IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NO: 89242/14

12/12/17

In the matter between:

KHUMBULANI FREDERICK NGUBANE **APPLICANT**

And

THE MINISTER OF HOME AFFAIRS **RESPONDENT**

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

12/12/17
DATE

SIGNATURE

JUDGMENT

MOKOENA A.J

INTRODUCTION

[1] In this application the Applicant Mr. Ngubane is challenging the decision of the Minister of Home Affairs who is the Respondent in the matter, for refusing to grant him an exemption and a permanent residence permit under Section 31(2)(b) of the Immigration Act 13 of 2002 *("the Act")*. He is asking the Court to review and set aside that decision and to grant him a Substitution Order

alternatively, to remit the matter back to the Minister for his re-consideration and to be allowed to remain in and work in the Republic of South Africa *("the Republic")* pending his application for a status permit.

[2] The Applicant further seeks a declarator that statelessness is a special circumstance for purposes of Section 31(2)(b) of the Immigration Act 13 of 2002 *("the Act")*.

[3] He initially sought also a condonation for his failure to exhaust internal remedies and for the Court to declare that Section 31(2)(b) of the Act is unconstitutional if the Court's finding is that statelessness is not a special circumstance for purposes of Section 31(2)(b) of the Act. This relief has since been abandoned.

[4] The Minister is not opposed to the granting of the Order referring the matter back to him for re-consideration and for the Applicant to be allowed to sojourn and work in the Republic pending the decision on his application for a status permit.

BACKGROUND

[5] The Applicant made several allegations regarding his place of birth, his movement in and out of the Republic to Uganda and Kenya and his current return to the Republic.

[6] He alleges that he was born in Newcastle, South Africa on 10 December 1990 and his late parents were South African citizens at the time of his birth. His father died in 1993 and him and his mother went to live in Nairobi, Kenya. During their stay in Nairobi, his mother was employed as a Pharmacist in Westlands, Nairobi and he attended school at Consolata in Nairobi until 2002.

[7] His mother was then murdered in 2002 and buried in Kenya. He thereafter left Kenya with a friend of his late mother and went to live in Uganda. During his stay in Uganda, he attended and completed schooling at Shimon Primary School. The school has since been closed and the friend of his mother whom he used to live with died in 2008.

[8] He alleges that in 2009, he decided to return to the Republic. Since he was not in possession of a South African identity document, he went to the South African Consulate in Nairobi to obtain a South African passport using his birth certificate. He was told that there is a problem with I.D numbers listed in that certificate and it has to be fixed by Home Affairs in South Africa.

[9] He then decided to travel from Kenya to Tanzania where he spend several weeks, and proceeded to Mozambique. He stayed and worked in Mozambique for a period of a month. He left Mozambique and travel to South Africa and reached the Komatipoort boarder post on 27 March 2009. At the border post, he was allowed entry into the Republic by merely producing his birth certificate and he was issued with a Section 23 permit and advised to report to a local Home Affairs Office.

[10] On his way from the border posts, the taxi he was travelling in was hijacked and he and fellow passengers were taken hostage. They were robbed their belongings including his bag containing his original birth certificate as well as his high school certificate. He however managed to escape from captivity and alerted the police about the incident. The police refused to file a police report in that he did not have an ID.

[11] After that ordeal, according to him, he visited several Home Affairs Offices in the Republic for a late registration of birth to be able to obtain an identity document, and he could not be assisted.

[12] He then engaged Lawyers for Human Rights to assist him with his problem. The lawyers contacted both the Ugandan and Kenyan Government to confirm the status of the Applicant in their respective countries and the written response they received was that the Applicant was not their citizen and he does not qualify for citizenship of any of those countries.

[13] Based on this information and the fact that he is not a South African citizen, the Applicant's attorneys applied to the Minister to grant him an exemption and a permanent residence permit under Section 31(2) (b) of the Act. The application was rejected by the Minister for the following reasons:-

> *"Mr Ngubane claims to have been born in the Republic of South Africa. However, he has not been able to provide documented evidence to substantiate any of his statements and therefore I have decided not to grant him the right of permanent residence since I would not be able to justify such a decision".*

[14] This led the Applicant to bring this application challenging the decision of the Minister on the grounds that the Minister has failed to undertake a correct enquiry which is whether the Applicant was stateless and whether his statelessness constitute special circumstances for purposes of Section 31(2) (b) of the Act.

THE ISSUES

[15] This application comprises broadly three inquiries:

1.1. *Is the decision of the Minister reviewable and subject to be set aside.*
1.2. *Can this Court grant a Substitution Order based on the facts before it.*
1.3. *Does s*tatelessness constitutes special circumstances for purposes of Section 31(2)(b) of the Act.

Review and setting aside of the decision

[16] The Applicant's contentions are that three documents were placed before the Minister which contained information that supports his application for an exemption and permanent residence permit under Section 31(2)(b) of the Act. The documents referred to are:-

- *The Applicant's application to the Minister and its annexures;*
- *The recommendations to the Minister; and*
- *The investigation report by the Control Immigration Officer.*

[17] Annexures to the Applicant's application are letters from the Republic of Kenya, Uganda and Tanzania. The contents of those letters are that the Applicant is not a citizen of any of the named countries and does not qualify for citizenship in all of them. He further state in his application to the Minister that he applied for late registration of birth and his application was rejected on the ground that he was unable to prove his South African nationality. Hence he is applying for an exemption.

[18] With these facts before the Minister, Ms Hobden contend that the reasons the Minister gave in rejecting the Applicant's application indicate that the Minister undertook a wrong enquiry in arriving at his decision. She argued that the Minister was not asked to decide whether the Applicant was a South African citizen or not but whether, and on the facts before him, the Applicant was stateless or not. Ms. Hobden contends that the interview that took place with regards to the Applicant's application for late registration of birth is merely to show that the Applicant is not recognised as a South African citizen also. To put differently, the Minister was not expected to decide the obvious fact that the Applicant was not a recognised South African citizen.

[19] The Minister in his Answering Affidavit does not dispute the fact that the said documents were placed before him. He does not dispute also its contents in so far as reliance on them by the Applicant that he is not recognised as South African citizen.

[20] However, Mr. Mokhari argued contrary to what the Minister has already admitted. During argument, he referred to part of a passage in Annexure **"FA4"** at paragraph 4.1 where the Applicant state that *"is a South African national born on the territory"*. According to him, the Minister was therefore asked to determine whether the Applicant was a South African citizen or not. It seems Mr. Mokhari ignored the statement by the Applicant in the very same paragraph where the Applicant states further that *"is unable to prove his nationality to the satisfaction of the Department"*.

[21] In addition, an application by the Applicant for a status permit in terms of Section 31(2)(b) was a sufficient proof that the Applicant was not asking the Minister to consider him as a South African but a foreigner who is stateless.

[22] I tend to agree with Ms. Hobden that the Minister was not expected to decide whether the Applicant was a South African or not, considering his admission that he was not recognised as a South African citizen.

[23] Based on these facts, I am of the view that the Minister was not asked to make a finding whether the Applicant was a South African national or not. I agree with Ms. Hobden that the correct enquiry was whether the Applicant was stateless or not. The Minister has therefore failed to consider the matter properly.

[24] In Littlewood v Minister of Home Affairs[1], the Supreme Court of Appeal held that if a repository of power fails to apply his mind to the question before him, such failure constitute a failure on his part to exercise a discretion conferred upon him by an enabling statute and his decision must be set aside ***["See also Cora Hoexter "Administrative Law in South Africa" 2nd Edition at p314"]***

[25] In addition to the reasons given for setting aside of the decision, the Minister has agreed that this Court can remit the matter back to him for consideration. It will therefore be unattainable to remit the matter back to him for re-consideration and for his decision and at the same time allow his current decision to stand.

Substitution Order

[26] The Applicant is asking for the substitution of the Minister's decision with that of the Court. He is contending that the grounds upon which he relied for his application to the Minister, meets the jurisdictional requirements set out in Section 31(2)(b) of the Act. He claims to be stateless.

[1] 2006 *(3)* SA 474 *(SCA)*

[27] In her submission, Ms. Hobden argue that Substitution Order is appropriate in this matter for the following reasons:-

(a) *If the Court accepts that statelessness is a special circumstance under Section 31(2)(a), then the grant of an exemption and permanent residence permit is a foregone conclusion; in that there is nothing else the Department of Home Affairs could do.*

(b) *The decision to accept or refuse the Applicant's application is based on requirements provided by statutory and regulatory provisions, rather than specialist knowledge. The Court is in* ***as good position as the Minister*** *to make the decision; and*

(c) *Exceptional circumstances also exist where further delay would cause unjustifiable prejudice to the Applicant.*

[28] Mr. Mokhari objected to the granting of the Order. He argued that the Applicant is not stateless. He pointed out to the Court that the Tanzanian government has linked the origin of the Applicant to some other East African countries due to his small pox vaccination marks. Ms. Hobden admitted the existence of those small pox vaccination marks. It is also not in dispute that the Department of Home Affairs has still to investigate whether the origin of the Applicant may be linked to Burundi, Rwanda and South Sudan which are some of the East African countries.

[29] Mr Mokhari also argued that the Applicant did not file a replying affidavit disputing serious allegations made by the Kenyan, Ugandan and Tanzanian consulates labelling his allegations that he once resided and attended school in those countries as false. Furthermore, he did not dispute the Tanzanian consulate's finding that he could most probably be from one of the East African countries. This was never disputed by Ms. Hobden during oral argument.

[30] Regardless of these facts, Ms. Hobden initially persisted with the relief for Substitution Order. She however conceded during our engagement that the Minister is duty bound to investigate further the Applicant's allegations and in particular those raised by the Tanzanian government. That was a rational decision to make as there was no factual basis for the Court to grant a Substitution Order. Her only issue was that there should be a time frame for conducting such an investigation. Mr. Mokhari also agreed but they could not agree on the time to conduct such an investigation. The issue was left to the discretion of the Court which I have to exercise taking into account that there must be an investigation that must be carried out by the department of Home Affairs.

Does Statelessness Constitute Special Circumstances for Purposes of Section 31(2)(b) of the Act

[31] Section 31(2)(b) of the Act provides:-

> Upon application, the Minister may under terms and conditions determined by him or her:
>
> *(a) [...]*
>
> *(b) Grant a foreigner or category of foreigners the rights of permanent residence for a specified or unspecified period when special circumstances exist which would justify such a decision; [...]*

[32] In terms of the said Section, the power to decide whether the Applicant has satisfied the jurisdictional requirements of Section 31(2)(b) rests with the Minister. He is the one to decide, after investigations, whether the Applicant is stateless or not and, if stateless, whether such status constitutes special circumstances for purposes of Section 31(2)(b) of the Act . It is after the Minister has decided that the Applicant may approach this Court for an appropriate relief if not satisfied with that decision. Currently there is no decision before this Court that says statelessness is not a special circumstance for purposes of Section 31(2)(b).

[33] It will therefore be premature for the Court to make a pronouncement on this issue, before it is established by the department of Home Affairs whether the Applicant is indeed stateless or not and before the Minister decides whether statelessness constitutes special circumstance for purposes of Section 31(2)(b) of the Act.

COSTS

[34] It is of a serious concern to this Court that the Applicant approached it for assistance having admitted to have falsified his application to the Minister. It is so in that he did not dispute the findings of the consulates of Tanzania, Uganda, and Kenya that what he said in his application to the Minister was false and a self-created story ***["See: Plascon – Evans Paints Ltd[2]"]***.

[35] It seems the Applicant took advantage of the weaknesses in the Management Systems of the department of Home Affairs. That department was supposed to have suspended the referral of the Applicant's application to the Minister until it has investigated the findings of the Tanzanian Government that linked him to some East African countries.

[36] The Applicant has also failed to take this Court into his confidence. He failed to answer crucial questions asked in annexure **N11** by the Ugandan consulate. He did not state whether his stay in Uganda was legal or not and whether he attempted to apply for citizenship in that country, and if not, why.

[37] On the other hand, the department of Home Affairs failed to demand answers from him on these questions. It also failed to investigate as to how the Applicant managed to pass through the borders of Tanzania to Mozambique and, who were the officials at the border-post of Komatipoort that have allowed him entry into the Republic and to demand also official records of his entry into the Republic especially after he alleged that he was issued with a Section 23 permit.

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[2] 1984 (3) SA 620 *(AD)*

[38] The aforesaid conduct of the Applicant cannot be condoned and the Court is duty bound to express its displeasure and to discourage it. For the Court to close its eyes to it, is to tarnish the reputation of our Courts.

[39] It was also disturbing to hear Ms. Hobden saying that there is nothing in the behaviour of the Applicant to show that there is anything nefarious about his application. The said statement seems to suggest that Ms. Hobden associated herself with the conduct of the Applicant or failed to advice the Applicant accordingly. As an Officer of the Court, she was ethically bound to have brought to the attention of this Court, in particular, the findings of the Tanzanian consulate that the origin of the Applicant could be linked to some other East African country and not to persist with her argument that the Applicant was stateless.

[40] Based on these facts, this application would have been avoided if the Applicant was honest; open and frank to the department of Home Affairs and the said department having carried out its statutory duties diligently.

[41] I am therefore of the view that it is equitable and just that each party pays his own costs. In addition to the reasons provided on the costs aspect, both parties have partially succeeded in the matter.

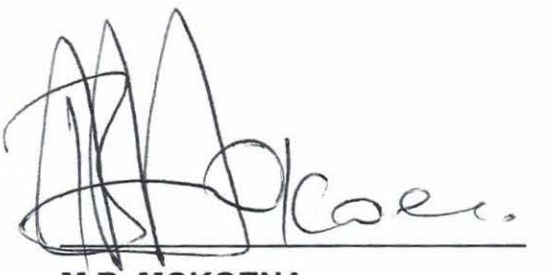
I accordingly make the following Order:-

1. The decision of the Respondent to refuse the Applicant's application in terms of Section 31(2)(b) of the Immigration Act 13 of 2002 is reviewed and set-aside.

2. The Applicant's application for an exemption and permanent residence permit, supplemented by any other relevant information the Applicant and the Respondent may want to present to the Minister, is remitted to the Minister for re-consideration and for a decision within 90 days of this Order. The Respondent may approach this Court for the extension of the time period of 90 days.

3. The Respondent is directed to issue the Applicant with a Form 20 "Authorisation for Illegal Foreigner to Remain in the Republic pending application for Status" permit which expressly include permission to lawful work and reside in South Africa until a final decision has been taken on the Applicant's application.

4. Each party to pay his own costs.



M.B. MOKOENA
ACTING JUDGE OF THE HIGH COURT

Date of Hearing	:	19/06/17
Judgment Delivered	:	12/12/17

APPEARANCES

For The Applicants	:	ADV. HOBDEN
Instructed By		Lawyers for Human Rights Kutlwanong Democracy Centre 357 Visagie Street PRETORIA
For The Respondent	:	ADV. MOKHARI, SC ADV. HUTAMO
Instructed By		The State Attorney 316 SALU Building PRETORIA

Regards,

M B MOKOENA
Acting Judge of the High Court

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IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

TO : Advocate Hobden

For the Applicant

AND TO : Advocate Mokhari SC & Advocate Hutamo

For the Respondent

RE: KHUMBULANI FREDERICK NGUBANE + THE MINISTER OF HOME AFFAIRS

CASE NO: 89242/14

MEMORANDUM

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[1] The above matter refers.

[2] I noticed that a sentence at paragraph 25 of my judgment appears obscure, uncertain and erroneous.

The affected sentence reads as follows:

"In addition to the reasons given for setting aside of the decision, the Minister has agreed that this Court can remit the matter back to him for consideration and for his decision, and at the same time allow his current decision to stand"

[3] In terms of Rule 42(1)(b) I hereby correct it as follows:

"In addition to the reasons given for setting aside of the decision, the Minister has agreed that this Court can remit the matter back to him for consideration. It will therefore be unattainable to remit the matter back to him for re-consideration and for his decision and at the same time allow his current decision to stand"

[4] The order remains and the signed judgment will be filed in the court file.