

REPUBLIC OF SOUTH AFRICA



SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2012/34977

(1)	REPORTABLE: YES / NO
(2)	OF INTEREST TO OTHER JUDGES: YES / NO
(3)	REVISED.
21/11/2012	
DATE	SIGNATURE

In the matter between:

ABBA MATEKU

Applicant

and

THE MINISTER OF HOME AFFAIRS

First Respondent

THE DIRECTOR GENERAL,
DEPARTMENT OF HOME AFFAIRS

Second Respondent

BOSASA (PTY) LTD
t/a LEADING PROSPECTS TRADING

Third Respondent

J U D G M E N T

MAKUME, J:

INTRODUCTION

[1] In this application the applicant who is an Ethiopian national seeks an order as follows:

- (a) Interdicting the first and second respondents from deporting him unless and until his status under the Refugees Act No 130 of 1998 has been fully and lawfully determined.
- (b) Declaring his detention at Lindela Repatriation Centre to be unlawful and that he be released forthwith therefrom.
- (c) The applicant seeks an order that he be afforded an opportunity to approach a Refugee Reception Centre so that he be issued with a temporary asylum seeker permit in accordance with section 22 of the Refugees Act.

BACKGROUND

[2] It is common cause that the applicant is a foreign national and holds no permit to sojourn in the Republic of South Africa. There is no information as to when exactly he arrived in the country. The applicant in his application has chosen not to divulge that information to the court.

[3] Attached to the respondents' answering affidavit marked Annexure "A" is a document issued by the Department of Justice and Constitutional Development dated 19 November 2009 containing details of and about the applicant.

[4] The information extracted from Annexure "A" indicates that the applicant was arrested on 5 December 2008 on a charge of housebreaking with intend to steal and theft. He was convicted in the Regional Court Atteridgeville on 19 November 2009 and sentenced to imprisonment for a period of five years. He was further in terms of section 103(1) of Act 60 of 2000 declared unfit to possess a firearm.

[5] The sentence imposed on him was to expire on 18 March 2014 however on 27 April 2012 he benefited from the Special Presidential Remission of Sentences decree.

[6] Having so benefited on 15 June 2012 he was transferred from the prison directly to Lindela Repatriation Centre where he is still being kept.

[7] In paragraph 10 of his founding affidavit all that the applicant says is the following:

"I came into South Africa to seek refugee. I unfortunately landed into hard times and resulted in prison."

The applicant does not tell this Court when and where he applied for refugee status and when and where he landed into hard times.

[8] Section 3 of the Refugees Act No 130 of 1998 states that subject to Chapter 3 which provides procedures for applicants for asylum to follow, a person qualifies for refugee status, if that person:

- (a) owing to a well-founded fear of being persecuted by reason of his or her race, tribe, religion, nationality, political opinion or membership of a particular social group is outside the country of his or her nationality and is unable or unwilling to avail himself or herself of the protection of that country or not having a nationality and being outside the country of his or her former habitual residence is unable or, owing to such fear, unwilling to return to it; or
- (b) owing to external aggression, occupation, foreign domination or events seriously disturbing or disrupting public order in either a part or the whole of his or her country of origin or nationality is

compelled to leave his or her place of habitual residence in order to seek refugee elsewhere;

(c) is a dependant of a person contemplated in paragraph (a) or (b).

[9] I am mindful of the fact that section 21(5) of the Refugees Act guarantees the confidentiality of asylum applications and that the information contained therein must be ensured at all times. However this section should be read with section 3. Section 21(5) does not preclude the court being apprised of information why an applicant says he is a refugee.

[10] Counsel for the applicant placed much reliance on the matters of *Kadire Ersumo v Minister of Home Affairs and Others* Case No. 69/2012 ZASCA in arguing that it is not necessary for the applicant in this application to have to indicate when he came into the country and why.

[11] In the *Ersumo* matter the applicant informed the court that he had been unlawfully imprisoned in Ethiopia where he was tortured for his political beliefs by members of the ruling party the Ethiopian Peoples' Revolutionary Party. He escaped by bribing prison officials and fled to Kenya then to South Africa.

[12] In the present matter the applicant is silent as to why he left Ethiopia all he says is that "*I came to South Africa to seek refuge*". He does not say what was happening to him in Ethiopia that forced him to leave his country of birth

to come to South Africa. The opening sentence in section 3 of the Refugees Act is quite clear. It says:

"A person qualifies for refugee status owing to a well founded fear of being persecuted by reason of his or her race, tribe, religion, political opinion or membership of a particular social group."

Secondly, in the *Ersumo* matter Mr Ersumo on entering the country did apply for an asylum transit permit in terms of section 23(1) of the Immigration Act unfortunately on a certain day he was mugged and lost all his documents.

[13] In the present matter the applicant has been economic with the truth. There is nowhere where he tells the court that he did apply to be considered as an asylum seeker prior to his arrest for the housebreaking case in December 2008.

[14] Counsel for the applicant further placed reliance on the matter of *Bula v Minister of Home Affairs* 2012 (4) SA 560 (SCA). That matter is distinguishable from the present matter. Mr Bula and 18 of his Ethiopian fellow nationals arrived in Johannesburg on 16 June 2011 and were arrested on the same day and transferred to Lindela Centre as they were found not to be in possession of any documents entitling them to remain in the country. The court found that at all times the applicants had demonstrated a desire to apply for asylum. Mr Mateku has failed to demonstrate why he did not apply for asylum and refugee status on his arrival instead what this Court knows is that he then became involved in criminal activities. He clearly had no intention to seek asylum in South Africa.

[15] In opposing the application the respondent relies in the whole on section 30 of the Immigration Act No 13 of 2002, which reads as follows:

"30. Undesirable Person.—

(1) *The following foreigners may be declared undesirable by the Director General as prescribed and after such declaration do not qualify for a visa, admission into the Republic, a temporary or a permanent residence permit:*

- (a) *Anyone who is or is likely to become a public charge;*
- (b) *Anyone identified by the Minister;*
- (c) *Anyone who has been judicially declared incompetent;*
- (d) *An unrehabilitated insolvent;*
- (e) *Anyone who has been ordered to depart in terms of this Act;*
- (f) *Anyone who is a fugitive from justice or;*
- (g) *Anyone with previous criminal convictions without the option of a fine for conduct which would be an offence in the Republic with the exclusion of certain prescribed offences."*

[16] In paragraph 7 the deponent on behalf of the first and second respondents says that the applicant cannot be released from Lindela where he is awaiting deportation because the applicant has been declared an undesirable person in terms of section 30 of the Immigration Act 13 of 2002.

[17] According to the respondent the Embassy of Ethiopia has refused to give the applicant emergency travelling certificates that is the only reason why

the applicant still found himself at Lindela as on 11 September 2012 when his attorney wrote a letter demanding his release. The applicant would have been deported a long time ago and soon after arriving at Lindela had it not been for the excuses of the Ethiopian Embassy.

[18] The issue that I have to decide on is the following. Having been criminally convicted in South Africa does the applicant automatically forfeit the right to apply for refugee status or does he retain that right through and through until he shall have exhausted all legal mechanisms as set out in section 8 of the Immigration Act.

[19] Regulation 2(2) of the Regulations under the Refugees Act reads as follows:

"2(2) Any person who entered the Republic and is encountered in violation of the Aliens Control Act, who has not submitted an application pursuant to subregulation 2(1) but indicates an intention to apply for asylum shall be issued with an appropriate permit valid for 14 days within which they must approach a Refugee Reception Office to complete an asylum application."

[20] The learned Judge in the matter of *Bula (supra)* in dealing with the effect of Regulation 2(2) at page 578A says the following:

"Once the appellants through their attorneys, indicated an intention to apply for asylum they became entitled to be treated in terms of regulation 2(2) and to be issued with an appropriate permit valued for

14 days within which they were obliged to approach a refugee reception office to complete an asylum application."

[21] The context in which the *Bula* matter was decided is with respect different from the present matter. The applicant lost that right after being convicted and serving a term of imprisonment for five years.

[22] Counsel for the applicant argues firstly that Mr Nhlanhla Freedman Buthelezi the deponent to the respondents' affidavit is not the Director General and that the power to declare any person undesirable in terms of section 30(1) of the Immigration Act lies with the Director General. Mr Buthelezi describes himself as the Senior Immigration Officer at Lindela Deportation Centre and that he has been duly authorised to depose to the opposing affidavit.

[23] Secondly, the applicant argues that there is no written proof that such declaration of undesirability was ever issued and if it was it should have been attached to the opposing affidavit.

[24] The first problem I have with this argument is that the applicant chose not to reply to the respondents' answering affidavit and argues from the Bar on these two aspects. Secondly, Mr Buthelezi says clearly that he has been duly authorised.

[25] When the applicant's term of imprisonment expired he was transferred to Lindela with the sole intention to deporting because he had automatically been declared an undesirable alien. Section 30(1)(c) and (g) are of relevance. In this regard subsection 30(1)(c) refers to anyone who has been judicially declared incompetent. It is not in dispute that when he was convicted of housebreaking the applicant was simultaneously declared incompetent to possess a firearm in terms of the Firearms Control Act No 60 of 2000. He was sentenced to imprisonment without a fine.

[26] That declaration of judicial incompetence and the imprisonment having ensued it was not necessary for the Director to issue a separate declaration. The declaration was automatic and followed upon the conviction. Hence Correctional Services handed the applicant over to the Department of Immigration on 15 June 2012 to enable that Department to deal with the applicant further.

[27] Section 48 of the Immigration Act reads as follows:

"No illegal foreigner shall be exempt from a provision of this Act or be allowed to sojourn in the Republic on the grounds that he or she was not informed that he or she could not enter or sojourn in the Republic or that he or she was admitted or allowed to remain in the Republic through error or misrepresentation or because his or her being an illegal foreigner was undiscovered."

[28] This section puts paid to the applicant's argument that there is no proof that the Director General did issue a declaration of him being an undesirable person.

[29] The Supreme Court of the United States in *Fong Yue Ting v United States* 149 US Reports 905 quoted and confirmed the following extracts from an own earlier decision:

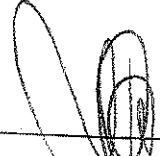
"It is an accepted maxim of international law that every sovereign nation has the power as inherent in sovereignty and essential to self-preservation to forbid the entrance of foreigners within its dominion, or to admit them only in such cases and upon such conditions as it may see fit to prescribe."

In the United States this power is vested in the national government to which the Constitution has committed the entire control of international relations in peace as well as in war. It belongs to the political department of the government and may be exercised either through treaties made by the President and Senate or through statutes enacted by the Congress. It proceeded as follows at page 911:

"The right of a nation to expel or deport foreigners who have not been naturalised or taken any step towards becoming citizens of the country rests upon the same grounds and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country."

[30] This application must accordingly fail for the reasons I have narrated above. Accordingly the order that I make is as follows:

The application is dismissed with costs.



M A MAKUME
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG