citizens.<sup>9</sup> In certain instances these relations lead to dual citizenship which in turn may lead to the severing of one's legal link to a state.<sup>10</sup>

### 3 CITIZENSHIP IN ZIMBABWE

#### 3.1 Citizenship under the LHC of 1980

Zimbabwe attained its independence on 18 April 1980 and enacted its Constitution popularly known as the Lancaster House Constitution (LHC).<sup>11</sup> Section 4 of the now repealed LHC provided that, a person who, immediately before the independence day,<sup>12</sup> was or was deemed to be a citizen by birth, descent or registration shall, on and after that day, be a citizen of Zimbabwe by birth, descent or registration, as the case may be.

Citizenship by birth was provided for under section 5 as follows:

“(1) A person born in Zimbabwe on or after the appointed day but before the date of commencement of the Constitution of Zimbabwe Amendment Act (No. 14) 1996 shall be a citizen of Zimbabwe by birth, unless-

(a) at the time of his birth, his father-

(i) possesses such immunity from suit and legal process as is accorded to the envoy of a foreign sovereign power accredited to Zimbabwe; and

<sup>8</sup> Bloemraad “Who Claims Dual Citizenship the Limits of Post nationalism, the Possibilities of Transnationalism and the Persistence of Traditional Citizenship” 2004 *International Migration Review* 389 426.

<sup>9</sup> Aleinikoff and Klusmeyer *Access to Citizenship* (2001) 18.

<sup>10</sup> *Ibid.*

<sup>11</sup> Section 8 of the Lancaster House Constitution 1980. The Lancaster House Constitution (LHC) came into force after the Lancaster House Agreement in 1979 between leaders of the African Nationalist parties, Robert Mugabe (ZANU-PF), Joshua Nkomo (PF-ZAPU), Prime Minister of the then Zimbabwe-Rhodesia's Bishop Abel Muzorewa and representatives of the white minority population. It has been replaced by the new 2013 Constitution. See also the Citizenship Act in section 9 which provides that, “no adult citizen of Zimbabwe shall be entitled to be a citizen of a foreign country”. However, minors are allowed to enjoy dual citizenship until they turn 18 years and before their 19th birthday have to make a choice as to their preference of citizenship.

<sup>12</sup> Zimbabwe attained its independence on 18 of April 1980.

(ii) is not a citizen of Zimbabwe; or

(b) at the time of his birth-

(i) his father is an enemy alien; and

(ii) his mother is interned in a place set aside for the internment of enemy aliens or the birth occurs in a place then under occupation by the enemy;

or

(c) at the time his birth, his father or, in the case of a child born out of wedlock, his mother is residing in Zimbabwe in contravention of the provisions of any law:

Provided that, if subsequent to his birth his father or mother, as the case may be, is accepted for permanent residence in Zimbabwe under any law in force in Zimbabwe, he shall be a citizen of Zimbabwe by birth; or

(d) at the time of his birth, his father or, in the case of a child born out of wedlock, his mother is-

(i) not a citizen of Zimbabwe; and

(ii) not ordinarily resident in Zimbabwe.

(2) A person born outside Zimbabwe on or after the appointed day but before the date of commencement of the Constitution of Zimbabwe Amendment Act (No. 14) 1996 shall be a citizen of Zimbabwe by birth if -

(a) his father or, in the case of a child born out of wedlock, his mother is at the time of his birth-

(i) a citizen of Zimbabwe and resident outside Zimbabwe by reason of the service of his father or his mother, as the case may be, under the Government; or

(ii) lawfully ordinarily resident in Zimbabwe; and

(b) his birth is registered in accordance with the law relating to the registration of births.

(3) A person born in Zimbabwe on or after the date of commencement of the Constitution of Zimbabwe Amendment Act (No. 14) 1996, shall be a citizen of Zimbabwe by birth if at the time of his birth his father or his mother is a citizen of Zimbabwe.

(4) A person born outside Zimbabwe on or after the date of commencement of the Constitution of Zimbabwe Amendment Act (No. 14) 1996, shall be a citizen of Zimbabwe by birth if:

(a) at the time of his birth his mother or his father is a citizen of Zimbabwe and lawfully ordinarily resident in Zimbabwe or resident outside Zimbabwe by reason of his or her service under the Government; and

(c) his birth is registered in accordance with the law relating to the registration of births.”

Citizenship by descent was provided for in section 6 as stated herein under:

“Save as is otherwise provided by section 5(2) or (4), a person born outside Zimbabwe on or after the appointed day shall be a citizen of Zimbabwe by descent if-

(a) his father or his mother is at the time of his birth a citizen of Zimbabwe otherwise than by descent; and

(b) his birth is registered in accordance with the law relating to the registration of births.”

Dual citizenship under the LHC was prohibited as per section 8 of the same and coupled with section 9 of the Citizenship Act which provides that, “*no adult citizen of Zimbabwe shall be entitled to be a citizen of a foreign country*”. However, minors are allowed to enjoy dual citizenship until they turn 18 years and before their 19th birthday have to make a choice as to their preference of citizenship.

### **3 2 Citizenship under the 2013 Constitution**

Zimbabwe marked a groundbreaking moment in the protection and advancement of the rights of the people including citizenship rights when it adopted its 2013 Constitution.<sup>13</sup> The provisions of the 2013 Constitution are robust and comprehensive, and unlike the LHC,<sup>14</sup> there

<sup>13</sup> Constitution of Zimbabwe Amendment Act No. 20 2013 (hereafter the 2013 Constitution). The 2013 Constitution came into force on 22 May 2013 and provides for citizenship rights in sections 36 to 42.

<sup>14</sup> Section 8 of the Lancaster House Constitution 1980. The Lancaster House Constitution (LHC) came into force after the Lancaster House Agreement in 1979 between leaders of the African Nationalist parties, Robert Mugabe (ZANU-PF), Joshua Nkomo (PF-ZAPU), Prime Minister of the then Zimbabwe-Rhodesia’s Bishop Abel Muzorewa and representatives of the white minority population. It has been replaced by the new 2013

is provision for dual citizenship as discussed below. Zimbabwean citizens who acquire citizenship of any other country as from 22 May 2013 do not lose their citizenship.<sup>15</sup> In addition, under the present law there is no requirement for citizens to renounce their foreign citizenship in order to regain their Zimbabwean citizenship. Sections 36 and 37 of the 2013 Constitution provide 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.

(37) Citizenship by descent

Subject to section 36 (2), persons born outside Zimbabwe are Zimbabwean citizens by descent if, when they were born—

(a) either of their parents or any of their grandparents was a Zimbabwean citizen by birth or descent; or

(b) either of their parents was a Zimbabwean citizen by registration; and the birth is registered in Zimbabwe in accordance with the law relating to the registration of births.”

#### 4 FACTS OF THE CASE

The case of *Farai Daniel Madzimbamuto v The Registrar General*<sup>16</sup> (hereinafter *Madzimbamuto* case) is one of the positive decisions handed down thus far by the nascent Constitutional Court of Zimbabwe (hereinafter CCZ).<sup>17</sup> From a human rights perspective, this decision is welcomed as one of the positive steps towards the proper, purposive and effective interpretation of all rights protected in the Declaration of Rights entrenched in the 2013 Constitution. The real direction of the CCZ is yet to be seen particularly in relation to decisions

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Constitution. See also the Citizenship Act in section 9 which provides that, “no adult citizen of Zimbabwe shall be entitled to be a citizen of a foreign country”. However, minors are allowed to enjoy dual citizenship until they turn 18 years and before their 19th birthday have to make a choice as to their preference of citizenship.

<sup>15</sup> Magaisa “A Dual Citizenship: What the Law Says” NewsdzeZimbabwe <http://www.newsdzezimbabwe.co.uk/2015/08/dual-citizenship-what-law-says.html> (accessed 14-06-2016).

<sup>16</sup> *Madzimbamuto v The Registrar General Home Affairs* CCZ 5/14.

<sup>17</sup> The Zimbabwean Constitutional Court was established in 2013 under the purview of the 2013 Constitution.

that affect the day to day lives of many Zimbabweans by virtue of its interpretation of the Declaration of Rights.<sup>18</sup>

The *Madzimbamuto* case resulted from a declaratory order sought by Mr. Madzimbamuto, a Zimbabwean citizen by birth, for confirmation of his right to a Zimbabwean passport and other ancillary reliefs.<sup>19</sup> Of importance in this contribution is the order sought by the applicant (Madzimbamuto) to endorse his South African passport with an unrestricted and indefinite residence permit, which the respondent (the Registrar-General of Home affairs) staunchly refused.<sup>20</sup> The LHC did not permit dual citizenship.<sup>21</sup> As such, it was constitutionally impossible for a Zimbabwean citizen to acquire foreign citizenship, for example South African citizenship, while still retaining Zimbabwean citizenship.<sup>22</sup> Although, the 2013 Constitution retains most of the provisions of the LHC with regard to citizenship laws, it makes an important departure with regard to dual citizenship which has since been affirmed by the apex court of the land.<sup>23</sup> Notably, the 2013 Constitution in section 36 stresses that, citizenship by birth (as that of Mr. Madzimbamuto) cannot be lost and the CCZ emphatically affirmed this provision in the case at hand. In the words of the Court:

“The powers given to Parliament in respect of revocation of Zimbabwean citizenship and the prohibition of dual citizenship relate only to citizens of Zimbabwe other than by birth. No similar provision is made in respect of citizens by birth. Thus, a Zimbabwean citizen by birth does not lose his or her citizenship on acquiring a foreign citizenship. He or she is entitled to hold foreign citizenship and a foreign passport. Indeed the Constitution has made it clear that Zimbabwean citizenship by birth cannot be lost.”<sup>24</sup>

<sup>18</sup> A number of positive judgments that have been delivered by the CCZ particularly in relation to the protection of the rights entrenched in the Declaration of Rights including *Mudzuru v the Minister of Justice, Legal and Parliamentary Affairs* Judgment No. CCZ 12/2015 which further emphasized that for better and effective protection of rights, due regard must be paid to international human right law norms. See also *Nevanji Madanhire, Nqaba Matshazi v Attorney-General of Zimbabwe* CCZ 78/12 2014 (ZWCC).

<sup>19</sup> See the case of *Madzimbamuto v The Registrar General Home Affairs* CCZ 5/14.

<sup>20</sup> *Ibid.*

<sup>21</sup> Section 8 of Lancaster House Constitution 1980.

<sup>22</sup> Section 9 (b) of the LHC. See also Zimbabwe Immigration Regulations 1998.

<sup>23</sup> See *Madzimbamuto v The Registrar General Home Affairs* CCZ 5/14. See also *Mawere v The Registrar General Home Affairs* CC4/14.

<sup>24</sup> *Madzimbamuto v The Registrar General Home Affairs* CCZ 5/14 para 11. Section 36 and 37 of the 2013 Constitution provide 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. (37) Citizenship by descent subject to section 36(2), persons born outside Zimbabwe are Zimbabwean citizens by descent if, when they were born— (a) either of their parents or any of their grandparents was a Zimbabwean citizen by birth or descent; or (b) either of their parents was a

What follows from this positive decision, which was celebrated by many Zimbabweans citizens who have been long denied their citizenship rights, is that Zimbabwean citizens by birth enjoy the benefit of acquiring foreign citizenship while retaining their Zimbabwean citizenship.<sup>25</sup> Due to a myriad of economic problems in the past decade, many Zimbabweans have migrated to all parts of the world in search of greener pastures in the form of higher education and employment amongst other things. Accordingly, many Zimbabwean nationals have acquired foreign citizenship and as a result were exposed to being treated as aliens in their homeland under the now defunct LHC.

## 5 JUDGMENT

To emphasize the new 2013 constitutional era, the CCZ in the *Madzimbamuto* case held that Mr. Madzimbamuto is a citizen of Zimbabwe by birth with entitlement to dual citizenship.<sup>26</sup> The CCZ had in any event affirmed this position in 2013 in the case of *Mawere v The Registrar General Home Affairs*.<sup>27</sup> Mr. Mawere had sought an order confirming that he was entitled under the 2013 Constitution to dual citizenship and that he was not required by law to renounce his South African citizenship before he could be issued with Zimbabwean nationality documents. In a landmark ruling, the CCZ granted his application and emphatically affirmed the constitutional recognition of dual citizenship under Zimbabwean law. The apex court also affirmed that no formalities whatsoever were required before one would enjoy his citizenship rights.<sup>28</sup> In that case, it was in fact, held that Mr. Mawere was a citizen by birth having been born in Zimbabwe and was therefore entitled to dual citizenship under the 2013 Constitution.<sup>29</sup> Furthermore, the 2013 Constitution precisely provides that every court or tribunal, when interpreting legislation developing common law or customary law, must promote and be guided by the spirit of the Declaration of Rights.<sup>30</sup>

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Zimbabwean citizen by registration; and the birth is registered in Zimbabwe in accordance with the law relating to the registration of births”.

<sup>25</sup> *Mawere v The Registrar General Home Affairs* CC4/14.

<sup>26</sup> See *Madzimbamuto v The Registrar General Home Affairs*, where the Constitutional Court of Zimbabwe (CCZ) ordered the Registrar General Home Affairs-(the second respondent) to endorse in the applicant’s South African passport upon presentation thereof to him, the applicant’s right to unrestricted and unconditional residence in Zimbabwe.

<sup>27</sup> CC4/14.

<sup>28</sup> *Mawere v The Registrar General Home Affairs* paras 2, 35 and 36. See also Magaisa “Dual Citizenship in Zimbabwe” 2015 <http://alexmagaisa.com/dual-citizenship-in-zimbabwe/> (accessed 14-06-2016). Magaisa opined that “...at practical level a citizen by birth is entitled without going through any formalities to apply for a passport and a national identity document or indeed any other benefits to which citizens are entitled”.

<sup>29</sup> *Mawere v The Registrar General Home Affairs* CC4/14 paras 2, 35 and 36.

<sup>30</sup> Section 46 of the 2013 Constitution.



In the *Madzimbamuto* case the Registrar General submitted that, in terms of the Immigration Regulations 1998, anyone in possession of foreign citizenship must first renounce his foreign citizenship before being restored to their Zimbabwean citizenship.<sup>31</sup> Perhaps this was legally correct before the progressive 2013 Constitution. What is unfortunate about this submission, which the CCZ rightly dismissed, is that government officials and departments are not well versed with the provisions and demands of the 2013 Constitution. Specifically that, the Constitution is the supreme and fundamental law of the land and any conduct short of its demands is null and void.<sup>32</sup> In particular, the Constitution states as follows, “the 2013 Constitution is the supreme law of Zimbabwe and any law, practice, custom or conduct inconsistent with it is invalid to the extent of the inconsistency.”<sup>33</sup> Thus the CCZ in the *Madzimbamuto* case held that, it is the regulations that must be in conformity with the Constitution and not vice versa.<sup>34</sup>

It is thus clear from the constitutional court decision in *Madzimbamuto* that the legislature must fulfil its obligations and align its legislation with the demands of the Constitution particularly the Declaration of Rights.<sup>35</sup> This will ensure that citizens’ rights are respected, protected, promoted and fulfilled.<sup>36</sup> The CCZ rightly dismissed the submissions by the Registrar General that Mr. Madzimbamuto must be treated like any other alien who enters the country on a foreign passport and therefore needed to have his foreign passport endorsed with a residence permit. The CCZ instead ordered the Registrar General to endorse Mr. Madzimbamuto’s South African’s passport with an unrestricted and unlimited entry into Zimbabwe.<sup>37</sup> The above contention by the Registrar General was problematic in that it clearly limited or restricted Mr. Madzimbamuto’s right to freedom of movement and residence, which is expressly protected in section 66 of the 2013 Constitution.<sup>38</sup> In addition, the contention had

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<sup>31</sup> Section 16 of the Zimbabwean Immigration Regulations 1998.

<sup>32</sup> Magaisa “President Mugabe is Grossly Misinformed on the Law of Dual Citizenship in Zimbabwe” 2016 <http://www.thezimbabwean.co/2016/05/open-letter-to-mugabe-on-dual-citizenship/> (accessed 29-06-2016). The president is on record for having opined during the University of Fort hare Centenary Celebrations that “once you take up citizenship of another country, you cancel your citizenship. We don’t accept multiple, or dual citizenship”. It follows therefore that, an inference maybe be made that the President is ill informed about the law of dual citizenship in Zimbabwe under the 2013 Constitution.

<sup>33</sup> Section 2 of the 2013 Constitution.

<sup>34</sup> See *Madzimbamuto v The Registrar General Home Affairs*.

<sup>35</sup> This includes not only laws as passed by parliament but it further includes, delegated legislation and sub-delegated legislation.

<sup>36</sup> Section 44 of the 2013 Constitution.

<sup>37</sup> See *Madzimbamuto v The Registrar General Home Affairs*.

<sup>38</sup> Section 66 of the 2013 Constitution provides for the right to freedom of movement and residence as follows: “(1) Every Zimbabwean citizen has—  
(a) the right to enter Zimbabwe;  
(b) immunity from expulsion from Zimbabwe; and

a potential harsh limitation on the right to freedom of movement of many others in a similar position as Mr. Madzimbamuto.<sup>39</sup> There is therefore no doubt that the CCZ in both the *Mawere* and *Madzimbamuto* cases followed a purposive and substantive interpretation of fundamental rights.<sup>40</sup>

The purposive and substantive approach will often be one which calls for a liberal interpretation to be given to a right to ensure that individuals secure the full protection of the Declaration of Rights.<sup>41</sup> Section 46(2) of the 2013 Constitution provides that, when interpreting any legislation and when developing common law or customary law, every court must promote and be guided by the spirit and objectives of the Declaration of Rights. The directive contained in section 46(2) of the Constitution makes it clear that legislation, common law and customary law fall within the ambit of the Declaration of Rights and the 2013 Constitution itself. Put differently, the 2013 Constitution is the supreme law through which all law must be tested and, in particular, all laws should be measured through the prism of the Declaration of Rights. The consequence of this provision is that any law that is retrogressive in respect of the enforcement and implementation of rights in the Declaration of Rights would not pass constitutional muster and must be declared invalid.

However, the two judgments (*Mawere and Madzimbamuto* cases) clearly support the view that only citizens by birth qualify for dual citizenship. The Constitution in section 42 also precisely states that dual citizenship is meant for citizens by birth and therefore citizens by registration and descent are left out of the loop with respect to eligibility for dual citizenship. The question then arises as to whether children born outside Zimbabwe to a Zimbabwean

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(c) the right to a passport or other travel document.

(2) Every Zimbabwean citizen and everyone else who is legally in Zimbabwe has the right to—

(a) move freely within Zimbabwe;  
 (b) reside in any part of Zimbabwe; and  
 (c) leave Zimbabwe.”

<sup>39</sup> Section 66 of the 2013 Constitution provides for the right to freedom of movement and residence as follows:

“(1) Every Zimbabwean citizen has—

(a) the right to enter Zimbabwe;  
 (b) immunity from expulsion from Zimbabwe; and  
 (c) the right to a passport or other travel document.

(2) Every Zimbabwean citizen and everyone else who is legally in Zimbabwe has the right to—

(a) move freely within Zimbabwe;  
 (b) reside in any part of Zimbabwe; and  
 (c) leave Zimbabwe.”

<sup>40</sup> In *Rattigan v Chief Immigration Officer* 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”.

<sup>41</sup> See *Soobramoney v Minister of Health, KwaZulu-Natal* 1997 12 BCLR 1696 (CC) case para 17.

parent (who is not working on state duty or for an international organization as envisioned by section 36 (2) of the 2013 Constitution) and a South African parent do qualify for dual citizenship. The next section attempts to answer this question.

## **6 THE MISSED OPPORTUNITY – ARE CHILDREN BORN OF MIXED ZIMBABWEAN AND SOUTH AFRICAN PARENTAGE ELIGIBLE FOR DUAL CITIZENSHIP?**

It should be noted that the 2013 Constitution grants citizenship both through *jus soli* and *jus sanguini*. On one hand *jus soli* is the Latin equivalent to the right of the soil, which describes a system of law that grants nationality on the basis of birth in the territory (citizens by birth).<sup>42</sup> On the other hand *jus sanguini* refers to the right of the blood and describes the granting of nationality by birth to a national irrespective of place of birth (citizens by descent).<sup>43</sup>

The 2013 Constitution in section 42 prohibits dual citizenship in respect of citizens by descent or by registration. In fact, it empowers parliament to enact legislation in this regard.<sup>44</sup> It is worthwhile to consider what a citizen by descent is. Section 37 provides that, subject to section 36 (2), persons born outside Zimbabwe are Zimbabwean citizens by descent if when they were born, either of their parents or any of their grandparents was a Zimbabwean citizen by birth or descent or either one of their parents was a Zimbabwean citizen by registration and the birth is registered in Zimbabwe in accordance with the law relating to the registration of births.

Accordingly, the offspring of a Zimbabwean parent by birth and a South African parent by birth born outside Zimbabwe is a Zimbabwean citizen by descent (*jus sanguini*). The consequence in terms of the 2013 Constitution is therefore that, such a person may not qualify for dual citizenship. It is submitted however that a case may indeed be made for the citizenship provisions to be interpreted by the courts as widely as possible to allow a category of people falling under the citizens by descent group to be eligible for dual citizenship, which *prima facie* is available only to persons born in Zimbabwe who in fact fall under *jus soli*.

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<sup>42</sup> Section 35(1) of the 2013 Constitution provides the different classes under which a person may qualify for citizenship as citizenship by birth, by descent or registration. Section 35(2) requires that citizens of all classes should enjoy the same rights, privileges and benefits of citizenship and are equally subject to the duties and obligations of citizenship. See also George and Elphick *Promoting Citizens and Preventing Statelessness in South Africa: A Practitioner's Guide* (2014).

<sup>43</sup> Section 36 of the 2013 Constitution.

<sup>44</sup> So far Parliament has not yet passed the law relating to or governing the prohibition of dual citizenship.

The fundamental difference between Mr. Madzimbamuto, and a citizen by descent of mixed Zimbabwean and South African parentage is that, although Mr. Madzimbamuto also had a Zimbabwean parent and a South African parent, he was born within the borders of Zimbabwe (hence is a citizen *jus soli*) whereas the latter, if born outside those borders, is considered a citizen *jus sanguini*. As such, the CCZ did not need to address the issue of dual citizenship and citizenship by descent in order to resolve Mr. Mazimbamuto's problem. We submit however that this was a missed opportunity to address the distinction and the bias suffered by certain individuals born outside Zimbabwe by virtue of their parents' employment and place of ordinary residence which are factors that are largely economically and politically motivated.<sup>45</sup> Many Zimbabwean nationals have flooded neighbouring countries, including South Africa, in search of greener pastures due to the economic and political situation in Zimbabwe. In the process, a number of them have married South African nationals and citizens of other countries. These unions have produced off springs as is bound to happen in such living conditions.

In terms of the South African legal framework, particularly section 2(1)(b) of the South African Citizens Act 1995 (as amended), the offspring of such a union qualifies for citizenship through one of the parents (the South African citizen by birth). These children are thus holders of South African identity documents and passports, which is not in itself a legal problem; at least as far as South Africa is concerned. The problem however arises when these children attempt to travel to Zimbabwe especially when conflict erupts, such as in the case of xenophobic attacks as recently experienced in 2008 and 2016.<sup>46</sup> Should they be treated as aliens, as Mr. Madzimbamuto was before the CCZ decision, or be treated as citizens?

There is no doubt that any foreign national who intends to enter another country on a foreign travel document or passport should have the same document endorsed with a temporary residence permit upon entering Zimbabwe. However, a problem arises especially in contemporary times where foreigners are being threatened by South African nationals in what has become recurrent xenophobic attacks.<sup>47</sup> The group of people who are born outside

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<sup>45</sup> Section 36 (2) of the 2013 Constitution allows the offspring of individuals who are employees of the state or international organisations abroad to be termed as citizens by birth.

<sup>46</sup> Ratlebjane and Pather "Inequality and poverty drive xenophobia" 2016 Mail and Guardian <http://mg.co.za/tag/xenophobic-attacks> (accessed 22-08-2016).

<sup>47</sup> Immigrants faced discrimination and even violence in South Africa prior to 1994 due to the institutionalised racism of the time attributed to apartheid. After democratisation in 1994, contrary to expectations, the incidences of xenophobia increased. See Neocosmos *From 'Foreign Natives' to 'Native Foreigners': Explaining Xenophobia in Post-Apartheid South Africa* (2010) 172. In what were described as xenophobic attacks between 2000 and March 2008 at least 67 lives were claimed. Further in May 2008, a series of what were termed as xenophobic attacks left 41 foreign nationals dead. See Landau (ed.) *Exorcising the Demons*

Zimbabwe who are of mixed Zimbabwean and South African parentage while bearing Zimbabwean names, as is often the case, and speak any of the Zimbabwean languages are highly likely to be attacked during these assaults. The practical import is that these children who though are legally recognized as South Africans are treated as foreign nationals due to their names or their spoken language and when they attempt to seek refuge in Zimbabwe are denied access due to their failure to qualify as citizens' *jus soli*. In the process, many fundamental rights that flow from nationality will be compromised and these include, the right to freedom of movement,<sup>48</sup> freedom of security of a person<sup>49</sup> and more importantly, the right to equality<sup>50</sup> and dignity<sup>51</sup> all protected in the 2013 Constitution.

## 7 CONCLUSION

It is submitted that to ensure the proper protection of rights, especially the right to freedom of movement of citizens by descent (*jus sanguini*) and regard for the core values underlying the 2013 Constitution which include equality and dignity, citizens by descent should be allowed to benefit from dual citizenship. Moreover, citizenship by descent should not be a back-handed compliment but instead confer all the rights, privileges and benefits that flow from being a citizen. A case indeed maybe made that Zimbabwean courts must interpret section 36 (2) as wide as possible taking into cognisance the core values of human dignity, equality and freedom and provisions of the Declaration of Rights particularly the right to freedom of movement, equality and human dignity.<sup>52</sup> This is because a court considering a dual citizenship matter must adopt substantive and purposive interpretation of rights to ensure proper protection of the rights in question.

It is further submitted that any formalistic and rigid approach detracts from the object, purpose and spirit of the Bill of Rights. *In Re Munhumeso*<sup>53</sup> it was held that the purposive approach will often be one which calls for a generous interpretation to be given to a right to ensure that individuals secure the full protection of the Bill of Rights.<sup>54</sup> In addition in *Bull v*

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*Within: Xenophobia, Violence and State Craft in Contemporary South Africa* (2012). There have been further similar attacks in October 2015 and June 2016 all leading to the displacement of foreign nationals.

<sup>48</sup> See section 66 of the 2013 Constitution.

<sup>49</sup> *Ibid* section 52.

<sup>50</sup> *Ibid* section 56.

<sup>51</sup> *Ibid* section 51.

<sup>52</sup> See the CCZ in *Mawere* case para 32, opined that parliament may enact legislation prohibiting dual citizenship for citizens by descent. However, the same Court also held that such legislation must be fully consistent with the Bill of Rights. Such legislation may not allow for derogation from any rights conferred in the Bill of Rights.

<sup>53</sup> 1995 1 SA 551 (ZSC).

<sup>54</sup> *In Re Munhumeso* 1995 1 SA 551 (ZSC).

*Minister of Home Affairs*,<sup>55</sup> the Zimbabwe Supreme Court (ZSC) held that, while courts must always address themselves to the actual language used in a constitutional provision, narrow and pedantic interpretations must be avoided.<sup>56</sup> In this regard section 42(e) is discretionary and not prescriptive as the word “may” is used as opposed to “must” leaving room for a generous interpretation.

Hence it is argued that, to allow for the enjoyment of all the rights in the Declaration of Rights, courts (especially the Constitutional Court as the guardian of the Constitution), must also consider classifying children born outside Zimbabwe of mixed Zimbabwean and South African parentage as citizens by birth irrespective of the place of birth (thus doing away with the *jus sanguini*). This will ensure that all citizens by descent including children falling under *jus sanguini* - are eligible for dual citizenship irrespective of where they are born.

The 2013 Constitution in section 46 stipulate that when any court or tribunal is interpreting any right in the Declaration of Rights, it may consider relevant foreign law.<sup>57</sup> In this regard, the Kenyan 2010 Constitution (hereafter the Kenyan Constitution) which is substantially similar to the 2013 Constitution provides insight into the treatment of dual citizenship of citizens by birth. Section 16 of the Kenyan Constitution provides that, a citizen by birth does not lose their citizenship by acquiring the citizenship of another country. This *prima facie* echoes the values of the 2013 Constitution. There is however a fundamental departure made in the treatment of citizens “*jus soli*” and citizens “*jus sanguini*” by the Kenyan Constitution. Notably, there is no discrimination between a citizen by birth and a citizen by descent. The Kenyan Constitution regards both categories of citizens as “citizens by birth” by virtue of section 14 which reads as follows:

“14 (1). A person is a citizen by birth if on the day of the person’s birth, *whether or not the person is born in Kenya*, either the mother or the father of the person is a citizen.” (Our emphasis)

Therefore, denying dual citizenship to citizens by descent will likely lead to unfair treatment, unjustified discrimination and limited or restricted movement to citizens born outside Zimbabwe between a Zimbabwean parent by birth and South African parent by birth.

To this end, an interpretation must be adopted in relation to section 36 (2). The CCZ and indeed any other court must interpret section 36 (2) as encompassing not only children born

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<sup>55</sup> 1986 1 ZLR 202 (ZSC) 211.

<sup>56</sup> *Bull v Minister of Home Affairs* 1986 1 ZLR 202 (ZSC) 211.

<sup>57</sup> Section 46 of the 2013 Constitution.

between one Zimbabwean parent by birth who is working for an international organization or on state duty as qualifying for dual citizenship. Instead, to ensure equality our courts must interpret this section to include every child of a Zimbabwean national by birth born outside Zimbabwe. Such a wide and substantive interpretation will allow children of one Zimbabwean parent by birth and a South African parent who enter Zimbabwe on South African passports to be treated as citizens of Zimbabwe instead of aliens. As was done by the apex court in the *Madzimbamuto* case, despite entering Zimbabwe on a foreign passport the children born between one South African parent by birth and Zimbabwean parent by birth born outside Zimbabwe will have their passports endorsed with unrestricted and unlimited permit. In addition, it is strongly submitted that parliament should enact legislation dealing with dual citizenship with flexible provisions that will ensure that every child of Zimbabwean citizens irrespective of their place of birth enjoy the benefits of the 2013 Constitution especially all the rights entrenched in the Declaration of Rights. Further the language of the 2013 Constitution is discretionary therefore giving leeway to Parliament.<sup>58</sup>

This paper also recommends the amendment of the section 36 (2) (read with section 42) of the 2013 Constitution so that it reads like section 14(1) of the Kenyan Constitution in order to reflect and uphold the values of equality, human dignity and freedoms with regard to dual citizenship. Particularly, the discriminatory provisions in section 36 and 42 respectively. Section 36 (2) must not limit dual citizenship to off springs of Zimbabwean citizens only working outside the country for the state or international organisations. Instead, its wording must include every offspring of a Zimbabwean citizen whether or not they are working for the state or international organisations.

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<sup>58</sup> Section 42 of the 2013 Constitution. This section provides that, Parliament may enact legislation prohibiting dual citizenship in regard to citizenship by descent.