IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No. : 3107/2004

In the matter between:

CHRISTIAN BUCHUKWU OMUMATU	APPLICANT
and	
THE MINISTER OF HOME AFFAIRS	1ST RESPONDENT
THE DIRECTOR GENERAL	2ND RESPONDENT
MAREE BASSON N.O.	3RD RESPONDENT

HEARD ON: 4 NOVEMBER 2004

JUDGMENT: VAN DER MERWE J

DELIVERED ON: 25 NOVEMBER 2004

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[1] On 10 September 2004, as a result of an urgent application brought on that day, Beckley J made the following order:

"1. A rule nisi is issued with return date **Thursday, 7th of October 2004** calling upon the respondents so (sic) show cause;

a) Why the permit issued to the applicant in terms of regulation 18(6)(b) on 2 September 2004 should not be declared valid,

b) Why the 1st respondent should not be ordered to pay the cost of the application,

2. The order granted in prayer 1(a) operate as an interim order."

[2] On the extended return date of the rule nisi dated 10 September 2004, the applicant moved for the confirmation thereof whereas the respondents argued that the rule nisi should be discharged with costs. For the sake of convenience, I will refer to the actions and conduct of the respondents and other employees of the Department of Home Affairs, simply as that of "the department". The background facts that follow, are admitted or not disputed.

[3] The applicant is a citizen of Nigeria. During December 2000 the applicant entered the Republic of South Africa. On 19 December 2000 the department at its regional office in Port Elizabeth, issued to the applicant an Asylum Seeker Temporary Permit in terms of the provisions of section 22 of the Refugees Act, No. 130/1998. During the following year the applicant moved to Bloemfontein where he got married to a South African citizen by the name of Nkozasana Getrude Maloyi. The couple has one child, namely a boy of almost two years of age.

[4] During 2001 the department advised or instructed the applicant to apply for a temporary residence permit in terms of the now repealed Aliens Control Act, No. 96/1991. For this reason the applicant's asylum seeker permit had to be cancelled, which was in fact done on 26 June 2001. The temporary residence permit applied for was issued by the department at Bloemfontein on 18 July 2001. This temporary residence permit was thereafter renewed on more

than one occasion. In the meantime, at the offices of the department in Bloemfontein, the applicant applied for a permanent residence permit. The aforesaid renewed temporary residence permit expired on 28 August 2004.

[5] During the week of 17 to 20 August 2004, the applicant had a telephonic conversation with Mr. Mikael Moeketsi Moremoholo, a senior administration clerk in the employ of the department in Bloemfontein. The applicant enquired from Mr. Moremoholo as to the status of his application for a permanent residence permit. Mr. Moremoholo advised the applicant to attend the offices of the department in Bloemfontein. This the applicant did on 24 August 2004, where he was informed by Mr. Moremoholo that his application for a permanent residence permit was not finalized yet and that therefore he had to renew his temporary residence. This application, he was informed by Mr. Moremoholo, he should have made at least 30 days prior to the date of expiry of the present permit. Nevertheless, he handed in some forms for purposes of renewal of his

temporary residence permit. The applicant returned to the offices of the department in Bloemfontein on both Thursday 26 August 2004 and Friday 27 August 2004. He was informed by officials of the department that in the absence of a passport, they were unable to assist him. (The applicant lost his Nigerian passport on 9 August 2004, but handed in a letter by the South African Police Service, confirming that the applicant reported the loss of the passport on 10 August 2004.) He was also informed that his application for a permanent residence permit had been rejected. It later transpired that the reason given for this rejection was failure by or on behalf of the applicant to hand in medical reports. Applicant was told that nothing could be done and that he should leave. Nevertheless, the applicant returned to the offices of the department in Bloemfontein on Monday 30 August 2004. By that time his temporary residence permit had expired. Whilst at the offices of the department in Bloemfontein, he was arrested by an official in the employ of the department and removed to a police station.

[6] As a result of the efforts of his attorney, the applicant was released from custody on 1 September 2004. Thereafter he proceeded with his attorney to the offices of the department in Bloemfontein, where application for a permit was made. On 2 September 2004 the department, represented by Mr. Moremoholo, issued a permit to the applicant. For the sake of convenience, this permit will herein simply be referred to as "the permit". The relevant printed heading of the permit is: "EXTENTION OF TEMPORARY RESIDENCE PERMIT". Immediately below, also in print, reference is made to section 11 of the Immigration Act, No. 13/2002 ("the Act") as well as regulation 18 of the regulations made in terms of section 52 of the Act under General Notice 487/2003, published in the Government Gazette of 21 February 2003 ("the regulations"). Section 11 of the Act deals with the requirements for a visitor's permit and regulation 18 deals with procedures applicable to application for temporary residence permits in general. In the body of the permit it is stated that the temporary residence permit No. BFN04/2 is extended until 1 March 2005 and that the permit is approved in terms of

regulation 18(6)(b) of the regulations. The issue of temporary residence permits was part of the normal duties of Mr. Moremoholo.

[7] On 10 September 2004 the applicant became aware of a letter dated 6 September 2004 and addressed to his attorney on behalf of the department. The gist of the contents of this letter is that when the permit was issued, it was unknown that the applicant had previously been in possession of an asylum seeker permit, that in terms of the policy or approach of the department the permit, being a temporary residence permit, should not have been issued and that the permit is therefore not valid and must be seen as null and void. The present application was brought in response to this letter.

[8] As is apparent from what is stated above, the department formally issued the permit as a temporary residence in terms of the Act. Counsel for respondent nevertheless submitted that the permit should be regarded as invalid and null and void and that therefore the rule nisi should be discharged.

This submission was based on three grounds with which I will deal in turn below. In the first place it was submitted that the applicable legislation makes no provision for a permit such as the one in question. Secondly, naturally in the alternative, it was submitted that the permit was invalid as result of defects in the procedure that led to the issue of the permit. In the third place, counsel for respondents submitted that the permit is to regarded as null and void in terms of the provisions of regulation 50 of the regulations.

[9] The first of these arguments mentioned above, as I understand it, is based thereon that in the permit is stated that the temporary residence permit issued previously to the applicant, is extended. For the reasons that follow, I consider that this argument has no merit. Temporary residence in terms of the Act is defined as meaning any permit referred to in section 10 of the Act. Section 10 of the Act provides that anyone of the temporary residences set out in sections 11 to 23 may be issued to a foreigner. Section 11 of the Act deals with a visitor's permit. In terms of section

11(3) an illegal foreigner receiving a visitor's permit, shall comply with any terms and conditions which may be prescribed from time to time. Prescribed is defined in the Act as provided for by regulation. Section 53(2) of the Act provides that a permit issued in terms of the previous Act may only be renewed in terms of the Act. Regulation 18(6)(b) of the regulations provides as follows:

> "In the case of an illegal foreigner, excluding a prohibited person, who is the spouse or dependant, no older than 25 years of age, of a citizen or resident, who applies for a permit, a visitor's permit may be granted for a period not exceeding six months to enable such illegal foreigner to apply for any other temporary residence permit or permanent residence permit, within such period."

[10] It is clear that after 28 August 2004, the applicant was an illegal foreigner as defined in the Act, married to a citizen of the RSA. The permit was issued for exactly six months. In the founding affidavit the applicant stated that he applied for and was issued a permit in terms of regulation 18(6)(b). This

evidence was expressly admitted on behalf of the department. In the answering affidavits, as well as in the aforesaid letter of 6 September 2004, it was stated that a visitor's permit in terms of regulation 18(6)(b) was issued to the applicant. In all these circumstances, the words "APPROVED IN TERMS OF REG 18(6)(b)" in the permit can have no other meaning than that a visitor's permit was issued to the applicant in terms of regulation 18(6)(b).

[11] The second aforesaid line of argument is based thereon that the applicant should not have applied for the permit at the offices of the department in Bloemfontein and that in any event he did not properly complete the relevant forms. This argument can be quickly disposed of. It is true that regulation 2(8) provides that an application to be lodged within the Republic shall be handed or mailed to the regional director of the department in the area in which the applicant intends to work or study or, in respect of any permit for purposes other than study or work, where he or she sojourns. The department relies thereon that in the forms

that led to the issue of the permit, it was stated that the applicant is presently residing in Germiston. According to the applicant, that is the address of his wife, who is a candidate attorney and is serving articles in Germiston. However, the regulation relied upon, does not refer to where the applicant resides, but sojourns, that is where he stays temporarily. At best for respondents, the applicant stayed temporarily in Bloemfontein from at least 24 August 2004. Therefore, in my view, he was entitled to make application for the permit at the offices of the department in Bloemfontein. This conclusion renders it unnecessary to enquire whether this provision is in any event peremptory or merely directory. The department was fully aware thereof that the relevant forms, which are matters of internal procedure and administration of the department, were not completed in all respects. Nevertheless, the permit was issued. The result thereof is simply, in my view, that the information to which the in-completed portions of the forms relate, was not called for or required by the department. Accordingly, in these circumstances, the department cannot

subsequently rely on incomplete filling in of forms to invalidate a permit formally and deliberately issued in terms of the Act.

[12] Regulation 50(1) provides as follows:

> "(1) Any visa or temporary or permanent residence permit issued on the basis of false material information or an omission to provide required or reasonably expected material information shall be deemed to be null and void, provided that the Department shall
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> a) notify the person concerned of its findings and the related consequences including, if applicable, the loss of status; and
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> b) give the person concerned a reasonable opportunity to rectify the matter, if the matter can be easily rectified and the Department is satisfied that no fraud or fraudulent intent was involved, failing which paragraph (a) shall apply; or
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> c) declare such consequences as having occurred and notify the person concerned of the rights set out in section 6 of the Act."

[13] It should firstly be mentioned that I have grave doubts in respect of the validity and constitutionality of regulation 50. It will be noted that in terms of regulation 50, a visa or temporary residence permit or even a permanent residence permit, may by the unilateral decision of the department be deemed to be or declared null and void, without any notice beforehand to the holder of such visa or permit and without affording such person any opportunity whatsoever to state his or her case. This result, in my judgment, appears to be inconsistent with the provisions of section 33 of the Constitution, 1996. These provisions of regulation 50 are also in direct conflict with the provisions of section 8 of the Act. Section 8 of the Act provides in peremptory terms that before making a determination adversely affecting a person, the department shall notify the contemplated decision and related motivation to such effected person and give such person at least 10 calendar days to make representations. However, in view of the conclusion that I have reached in this case, and especially in view thereof that no argument had

been addressed to me in this regard, I refrain from making a firm finding in this regard.

[14] It is clear that in terms of regulation 50 an application of mind by or on behalf of the department is required. If in the opinion of the department the particular matter can be easily rectified and the department is satisfied that no fraud or fraudulent intent was involved, the department shall notify the person concerned of its findings and the related consequences thereof and give the person concerned a reasonable opportunity to rectify the matter. Obviously, if this option is decided upon after consideration of the matter, the visa or permit in question will only be deemed null and void in the event of the person failing to rectify the matter. No reference at all to regulation 50 or its contents are to be found in the aforesaid letter of 6 September 2004 nor, for that matter, in the answering affidavit. In this letter it is not stated that the permit was issued on the basis of false material information or on an omission to provide required or reasonably expected material information nor is the applicant

notified therein of the rights set out in section 8 of the Act, as required by regulation 50(1)(c).

[15] The crux of this letter is that the permit is null and void because of the policy or approach of the department not to renew a residence permit of an asylum seeker whose asylum seeker permit has expired. It also reflects the stance taken by the department in more detail in the answering affidavits. On the totality of the evidence, I have no doubt that no relevant official in the department had regulation 50 in mind in respect of the applicant and the permit before the matter was argued on 4 November 2004.

[16] Finally, reliance on regulation 50 is in any event without factual basis. This argument was based thereon that the material information that the applicant omitted to provide, was the fact that he previously held an asylum seeker permit. Apart from the fact that the details of the original permit issued to the applicant prior or on arrival in South Africa, required in the relevant forms of the department, were left

open with the apparent consent of the department, the evidence of Mr. Moremoholo of the department was that he issued the permit after he familiarised himself with all the facts in relation to the application of the applicant and that he had full knowledge of the fact that the applicant had been the holder of an asylum seeker permit, which had been cancelled on 26 June 2001, as was required by the procedures of the department. According to the deponent these facts were even reflected on the outside of the file of the applicant kept by the department. The respondents sought and obtained leave to file a fourth affidavit. The aforesaid evidence of Mr. Moremoholo was not disputed in this affidavit.

[17] It follows that the rule nisi must be confirmed. For the sake of completeness, I consider it necessary to make reference in the order to the regulations. On behalf of respondents, it was submitted that even in the event of this conclusion being reached, the applicant should be deprived of costs and that each party should pay its own costs. This argument was

primarily based on the allegation that applicant's own conduct was the cause of his predicament. Even if this was true, which I doubt in view of the facts set out above, I do not, in exercise of my discretion in respect of costs, consider this to be sufficient basis or reason to deprive the successful party of his costs. Reference was also made in this regard to section 37 of the Act that provides that magistrates' courts are to operate as immigration courts and that the applicant should have approached that forum. At the time, however section 37 of the Act had not yet been put into operation.

[18] I make the following orders:

1. The permit issued to the applicant on 2 September 2004 in terms of regulation 18(6)(b) of the regulations made in terms of the Immigration Act, No. 13/2002 and published as General Notice 487/2003 in Government Gazette No. 24952 of 21 February 2003, is declared valid.

2. First respondent is ordered to pay the costs of the

application.

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C.H.G. VAN DER MERWE, J

On behalf of the applicant: Vorster & Botha Prokureurs	Mr. F. Botha BLOEMFONTEIN
On behalf of the respondents:	Adv. M.H. Wessels S.C. Assisted by: Adv. X.H. Mabusela
Instructed by: State Attorney BLOEMFONTEIN	

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