

IN THE HIGH COURT OF LESOTHO
(Constitutional Jurisdiction)

In the matter between:

ZWELAKHE MDA

APPLICANT

And

MINISTER OF HOME AFFAIRS

1ST RESPONDENT

DIRECTOR FOR NATIONAL IDENTITY CARDS

2ND RESPONDENT

DIRECTOR FOR PASSPORT SERVICES

3RD RESPONDENT

ATTORNEY GENERAL

4TH RESPONDENT

JUDGMENT

Coram : The Hon. Justice Hlajoane
 The Hon. Justice Nomngcongo
 The Hon. Acting Justice Moahloli

Date of hearing : 30th July 2014

Cur. adv. vult.

Date of judgment : 24th September 2014

SUMMARY

Civil Procedure – Application procedure – Dispute of fact – Urgency – Constitutional Litigation rules.

Constitutional law – Arbitrary deprivation of citizenship status unjustified and wrongful refusal to replace expiring passport violates citizen's constitutional right to freedom of movement, particularly not to be refused entry to or exit from one's country – such a right would be empty without a concomitant right not to be deprived of the document which makes such movement possible - Withdrawal of citizenship – lawful only when done in compliance with law and procedure. Evidence-Admissibility and evidential weight of public documents – whether a birth certificate is a public document – whether a passport is a public document.

ANNOTATIONS

Cases

Agbakoba v Director, State Security Services & Another [1994]6 NWLR 475; [1996] ICHRD 89. (Commonwealth Human Rights Law Digest – Court of Appeal of Nigeria)

Burnett (Beatrice Alstrid), Re Judicial Review [2010] NICA 2 (www.bailii.org – Court of Appeal of Nigeria)

Dongo v The Registrar General & Another 2013 Vol.8 No.1 CHRLD 79. (Commonwealth Human Rights Law Digest – Zimbabwe Supreme Court)

Herbert Aptheker et al v Secretary of State 378 US 500, 12 L ed 2d 992 (US Supreme Court Reports)

Hassim v Naik 1952 (3) SA 331 (AD)

Joyce v DPP [1946] AC 247

Kalil v Decotex (Pty) Ltd 1988 (1) SA 843(A)

Luna Meubel Vervaardigers (Edms) Bpk v Makin 1977 (4) SA 135 (W)

Matthyssen Busvervoer v Plaaslike Padvervoerraad, Kimberley 1987 (4) SA 490 (NKA)
 Metropolitan Life Limited v Tebello Masupha 1999 – 2000 LLR – LB 35(CA)
 Napijalo v Croatia, (2004)15 BHRC 422. (Butterworths Human Rights Cases-European Court of Human Rights, First Session)
 Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)
 Principal Immigration Officer v Bhula 1931 AD 322
 Rv Braiford [1905] 3 KB 730
 Rockwell Kent v John Foster Dulles (Secretary of State) 357 US 116, 2 L ed 2d 1204, 78 S Ct 1113
 Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T)
 Salmons v Jacoby 1939 AD 588
 Secretary of State for the Home Department v Al-Jedda [2013] UKSC 62
 Soffiantini v Mould 1956(4) SA 150 (E)
 T v Registrar General of Births and Deaths [2008] ZWSC 26 (Supreme Court of Zimbabwe)
 Thabiso Mothobi & Another v The Crown C of A (CRI) 2 of 2010
 United States v Lee Levi Laub 385 US 475, 17 L ed 526, 875
 Yean & Another v Dominican Republic, [2008] 23 BHRC 601 (Inter-American Court of Human Rights-Butterworths Human Rights Cases)

Statutes:

The Constitution of Lesotho 1993
 Constitutional Litigation Rules 2011
 Evidence in Civil Proceedings Ordinance 72 of 1830
 Lesotho Citizenship Order 16 of 1971
 Lesotho Passports and Travel Documents Act 15 of 1998
 Lesotho Passports and Travel Documents (Amendment) Act 7 of 2010
 National Identity Cards Act 9 of 2011
 Registration of Births and Deaths Act 22 of 1973
 Registration of Births and Deaths Regulations 1974

Books

Bellengere et al, The Law of Evidence in South Africa : Basic Principles OUP 2013

Cross, Cross on Evidence 5 ed Butterworths 1979

Currie & De Waal, The Bill of Rights Handbook 5 ed Juta 2005

Dendy (ed), Herbstein and Van Winsen the Civil Practice of the Supreme Court of South Africa 4 ed Juta 1997

Harms, Civil Procedure in the Supreme Court: students' edition Butterworths 1995

Hoffman & Zeffertt, The South African Law of Evidence 4 ed Butterworths 1988

Pete` et al, Civil Procedure 2ed OUP 2011

Schwikkard & Van der Merwe, Principles of Evidence 2 ed Juta 2002

Theophilopoulos et al, Fundamental Principles of Civil Procedure 2 ed LexisNexis 2012

Schmidt & Zeffertt "Evidence" (1979) In Joubert (ed) The Law of South Africa Vol.9 Butterworths pp 211-343

Moahloli AJ:

BACKGROUND TO THE DISPUTE

- [1] Applicant is enrolled and admitted to practise as an Advocate in Lesotho (where he is a King's Counsel) as well as in South Africa.
- [2] He grew up and lives in the Mafeteng urban area in the district of Mafeteng, where he runs a legal practice.

[3] In March 2014 he applied for a replacement for his passport which was due to expire in May 2014. His application was turned down on the basis that he is not a Lesotho citizen and therefore not eligible for a Lesotho passport.

[4] Since Applicant regards himself a Lesotho citizen by birth he brings an urgent application to this court, exercising its constitutional jurisdiction, to:

- (a) review and set aside and/or declare as null and void the decision to refuse to issue him with a replacement passport;
- (b) declare as unlawful, illegal and unconstitutional the refusal to consider his application for a replacement passport on the basis that he must first apply for and be issued with an identity card;
- (c) declare the above prerequisite/linkage as an unconstitutional violation of his freedom of movement;
- (d) declare that his particulars as set out in his expiring passport constitute sufficient proof of his citizenship, birth and age for the purposes of section 14(2) (a) of the National Identity Cards Act 2011;
- (e) direct Respondents to ensure that he is issued with a birth certificate and identity card on the basis of the particulars in his old birth certificate and passport ; and

- (f) direct Respondents to issue him with the replacement passport applied for.

[5] Respondents oppose this application, primarily on the ground that they correctly refused to issue Applicant with a replacement passport because he was not born in Lesotho as he alleges, but in South Africa. Consequently he is not entitled to a Lesotho birth certificate and is ineligible for a Lesotho passport and identity card.

SURVEY OF EVIDENCE AND ARGUMENT

Applicants' version:

- [6] Zwelakhe Mda avers that he is a citizen of Lesotho by birth, as he was born at Lifateng in the district of Mphahle's Hoek on 22 September 1956. He attaches his birth certificate issued by the Government of Lesotho on 27 April 1995 (page 35 of the record) and avers that the information appearing on this document was provided to the authorities by his deceased mother.
- [7] He further says that he is the holder of a regular Lesotho passport number RA388818 (personal number 220956F023343M) issued on 31 May 2004 and expiring on 31 May 2014 (page 36 of the record).
- [8] In March 2014, after learning that 1st Respondent had issued media statements that no replacement passports would be issued to persons who did not possess identity cards, he went to the Mafeteng Passport Office to

enquire whether his application for a replacement passport could be processed on the basis of his old birth certificate and soon to expire passport.

- [9] He was categorically told that his application would only be processed if he produced a birth certificate issued pursuant to the new National Identity Cards Act of 2011.
- [10] On 25 March 2014 he duly applied for a new birth certificate and identity card. In support of the application he submitted a letter from Chief Majara Seeiso (local chief of Mafeteng urban area) confirming his citizenship and date of birth, as well as his old birth certificate and expiring passport.
- [11] On 3 April 2014 he received a letter from the Mafeteng District Manager of the National Identity and Civil Registry inviting him to come and discuss his application for registration of a birth, at his earliest convenience [page 37 of the record].
- [12] He duly went and met the district manager (Keketsi Litsoane) on the same day, who informed him that his application had not been successful because Litsoane's investigations had revealed that Applicant was not a citizen of Lesotho. Litsoane promised to provide him with formal written communication of his decision in due course, which he duly received on 9 April 2014 [page 38 of the record].
- [13] Applicant contends that there is no requirement in our law that a replacement passport can only be issued on production of an identity card. Hence 1st Respondent's directive to this effect and its implementation by his

officials is illegal and an infringement of the constitutional right to freedom of movement as enshrined in section 7 of the Constitution.

- [14] He further argues that his old birth certificate and passport, as official documents issued to him before the promulgation of the National Identity Cards Act, are proper and sufficient evidence of his Lesotho citizenship and place of birth. Therefore his citizenship cannot be questioned in any form or shape as it is vouchsafed by section 37 of the Constitution.
- [15] Applicant adds that he has at all material times of his life been enjoying, without any restriction, all rights and privileges bestowed by the law, as a citizen of Lesotho. These, *inter alia*, include use of his current passport, exercise of the right to vote since 1993 and being appointed member of the Council of State from 2011 to 2012 pursuant to section 95(1) (j) of the Constitution and section 95(3) which states that only Lesotho citizens are eligible to be members of the Council.
- [16] Applicant further contends that the process which resulted in the decision to refuse to issue him with a birth certificate was fatally flawed because : (a) he was not privy to Litsoane's investigations and did not participate in them in any manner whatsoever; (b) he was not afforded any opportunity to make representations; and (c) it was arbitrary and capricious.
- [17] He says that he is approaching this court on an urgent basis because he is unable to access government services without an identity card and to travel to South Africa in connection with his legal work without a passport.

Respondents' version:

- [18] 1st Respondent avers that the fundamental reason why Applicant was refused a birth certificate and new passport is because Litsoane's investigation established that he was not born in Lesotho as he alleges, but in Sterkspruit in the Republic of South Africa. He and his siblings only started living in Lesotho when his parents came to Lesotho as political refugees in April 1963, long after Applicant's birth.
- [19] To substantiate this, 1st Respondent attaches the form Applicant's father filled when he applied for naturalization in February 1985 [pages 52-55 of the record]. At entry number 19 [particulars of applicant's children (if any)] it is stated that child number 4 is Zwelakhe Mda born on 21-09-56 at Sterkspruit, Cape [page 53 of the record].
- [20] 1st Respondent also attaches the supporting affidavits of Thabo Tjemolane and Moeketsi Mda, who claim to know that Applicant was born in South Africa rather than Lesotho [Pages 59-61 and 62-64 of the record, respectively].
- [21] 1st Respondent maintains that the birth certificate and passport annexed to Applicant's Founding Affidavit are null and void because they were obtained as a result of wrong, false and misleading information provided by Applicant's late mother.
- [22] 1st Respondent makes a very significant concession. He admits that there is no requirement in law that replacement passports will only be issued to

applicants with identity cards. He also denies that there is an administrative directive to this effect.

[23] Regarding the investigation conducted by Litsoane he avers that it was legally conducted as Applicant was given a hearing and an opportunity to present his case.

[24] 1st Respondent contends that there is no urgency in this matter since Applicant is not a Lesotho citizen and cannot in any event be issued a replacement passport.

[25] Lastly, he denies that Applicant has established a clear right to the relief sought as he has not proven that he was born in Lesotho.

[26] 1st Respondent raises a point of law *in limine* to the effect that there is a real and material dispute of fact in this matter (regarding Applicant's place of birth) which cannot be resolved on the papers but only by the adducing of *viva voce* evidence.

ANALYSIS OF EVIDENCE AND ARGUMENT

[27] At the commencement of the hearing the court engaged the parties' representatives in order to narrow and crystalise the issues for decision. It was agreed that the main issues to be decided are:-

- (i) whether this is a constitutional matter or not;

- (ii) if it is, whether there is a material dispute of fact which cannot properly be decided on the papers; and
- (iii) if not, whether Applicant is a citizen of Lesotho eligible to be issued with a Lesotho birth certificate, identity card and passport.

Constitutionality:

[28] Applicant argues that this is a constitutional matter as envisaged in sections 4 (1) (c), 7 and 22 of the Constitution of Lesotho. It would have been a purely administrative matter if Respondents were merely saying that Applicant has not complied with certain procedural requirements and were requiring him to comply. But *in casu* they are saying that he is not entitled to be issued with a new birth certificate, identity card and passport at all. This is a direct challenge on the status and nationality of Applicant. Respondents have taken away Applicant's right to leave and come back to Lesotho which is a fundamental human right entrenched in section 7(1) of the Constitution.

[29] In essence section 4 (1) (c) enacts that every person in Lesotho is entitled to freedom of movement, subject to the prescribed limitations. Section 4(2) adds that this right also applies to acts or omissions by persons acting on behalf of the Government of Lesotho or acting in the performance of the functions of any public office or any public authority.

[30] Section 7 (1) gives more flesh to this freedom. It provides, *inter alia*, that freedom of movement includes the right to enter and leave Lesotho and immunity from expulsion from Lesotho.

- [31] The remainder of section 7 provides that the right to freedom of movement may legitimately be limited or restricted for reasons including lawful detention, defence, public safety, public order, public morality, public health, extradition, criminal conviction, non-citizenship and public office.
- [32] Applicant contends that Respondents, by denying him his Lesotho citizenship, are effectively depriving him of all rights enjoyed by citizens of this country. Their action is all pervasive. His very right to remain in this country is now in jeopardy. At present Applicant's passport has expired and he cannot leave and return to the country.
- [33] In my opinion a decision to deprive a person of his citizenship status is undoubtedly a constitutional and human rights matter. The right to a nationality is guaranteed in international instruments such as the Universal Declaration of Human rights, adopted by the United Nations in December 1948 [article 15], which goes further to provide that 'no one shall be arbitrarily deprived of his nationality'. In the US case of **Perez v Brownell** [356 US 44 at 64 (1958)] Warren CJ very aptly described the right to nationality as "man's basic right for it is nothing less than the right to have rights."
- [34] In terms of section 22(1) of the Constitution "if any person alleges that any of the provisions of section 4 to 21 (inclusive) of [the] Constitution has been, is being or is likely to be contravened in relation to him ... then, without prejudice to any other action with respect to the same matter which is lawfully available, that person ... may apply to the High Court for redress ...

provided that the High Court may decline to exercise its power under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law”. This is the test to use to determine whether a particular application to this court falls within the Court’s constitutional jurisdiction.

[35] In this application, Applicant alleges that section 7 of the Constitution has been, and is continuing to be, contravened. I agree that this allegation is the type contemplated by section 22 (1). Consequently this Court has jurisdiction to hear and determine this matter (and any question arising). Furthermore, the court does not have reason to decline to exercise its powers under section 22(1).

[36] Now, it might be argued that Applicant does not have a legitimate cause of action because there is no right to a passport provided for in the Constitution itself nor in the Lesotho Passports and Travel Documents Act. It might also be argued that on the contrary the latter Act explicitly provides that “[p]assports shall be issued in the name of the King and remain the property of the Government” [section 4] and gives the Minister a discretion whether to issue or not to issue a passport [section 7 (1)].

[37] However in my view although our Constitution does not explicitly give citizens the right to a passport, it explicitly guarantees them a right to freedom of movement. For this right to be meaningful it must be interpreted so as to be effective. The courts must avoid a narrow and literal construction of section 7 (1) of the Constitution which would retard the realization,

enjoyment and protection of the citizen's right to freedom of movement. The Nigerian Court of Appeal has held that:

“the right to freedom of movement ... would be empty without a concomitant right not to be deprived of the document which made such movement possible”. **[Agbokoba v Director State Security Services, at 90].**

The court concluded that the citizen, therefore, has a legal right to a passport and its arbitrary seizure or withdrawal constitutes a violation of the citizens right to freedom of movement. The court also declared that:

“The statement printed on the Nigerian passport that it “remains the property of the Government” meant that the holder could not transfer, sell or otherwise dispose of it. The statement that it “may be withdrawn at any time” was contrary to the constitutionally guaranteed right to freedom of movement and should be modified to reflect the true state of the law”.

I entirely associate myself with the above dicta as correctly stating the approach which we should adopt in constructing the right to freedom of movement enshrined in our Constitution. It, by necessary implication, means that our citizens have a concomitant right to a passport.

[38] The European Court of Human Rights expressed similar sentiments in the case of **Napifolo v Croatia**. It added that:

“[68] [T]he right to freedom of movement ... is intended to secure to any person a right to liberty of movement within a territory and to leave that territory, which implies a right to leave for such country of the person’s choice to which he may be admitted ... It follows that liberty of movement prohibits any measures liable to infringe that right or to restrict the exercise thereof which does not satisfy the requirement of a measure which can be considered as ‘necessary in a democratic society’ in pursuit of the legitimate aims referred to” in art 2(2) of the protocol no. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms 1950.

“[69] [A] measure by means of which an individual is dispossessed of an identity document such as, for example, a passport, undoubtedly amounts to an interference with the exercise of liberty of movement...”

Material dispute of fact:

- [39] The next issue to decide is whether there is a real dispute of fact, necessitating the hearing of *viva voce* evidence.
- [40] 1st Respondent argues that there is a material dispute of fact regarding the place of birth of Applicant because Applicant’s father’s application for naturalization states that Applicant was born in South Africa whereas Applicant’s old birth certificate and passport state that he was born in Lesotho.

[41] 1st Respondent contends that as this issue goes to the very heart of the dispute, it cannot be resolved without hearing *viva voce* evidence.

[42] Applicant, on the other hand, argues that the naturalization application 1st Respondent seeks to rely upon to substantiate his contention that there is a material dispute of fact is inadmissible in evidence because it is not a public document and hence hearsay.

[43] However 1st Respondent maintains that the application for naturalization is a public document and therefore has evidentiary status equal to that of Applicant's birth certificate.

[44] This Court is competent, under the common law and the Evidence in Civil Proceedings Ordinance [section 3], to decide upon all questions concerning the admissibility of any evidence.

[45] What is a public document?:

According to Innes CJ in **Northern Mounted Rifles v O' Callaghan** (1909 TS 174 at 177) a public document is a document which is made by a public official, in the execution of a public duty, intended for public use and the public must have a right to access it [see also Cross 516-8; Schwikkard 376; Matthyssen's case; Hoffman 150-1; Hassim's case at 338D-339B]. Applicant's old birth certificate falls squarely within this definition. It was made by a public official, viz. the Registrar of Births and Deaths, in the execution of his public duties (as per section 12 of the 1973 Act, read with Regulation 8 and Form E of the First Schedule thereto). The public has access to it [According to section 11 of the 1973 Act "any register in the

custody of the registrar shall, upon payment of such fees as may be prescribed be open to inspection”]. Furthermore, interested parties are entitled to obtain certified copies of any entry in any register in the custody of the registrar [section 12 of the 1973 Act].

[46] What is the probative weight of the birth certificate?:

According to section 13 of the 1973 Act “a copy of an entry in any register certified under the hand of the registrar to be a correct copy shall be *prima facie* evidence in all courts of the dates and facts therein stated”. Therefore Applicant’s old birth certificate, which is certified by the District Registrar of Births and Deaths as a true copy of the particulars recorded in relation to the birth [of Applicant] in the register of births kept at D.S. (District Secretary) office in Mohale’s Hoek is *prima facie* evidence in all courts of his date and particulars of birth contained therein.

[47] However the same cannot be said of the Application for Naturalisation. It was not made by a public officer in the execution of a public duty. On the contrary it was made by a private individual (viz. Applicant’s father) for his own purposes. In addition the Application was not made as a permanent record for the purpose of enabling members of the public to refer to it. It therefore does not meet the four requirements for a public document [cf. the case of **Hassim v Naik**, 1952(3) SA 331 (AD)]. No evidence whatsoever was led to show that it is a public document according to the criteria stipulated in paragraph 39 above nor that it has the same evidentiary value as the birth certificate. More significantly, it does not fall under the types of documents acceptable as *prima facie* evidence in terms of section 29 of the Lesotho Citizenship Order No.16 of 1971. It can therefore not be admitted in

evidence as a public document and consequently cannot be used to establish the truth and accuracy of the information therein. More importantly, as counsel for Applicant correctly argued, it cannot be accepted as testimony of the date and place of birth of Applicant, since it was not even executed for this purpose. As a result of this the primary document 1st Respondent sought to rely upon (his “smoking gun” or “trump card”, so to speak) cannot be used to substantiate the averment that there is a real dispute of fact because of its inadmissibility in evidence.

Supporting Affidavits to the Answering Affidavit

[48] 1st Respondent also relies on the supporting affidavits of Thabo Tjamolane and Moeketsi Mda (at pages 59 to 64 of the record) to show that there is a real and material dispute of fact.

[49] However Applicant argues that the biggest weakness of these affidavits is that the averments they contain amount almost to bald denials in that their deponents do not disclose to the Court how they came to acquire the knowledge that he was not born in Lifateng, what made them privy to this knowledge, what special interest they have in this particular birth, where exactly Applicant was born, how do they know this.

[50] Applicant further argues that the two deponents do not even fall in the category of people entitled by law to give information as to a birth [i.e. by sections 31(1) and 39 (i) and (2) of the 1973 of Act].

[51] In the light of the above arguments, I am not convinced that there is a real, substantial and material dispute of fact which makes it impossible to dispose of this matter without resort to *viva voce* evidence. As will become clearer later, I am of the view that despite the factual difference this matter can be decided on the papers.

Have Respondents established that Applicant is not a Lesotho citizen and therefore not eligible for a Lesotho birth certificate, identity card and passport?

[52] Applicant relies on his old birth certificate and expired passport to prove that he is a citizen of Lesotho. As already stated above the birth certificate is a public document and therefore *prima facie* proof that he is a national/citizen of Lesotho. Applicant also seeks to rely on his passport as evidence of his citizenship, but its evidentiary value is not as clear-cut as that of the birth certificate.

[53] According to Centlivres CJ in **Hassim v Naik** (at p 339 C-D) a passport is not a public document, on the ground that the public has no right of access to it, and therefore cannot be admitted in evidence on that ground. The learned Chief Justice however goes on to state that “there is not doubt that a passport is, *inter alia*, an official certificate of the bearer’s identity and nationality and it may be that it would be admissible in evidence to prove those facts” (p339E).

[54] Be that as it may, Applicant goes further and asserts that his old birth certificate and passport are official documents which evidence his

citizenship and place of birth in the country, therefore his citizenship cannot be questioned in any form or shape” (my emphasis. Page 17, paragraph 8.1 of the record). I totally disagree that the passport is conclusive and incontrovertible evidence of the holder’s citizenship. I find the following dicta by Givan LJ in **Burnett (Beatrice Alstrid)**, at the paragraphs indicated, very apposite:

“[21] A British passport does not confer citizenship but is merely evidence of it [T]he conditions of entitlement to British citizenship are a matter of law. If a passport is issued showing a person to have a status which he does not hold in fact the passport may be withdrawn and cannot be relied on to assert a status to which a person is not entitled ... [One] cannot rely on a British passport obtained on a false premise to establish [one’s] claim to be treated as a British citizen. This is so irrespective of whether she did or did not know that she did not fulfil the criteria of British citizenship since her state of mind cannot be relevant to the objective question whether she was a British citizen by descent.”

“[23] While a passport is clearly *prima facie* evidence of citizenship it is not conclusive and if evidence establishes that the individual is not entitled to hold it the immigration authority must have the ability and the right to treat the person who is not a British citizen accordingly.”

[55] Similarly in the case of **Dongo v The Registrar General**, the Supreme Court of Zimbabwe (at 79-80) held that:

“(2) It is not the issuance or denial of a passport that confers on or withdraws nationality or citizenship from Zimbabweans; rather Zimbabwean citizenship is acquired or lost in accordance with the principles laid out ... in the constitution. Holding a passport simply represents recognition by the state that the holder is a citizen and is entitled to enjoy his or her constitutional right to travel freely in and out of the country.”

[56] From the above it is clear that Applicant’s assertion that his passport is unassailable proof of his citizenship is not correct. Its authenticity may be challenged, but only on legitimate grounds and by following recognized legal procedures and processes. This has not been done in the present case and without such challenge the passport remains an authentic document. Hence in the case of **Agbakopa v Director, State Security Services & Another** the Nigerian Court of Appeal held that a citizen has the right to hold a passport and not to have it arbitrarily withdrawn.

[57] As far as the old birth certificate is concerned, the vital question to consider is whether Litsoane (District Manager, National and Civil Registry) had the authority and power to remove the entry relating to Applicant’s birth from the Register of Births and effectively cancel his birth certificate, upon being convinced that it was obtained on a false premise (as he alleges). Dealing with a similar situation and legislation worded along the same lines of our 1973 Act (and Regulations) the Supreme Court of Zimbabwe in **T v Registrar General of Births and Deaths** held as follows:

1. Section 8 (1) of the Act authorizes Registrar “to correct an entry in a register without erasing the whole entry altogether. Cancellation of a

- birth certificate has the effect of erasing the entry in the register. There is no section in the Act which gives the [registrar] power to cancel an entry in a register without an order of a court.”
2. “ A careful examination of the various provisions of the Act shows that the power to order cancellation of an entry in a register vests in a court. The [registrar] can only cancel an entry in the Register upon an order of a court.”
 3. “As the [registrar] purported to cancel the birth certificates of the children without having been ordered by a court to do so his action was unlawful.” (per Malaba JA).

[57] On the strength of the above dicta I am of the view that Respondents, *in casu*, have purported to cancel Applicant’s birth certificate and expunge entries relating to him from the register of births and thereby withdraw his Lesotho citizenship without following applicable laws and procedures. They did not have the power and authority to do so in the manner that they did. Therefore their actions are unlawful and invalid.

[58] In the circumstances the following order is made:

1. The decision of 4th Respondent communicated through his letter of 08/04/2014 (page 38 of the record) is declared null and void and of no effect or consequence.
2. The refusal by Respondents to consider the application for a replacement passport by Applicant on the basis that Applicant must first apply for and be issued with an identity card is declared unlawful and illegal.

3. The decision by the Respondents to cancel Applicants' current birth certificate without following applicable laws and procedures is null and void.
4. 1st and 3rd Respondents are directed to consider an application for a replacement passport by the Applicant forthwith.
5. 1st respondent must pay the costs of this application, including the costs of two counsel.

[59] I wish to commend Applicant's counsel for the well-researched heads of argument and very useful and pertinent authorities.

K.L. MOAHLOLI
ACTING JUDGE

I agree

M. HLAJOANE
JUDGE

I agree

T. NOMNGCONGO
JUDGE

For the Applicants: Adv. M.E. Teele KC (with him Adv. S. Ratau)

For the Respondents: Adv. LV Letsie