**REPUBLIC OF SOUTH AFRICA**

**SOUTH GAUTENG HIGH COURT**
**JOHANNESBURG**

**CASE NO: 2013/13550**

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|---|---|
| ~~(1)~~ | REPORTABLE: YES / NO |
| (2) | OF INTEREST TO OTHER JUDGES: YES/NO |
| (3) | REVISED. |

..... .....
DATE SIGNATURE

In the matter between:

| | |
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| **CHUKUKWA MAXWELL EKENE** | **Applicant** |
| And | |
| **THE MINISTER OF HOME AFFAIRS** | **First Respondent** |
| **THE DIRECTOR GENERAL**<br>**DEPARTMENT OF HOME AFFAIRS** | **Second Respondent** |
| **BOSASA (PTY) LTD**<br>**T/A LEADING PROSPECTS TRADING** | **Third Respondent** |

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# JUDGMENT

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RATSHIBVUMO AJ:

**Introduction**

1. This matter, initially brought as an urgent application was removed from the urgent roll and postponed to the opposed roll, following an order by Carelse J on 23 April 2013. The Applicant seeks relief in the following terms:-

   (a) An order permitting the Applicant to bring the present application without exhausting any applicable internal remedies provided for in section 8 of the Immigration Act 13 of 2002 ("the Immigration Act");

   (b) An order interdicting the first and the second Respondent from deporting the Applicant pending his application for asylum in terms of section 22 of Act 130 of 1998 ("the Refugees Act") until such application is fully and finally determined including the right of appeal and review;

   (c) An order declaring the detention of the Applicant to be unlawful;

   (d) An order directing the Respondents to release the Applicant forthwith;

   (e) A cost order against the Respondent.

   The matter was argued on the same day as the matter between Lukambo and the Minister of Home Affairs and others (2013/13552). Counsel appearing for the Applicant and the Respondent in both cases were the same. The facts were similar to a large extent and parties were accordingly allowed to refer to each of these cases when necessary, without repeating the arguments contained herein.

**Background**

2. According to the Applicant's Founding Affidavit, he is a Nigerian national who arrived in the Republic of South Africa (South Africa) on 31 October 2011 as a visitor. He left South Africa on 22 November 2011 and came back on 27 December 2011. Upon his return to South Africa, he was allegedly

fleeing from attacks perpetrated by his fellow countryman of the Islamic faith upon those of Christian faith. He therefore arrived in South Africa as an Asylum Seeker. He however did not express any intention to apply for asylum at that stage.

3. The Applicant avers that he was taken to an agent known to him only as Mr. Otto("the agent") who accompanied him to the Department of Home Affairs ("the Department") administered by the First and the Second Respondents. The agent informed him that he would arrange a life partner for him, whom he would register with the Department. Fees were disbursed to the agent and in return he presented him with a receipt bearing the stamps of the Department. The said receipt was attached to his affidavit.[1] Attached to the Applicant's Founding Affidavit is a document allegedly presented to him by the agent, informing him of the decision allegedly taken by the Department, rejecting his application on the basis that he had provided a false address and a fraudulent notarial contract. After the agent presented the latter document to the Applicant, he had no further dealings with him.

4. The Applicant was arrested on 22 March 2013 for being illegally in South Africa and was detained at the Third Respondent's premises pending his deportation to Nigeria. He now avers that his detention is unlawful according to the Refugees Act, since he was entitled to be released from detention the moment he expressed his intention to apply for asylum, pending a decision on such application. The said intention to apply for asylum was expressed in a letter dated 15 April 2013 directed to the First and Second Respondents.[2]

5. Mr. Nhlanhla Buthelezi, an Immigration Officer of the Department alleges in an Answering Affidavit, that upon his arrest the Applicant was found in

[1] See Annexure C2.
[2] See Annexure C4

possession of a fraudulent document ("permit") as foreshadowed in sec 29 (f) of the Immigration Act. It is further alleged that the Applicant insisted that the permit was not fraudulent; hence he saw no need to apply for asylum. The Applicant had an opportunity to reply to these allegations in the Replying Affidavit, but opted not to challenge this. It was further averred in the Answering Affidavit that the Applicant was informed of the decision to deport him and his right of appeal thereto, yet he opted not to appeal the decision. Annexure NB1 was attached bearing the Applicants signature to a form containing the same explanation.

**Issues for determination**

6. **Issue 1:** Does the fact that the Applicant chose not to appeal the decision to deport him, preclude him from bringing this application?

   **Issue 2:** Can the Applicant still express an intention to apply for asylum, more than a year after his arrival in South Africa?

   **Issue 3:** The Court is also called upon to make a finding on the impact of the fraudulently issued permit found in possession of the Applicant, as a precursor to his very recent intention to apply for asylum. The findings on these issues will by implication clarify the issue whether the Applicant's detention is unlawful and whether he is entitled to apply for an Asylum Seeker's permit.

7. It is opportune as a point of departure to have reference to the statutory provisions that the Applicant relies on, in his allegation that his detention is unlawful. Regulation 2(2) of the Refugees Act("the Regulation) provides,

   "(2) Any person who entered the Republic and <u>is encountered in violation of the Aliens Control Act</u>, who has not submitted an application pursuant to sub-regulation 2 (1), <u>but indicates an intention to apply for asylum shall be issued with an appropriate permit</u> valid for

14 days within which they must approach a Refugee Reception Office to complete an asylum application." [*Own emphasis*]

8. The Supreme Court of Appeal ("the SCA") dealt with the interpretation of the Regulation *supra* in the case of ***Bula and Others v Minister of Home Affairs and Others***[3] as follows:-

> "The word 'encountered' in reg 2(2) must be given its ordinary meaning, which is to meet or come across unexpectedly. The regulation does not require an individual to indicate an intention to apply for asylum immediately he or she is encountered, nor should it be interpreted as meaning that when the person does not do so there and then he or she is precluded from doing so thereafter. The purpose of ss 2 is clearly to ensure that where a foreign national indicates an intention to apply for asylum, the regulatory framework of the Refugees Act kicks in, ultimately to ensure that genuine asylum seekers are not turned away. It is clear that the appellants, when they were detained at Lindela, communicated to the department's officials and enforcement officers by the letter referred to earlier in this judgment that they intended to apply for asylum. Once the appellants, through their attorneys, indicated an intention to apply for asylum they became entitled to be treated in terms of reg 2(2) and to be issued with an appropriate permit valid for 14 days, within which they were obliged to approach a refugee reception office to complete an asylum application."

9. In light of this interpretation, it would mean there is no merit in the contention by the Respondents in arguing that the Applicant should have shown his intention to apply for asylum the moment he entered South Africa.

[3] 2012 (4) 560 (SCA) at paragraph 72.

It also appears that the intention shown by the Applicant through a letter sent through his attorneys would suffice to show his intention to apply for asylum; analogous to the position is *Bula*.

10. In refusing the Applicant an order directing the Minister of Home Affairs to issue him with an asylum seeker permit, the Court as per Epstein AJ[4] reached the conclusion that a foreigner in detention at Lindela cannot claim he was being encountered and as a result, the expression of the intention to apply for asylum could only be shown by a foreigner upon entry into South Africa, not at Lindela, since Lindela was not the Refugees Reception Office. This view was found to be wrong by the SCA[5]. In accordance with the decision of *Bula* from the SCA, it follows in the context of the matter at hand, that once the provisions of Regulation 2(2) of the Refugees Act kicks in, the arguments advanced by the Respondents on Issue 1 and 2 *supra* cannot be sustained.

11. The last issue is the impact of being in possession of the fraudulently issued permit. Mr. Buthelezi of the Department in his Answering Affidavit avers that if the Applicant is permitted to rely on the Refugees Act under the circumstances, it would render section 29(f) of the Immigration Act nugatory. It is opportune in the circumstances to visit the said statutory provision which provides as follows:-

"(29)(1) The following foreigners are prohibited persons and do not qualify for a visa, admission into the Republic, a temporary or a permanent residence permit:

…

[4] See *Shabangu v Minister of Home Affairs & others* [2011] JOL 27199 (GSJ) paragraph 30
[5] See *Bula and Others v Minister of Home Affairs and Others* 2012 (4) 560 (SCA) at paragraph 72

( f ) anyone found in possession of a fraudulent residence permit, passport or identification document.

(2) The Director-General may, for good cause, declare a person referred to in subsection (1) not to be a prohibited person."

12. My understanding of section 29 of the Immigration Act is that once a person is found in possession of any of documents of the genus stipulated in the Immigration Act, analogous to the fraudulent residence permit in this matter, he automatically *sine lege* becomes a prohibited person and would not qualify for a visa, admission into the Republic, a temporary or permanent residence permit. At face value it means that the said person would be in violation of the Immigration Act if he is found in South Africa. The two pieces of legislation provide a conundrum in that the same persons that Regulation 2 (2) of the Refugees Act refers to when its states,[6] "any person who entered the Republic and <u>is encountered in violation of the Aliens Control Act</u>[7]…" are the persons section 29(f) envisages.

13. To elaborate on the conundrum caused by the Immigration and Refugee Acts, the Refugees Act identifies and lists those who would not qualify for Refugee status. Ironically being in possession of a fraudulently issued permit is not one of them. Section 4 of the Refugees Act provides,

(1) A person does not qualify for refugee status for the purposes of this Act if there is reason to believe that he or she—

(a) has committed a crime against peace, a war crime or a crime against humanity, as defined in any international legal instrument dealing with any such crimes; or

[6] See paragraph 7 above.
[7] Aliens Control Act has been repealed by the Immigration Act.

(b) has committed a crime which is not of a political nature and which, if committed in the Republic, would be punishable by imprisonment; or

(c) has been guilty of acts contrary to the objects and principles of the United Nations Organisation or the Organisation of African Unity; or

(d) enjoys the protection of any other country in which he or she has taken residence.

14. The Applicant could fall into the category of persons listed in section 4(1)(b) of the Refugees Act, if the Department had laid charges of Fraud or any other related offence against the Applicant in respect of the possession of the fraudulently issued permit. In the event of a sentence of imprisonment as envisaged by section 4(1)(b) of the Refugees Act, the Applicant could be disqualified from applying for asylum. However, the Applicant has to date not been charged as aforesaid and this Court is therefore not enjoined to speculate on the prospects or otherwise of this issue or the intentions of the Department in this regard.

15. Having noted what I have said in the preceding paragraph, I am also mindful of the sentiments expressed in ***Shabangu v Minister of Home Affairs and Others***[8] where the Applicant had been convicted of fraud and was sentenced to direct imprisonment. Notwithstanding his conviction, the Court granted the relief sought for *Shabangu's* release from unlawful detention. In a similar vein in *Zaheer Iqbal v Minister of Home Affairs* and Others[9], the Court was conscious of the fact that the Applicant was involved in a marriage of convenience with a South African so he could get South African citizenship. That ground was not enough to deny him the relief sought, for his release

[8] Supra
[9] (39302/10) [2013] ZAGPJHC 5; (21 January 2013)

from detention and for an order directing the Minister of Home Affairs to issue him with an asylum seekers permit. Iqbal's application however, fell to be dismissed as it was not his first expression of an intention to apply for asylum as required by Regulation 2(2) of the Refugees Act. There is accordingly no basis for the argument advanced on Issue 3 that if the Applicant is permitted to rely on the Refugees Act that it would render section 29(f) of the Immigration Act nugatory.

16. I am accordingly satisfied that the Applicant whilst having been encountered in violation of the Immigration Act , he has indicated his intention to apply for asylum as envisaged in Regulation 2(2) of the Refugees Act.

17. For the reasons stated above, I make the following order:-

A. Subject to the Applicant approaching a Refugee Reception Office as contemplated in paragraph D below, the First and Second Respondents are interdicted from deporting the Applicant unless and until his status under the Refugees Act, 130 of 1998, has been lawfully and finally determined.

B. It is declared that the detention of the Applicant is unlawful.

C. The Respondents are directed to release the Applicant forthwith.

D. It is declared that, in terms of Regulation 2(2) of the Refugee Regulations, the Applicant is entitled to remain lawfully in the Republic of South Africa for a period of 14

days, in order to allow him to approach a Refugee Reception Office.

E. The First and the Second Respondents are directed, upon submission by the Applicant of his asylum application, to accept the Applicant's asylum application and to issue him with a temporary asylum seekers permit in accordance with s 22 of the Refugees Act, pending finalization of his claim, including the exhaustion of his rights of review or appeal in terms of chapter 4 of the Refugees Act and the Promotion of Administrative Justice Act 3 of 2000.

F. The First and Second Respondents are ordered to pay the costs of this application.

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**T.V. RATSHIBVUMO**
**ACTING JUDGE OF THE HIGH COURT**

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| **Date Heard:** | **22 May 2013** |
| **Judgment Delivered:** | **13 June 2013** |
| **For the Applicant:** | **Adv. S Mkata** |
| **Instructed by:** | **Mkata Attorneys**<br>**Johannesburg** |
| **For the Respondent:** | **Adv. M Gumbi** |
| **Instructed by:** | **State Attorneys**<br>**Johannesburg** |