REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 2013/13552

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

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DATE SIGNATURE

In the matter between:

MANKULA LUKOMBO **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**

JUDGMENT

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 Respondents 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) And costs order against the Respondent.

   This case was argued on the same day as the matter between Ekene and the Minister of Home Affairs and Others (case no. 2013/13550). 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 affidavit in support of this application, he arrived in the Republic of South Africa (South Africa) in December 2008, fleeing persecution by the Government Army of the Democratic Republic of

Congo (DRC). He belonged to a political party that was fighting against the Government of the DRC. Upon his arrival in South Africa, he applied for an asylum seekers permit with the officials of the First and the Second Respondents ("the Department") which was duly issued. The permit was, however, issued in the name of Samuel Papi (his father's name) pursuant to a misrepresentation he made to the Department as to his true identity. When the permit expired after two weeks, he made a further misrepresentation as to his true identity and was issued with a new permit in the name of Ardy Mukula. It was only on the third occasion when the second permit also expired, that he expressed the intention to apply for a permit using his name as reflected in the Notice of Motion. The officials at the Department brought it to his attention that he had committed the crime of Fraud. They verbalised their intention to arrest and even deport him. The Applicant fled and vanished into the general population of South Africa, until he was arrested on 05 March 2013 by officials of the Department. He was taken to the facility of the Third Respondent where he was detained pending his deportation to his country of origin.

3. The Applicant 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 an intention to apply for asylum, pending the decision on his application. The said intention to apply for asylum was expressed in a letter dated 15 April 2013 directed to the first and the second Respondents.[1]

4. Mr. Nhlanhla Buthelezi, an Immigration Officer of the First and Second Respondent alleges in an Answering Affidavit that upon his arrest, the Applicant was found in possession of a fraudulent document (permit) as foreshadowed in sec 29 (f) of the Immigration Act. It is further alleged that

[1] See Annexure ML2

the Applicant persisted that the permit was not fraudulent hence there was no need for him to apply for asylum. The Applicant had the opportunity to reply to these allegations in the Replying Affidavit, yet he opted not to challenge this. It was further averred in the same Answering Affidavit that the Applicant was informed of the decision to deport him and the right he had to appeal, and he chose not to appeal. Annexure NB1 was also attached bearing the Applicants signature to a form containing the same explanation. The Applicant disputed this in his Replying Affidavit averring that he is not well conversant in English.

5. 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 of the Refugees Act("the Regulation) provides,

> "(1) An application for asylum in terms of section 21 of the Act—
>
> (a) must be lodged by the Applicant in person at a designated Refugee Reception Office without delay;
>
> (b) must be in the form and contain substantially the information prescribed in Annexure 1 to these Regulations; and
>
> (c) must be completed in duplicate.
>
> (2) Any person who entered the Republic and is encountered in violation of the Aliens Control Act, <u>who has not submitted an application</u> pursuant to sub-regulation 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." [*Own emphasis*]

6. The Supreme Court of Appeal (the SCA) held that once a foreigner who is encountered expresses the intention to apply for an asylum, regulation 2 (2)

entitles him to be issued with a 14 day permit and to be released immediately.[2] There is therefore no need for the Applicant to show his intention to apply for an asylum upon arrival in South Africa. The expression of that intention by the Applicants while in custody was found to be sufficient.[3] The reason the SCA took that position is that the Applicants in *Bula* had not lodged an application within the terms set out in reg 2(1) (a).

Issues to be determined

7. **Issue 1:** Whether the detention of the Applicant is unlawful in view of him having expressed the intention to apply for asylum;

   Issue 2: The impact of the alleged prior application/s for asylum by the Applicant.

   The second issue is central to the Court's finding on the first, in light of the approach adopted in *Bula* to the effect that the Applicants were entitled to the relief they sought as they had not lodged any prior applications within the terms set out in regulation 2(1)(a). Mindful of the requirement in regulation 2 (2) of the Refugees Act, Counsel for the Applicant argued that "[I]t is Applicant's contention that absent is documentary proof by the Respondents that the Applicant had previously applied for asylum, he is entitled to be given a chance to do so."

8. This contention negates and contradicts what the Applicant averred in his Founding Affidavit. To highlights this it is opportune to have regard to his earlier claims as contained in his Founding Affidavit,[4]

   > "I am advised that until my application for asylum has been finalised, I have the right to sojourn in the Republic, I am advised that this means the right to move about freely in the Republic outside of detention. I am

[2] *Bula and Others v Minister of Home Affairs and Others* 2012 (4) 560 (SCA)
[3] See *Bula and Others v Minister of Home Affairs and Others supra* at paragraph 72.
[4] See paragraphs 46-48 of the Founding Affidavit.

advised further that the only exception to this, and the only basis on which an asylum seeker may be detained under the Refugees Act is in terms of section 23, which provides that where an asylum seeker permit has been withdrawn in terms of section 22 (6) of the Refugees Act, the Minister may cause the asylum seeker to be detained pending the finalisation of his or her claim. I have never been issued with an asylum seeker permit with my correct names and have thus never had an asylum seeker permit withdrawn except maybe on the names when I was wrongly advised."

9. The Applicant in the same affidavit avers that when he arrived in South Africa in December 2008, he applied for asylum and was issued with the asylum seekers permits on two different occasions before fleeing, when confronted with allegations of fraud.[5] Notwithstanding his claims on oath in his Founding Affidavit, the Applicant opportunistically distances himself from the asylum seekers permits that were issued to him on the basis that he had furnished wrong names to the officials of the Department and as a result, the permits were in the wrong names or rather not in his current names. He justifies this contention on an allegation that it was on the advice by a person or persons working at the same offices that he furnished wrong names. For that reason, he believes he did not commit fraud.

10. I do not see how the Applicant can genuinely argue that what he did was not fraudulent while he admits that he gave different names. The fact that in giving the said wrong names, he was acting on the advice of somebody else does not absolve him from what he did. He, on his own contradictory versions, was more than prepared to collude with such person or persons and not follow the virtuous path.

[5] See paragraphs 25 -29 of the Founding Affidavit.

11. Equally, the asylum seekers permits that were issued to him, irrespective of the names given when he applied, remain issued to "him" because if he is removed, there would not be a recipient of such actions other than him. If the Applicant's argument was to be accepted, there would be a void as to whom the permits were issued to, as it is clear that he was the recipient of such permits. If the contention by the Applicant was to be accepted, it could have far reaching consequences. By way of exposition and comparison, the Applicant has approached this Court under the name Mankula Lukombo. In the absence of any authentic documentation from his country of origin, the Court can only take his word that he is the person he alleges he is, but it may turn out that he is not the person he alleges he is, as when he applied for asylum on the first two occasions under false names. In the event that his application is unsuccessful under the current name in this application, would he be entitled to launch another application using different names? It is the Applicant who has chosen the names he used for this application and the names in his prior applications to the Department. He cannot blame his attorneys for the decision he finally makes even when the attorneys may have advised him to act in a particular manner.

12. Even if the Applicant's contention was to be accepted, he had an opportunity to clear himself when fraud allegations were made against him. Instead of standing up to what he believes to clear himself, he ran away and evaded due process of law. It is only after his arrest, that he has seemingly on advice of his legal representatives revived his desire to apply for an asylum seekers permit, after being on the run and sojourning in South Africa illegally again since December 2008 albeit under the different names to the ones he uses for purposes of this application.

13. It is accordingly the finding of this Court that the Applicant had indeed applied for an asylum as provided for in Regulation 2(1) of the Refugees Act, on two prior occasions using different names to his current identity.

14. In ***Iqbal v The Minister of Home Affairs and Others***,[6] Spilg J distinguished the matter where the Applicant had an opportunity to apply for asylum from the ***Bula*** case when he stated, *"I am also satisfied that as this case does not fall within the Bula type situation as explained in Ersumo at para 19, because the court is not dealing with "a first encounter by an immigration officer with an illegal foreigner who has not made application for asylum."* [7] [Own emphasis]. I am of the view that the matter at hand is equally distinguishable from ***Bula*** for the same reasons.

15. I according find that the Applicant on Issues 1 and 2 was unsuccessful in showing that when his attorneys wrote a letter to the First and the Second Respondents, he had not applied for asylum before. The Applicant has failed to show that the two asylum seekers permits issued when he applied for them were not issued to him, but to another person or persons. The Applicant when confronted about the two prior fraudulent applications failed to exhaust the internal remedies regarding the said applications when he opted to flee instead of appealing the non-issue or non-renewal of the same.

16. For the reasons stated above, I make the following order

    1. The application is dismissed with costs.

[6] [2013] 2 All SA 455 (GSJ).
[7] At paragraph 65.

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T.V. RATSHIBVUMO
ACTING JUDGE OF THE HIGH COURT

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