

**Ngoho v Minister of Home Affairs & others**  
**[2008] JOL 21607 (T)**

<b>Reported in (Butterworths)</b>	Not reported in any LexisNexis Butterworths printed series.
<b>Case No:</b>	3829 / 08
<b>Judgment Date(s):</b>	27 / 03 / 2008
<b>Hearing Date(s):</b>	14 / 03 / 2008
<b>Marked as:</b>	Not Reportable
<b>Country:</b>	South Africa
<b>Jurisdiction:</b>	High Court
<b>Division:</b>	Transvaal Provincial
<b>Judge:</b>	Seriti J
<b>Bench:</b>	WL Seriti J
<b>Parties:</b>	Didier Ngoyi Ngoho (At); Minister of Home Affairs (1R), Head of Lindela Holding Facility (2R), Ali Hlomane (3R)
<b>Appearance:</b>	Adv Potgieter, Moki van Huyssteen & Botes Inc (At); Adv Moloisane, State Attorney (R)
<b>Categories:</b>	Application – Civil – Procedural – Public
<b>Function:</b>	Confirms Legal Principle

### Key Words

Administrative action – Deportation – Illegal foreigner – Fraudulent residence permit – No case for release – Application dismissed

Immigration Act 13 of 2000 – Immigration Act 13 of 2000, sections 7, 29 and 34 – Immigration Act 13 of 2000, section 29(1) – Immigration Act 13 of 2000, section 29(1)(f)

### Mini Summary

The applicant was a Congolese who arrived in South Africa in 2000. When he tried to leave the country on a Congolese passport in November 2007 he was arrested on a warrant of detention issued under section 34 of the Immigration Act 13 of 2002 on the grounds that he was an illegal foreigner. In terms of regulation 26(4) promulgated under section 7 of the Act the immigration authorities had the power to order him to leave the country within 14 days. He was detained in a holding facility from where he launched this application to be released from custody, and to be granted at least six months in which to leave the country on his own. During oral argument his counsel conceded that the temporary residence permit stamped in his passport was invalid. There was also no dispute that his application for refugee status had been denied.

**Held** that the provisions of section 29(1)(f) of the Immigration Act applied to the applicant because he had been found in possession of a fraudulent temporary residence permit. As a result, he did not qualify for entrance into the country. He had not made out a proper case for his release under regulation 26(4). His application was dismissed.

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#### SERITI J

##### [1] Introduction

This matter came to court by way of motion.

In the notice of motion, the applicant is seeking an order in the following terms:

- 1.1 that the applicant be released from the respondents' custody in accordance with Form 21; and

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- 1.2 that the time period specified on Form 21 not be less than six months from date of issue.

##### [2] Founding affidavit

It was attested to by Mr Didier Ngoyi Ngoho, an adult male, currently in custody at Lindela Holding Facility

situated at Krugersdorp.

He alleges that he was born on 26 May 1969 in the Republic of Congo where he grew up and he has a Congolese passport.

Due to the gravity of the situation in his country of birth, he moved to Angola where he became a teacher. During his stay at Angola, he obtained an Angolan passport.

He came to the Republic of South Africa during March 2000. He was granted asylum seeker's status for which he applied using his Angolan passport. He later amended his application and used his Congolese passport. Due to his asylum seeker's status he was entitled to work in South Africa.

During the period 2000 and 2006 he worked for different institutions as a translator.

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In November 2006 he went to the Department of Home Affairs in Johannesburg to obtain a work permit. The officials provided him with an application form and also informed him which documents were required for such an application. He completed the application form and he was required to pay an amount of R1 500 for the work permit. The official who assisted him supplied him with a temporary residence permit that was valid until November 2008. The said official advised him that he can apply for a permanent residence status thereafter.

Two days later he collected the temporary work permit.

On 28 November 2007 he was on his way to Madagascar on a business trip. On his departure at OR Tambo International Airport he was arrested for an alleged false work permit. He is now aware that he was issued with a false temporary work permit by a corrupt official who also stole his money. He further alleges:

"There was no need for me to obtain a false work permit as it is clear that with due process I would eventually have received refugee status in anyway which would have allowed him to legally work in South Africa."

After his arrest he was detained at Kempton Park police station and on 21 December 2007 he was transferred to Lindela Holding Facility where he is currently held. He was informed by the officials at Lindela Holding Facility that he was going to be deported back to Congo. He has not been to Congo for the

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past ten years and he has no family or businesses or any other interests at all in Congo.

Whilst in detention, he gave instructions to his attorneys to assist him. His attorneys wrote a letter to the Department of Home Affairs requesting that he should be issued with a Form 21 order in terms of the Immigration Regulations. The latter order would allow him to be freed from detention and after such a release, he will again, through the proper channels, make an application to the Department of Home Affairs to reinstate his asylum seeker's status.

On 18 January 2008, during a telephonic conversation, his attorneys were advised by Mr Hlongwane, an official of Department of Home Affairs, that they have decided to deport him.

He further alleges that his deportation is eminent due to the corrupt official of the Department of Home Affairs.

There can be no prejudice to the Department of Home Affairs or to the people of South Africa if he is released on a Form 21 order giving him time to prepare and depart from South Africa on his own.

A confirmatory affidavit by Attorney McMenamin was attached. In the said affidavit, the said attorney stated, *inter alia*:

"I have advised my client that he can

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be released on a Form 21 whereafter we can apply for his Asylum Seeker Status to be reinstated."

[3] *Answering affidavit*

It was attested to by Mr Sifiso Aaron Sigasa, an adult male employed by the Department of Home Affairs as an immigration officer and stationed at OR Tambo International Airport. He alleges that the applicant is a national of the Republic of Congo (Brazzaville). On 28 November 2007 through OR Tambo Airport he attempted to leave South Africa on a passport issued in the Congo, his country of origin. The date of issue of the said passport is 6 August 2005 and it expires on 5 August 2010. It appears that the applicant had applied for refugee status or asylum in South Africa and his application was unsuccessful. According to the records of the Refugee Appeal Board, the applicant alleged that he arrived in South Africa by road during March 2000 and applied for an asylum seeker permit on 28 June 2005. His application for asylum was dismissed on or about 4 July 2006.

Applicant then appealed against the decision of Refugee Status Determination Officer. The applicant's oral appeal hearing was held on 13 September 2006. The appeal was dismissed on 31 July 2007.

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According to the decision of the Refugee Appeal Board the applicant did not meet the criteria for the granting of refugee status or asylum. The applicant's passport was issued by the Embassy of the Republic of Congo in Pretoria.

The applicant applied for a passport at the Congolese Embassy on 5 August 2005, which is several weeks after his application for asylum seeker's permit.

The applicant is currently detained at Lindela Holding Facility, on the strength of a warrant of detention issued pursuant to the provisions of section 34 of the Immigration Act read in conjunction with regulations promulgated thereunder.

He further alleges that there is no procedure in neither the Immigration Act nor the Refugee Act for the reinstatement of an asylum seeker status which has already been determined by the RSDO and confirmed by the Refugee Appeal Board.

The deportation of the applicant is imminent as there is no reason to allow him to sojourn in South Africa when he is clearly an illegal foreigner.

The detailed decision of the Refugee Appeal Board dated 31 July 2007 was attached as an annexure.

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[4] *Applicant's replying affidavit*

It was attested to by the applicant. He alleges that:

"I applied immediately on arrival in Republic of South Africa for Asylum Seeker and/or Refugee Status at Braamfontein and that the Home Affairs Office at Braamfontein was closed. I do not know what happened to the files, records and/or system, but thereafter I reported to the Crown Mines Office of the Department of Home Affairs. I renewed my permit every two months in accordance with the Refugee Act."

From 2002 until now he is on the Refugee system of the Department of Home Affairs.

He confirms that the oral appeal to the Refugee Appeal Board was held on 13 September 2006, but denies that he was informed about the outcome of the appeal.

As a result of the long delay in establishing his status in South Africa, and after 13 September 2006, he was advised by officials of the Department of Home Affairs to withdraw his application for refugee status as well as the appeal and rather apply for a work permit.

Consequently he duly withdrew his application for refugee status as well as the appeal and he applied for a work permit in November 2006.

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It has now come to his attention that his appeal has failed (although he withdrew it), he is requesting the court to grant him an opportunity to take the decision of the Refugee Appeal Board on review.

His passport was not issued by the Embassy of Congo in Pretoria but was issued in Congo. His friend took his (deponent's) documents with him to Congo and applied for a passport on his behalf. His friend brought the

passport along with him on his next visit to South Africa.

He entered the country with his Angolan passport and initially applied for refugee status with his Angolan passport.

He further alleges that:

"My dire concerns although communicated at the oral appeal, were not reflected in the judgment of the Refugee Appeal Board.

I am afraid to go back to the Congo because of the political unrest and ethnic killings that still subsist.

Due to my military background and my Uncle who was previously the Director of the Presidential Security, previously, I have no doubt that my enemies would without hesitation kill me, if I ever return."

A confirmatory affidavit, attested to by a candidate attorney, Maritza Breytenbach was attached. In the said affidavit, it is stated, *inter alia*, that she attended, on

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Friday, 8 February 2008, the offices of the Department of Home Affairs. She spoke to an immigration officer and requested the latter to confirm the applicant's status in South Africa. The immigration officer captured the data of the applicant on their internal computer system. The said official confirmed that the applicant's work permit is valid and further that the applicant's asylum seeker status was captured on their system from 2002.

#### **[5] Findings**

During oral argument, the applicant's counsel conceded that the temporary residence permit in the applicant's passport is invalid. The applicant does not have a valid work permit.

It is also not in dispute that the Refugee Status Determining Officer declined to grant refugee status to the applicant, and the applicant thereafter appealed to the Refugee Appeal Board.

According to the decision of the Refugee Appeal Board, the applicant arrived in South Africa without a passport in March 2000. He lodged an application for refugee status and he was interviewed by the Refugee Reception Officer on 28 June 2005. The application was declined by the Refugee Status Determination Officer on the same day and the applicant was duly informed. The decision of the Refugee Appeal Board, at paragraph 22 thereof, states the following:

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"From his testimony it is clear that the Appellant has not suffered any form of ill treatment amounting to persecution as required by section 3(a) of the Refugee Act and there is no disturbances or disruptions of public order in Congo presently that will not allow the appellant to return to Congo as required by section 3(b) of the Act."

The decision of the Refugee Appeal Board was made on 31 July 2007.

Section 29(1)(f) of the Immigration Act 13 of 2002 reads as follows:

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

The applicant was found with a fraudulent temporary resident permit and consequently he is affected by the provisions of section 29(1)(f) mentioned above. In the papers he does not make out a case for his entitlement to refugee status. Besides that, as mentioned earlier, the Refugee Appeal Board found that the applicant does not meet the requirements of section 3(a) of the Refugees Act 130 of 1998.

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In his founding affidavit, the applicant states that if he is released on a Form 21 order, he will have sufficient time to prepare and depart from the Republic of South Africa on his own.

In the following paragraph, which is paragraph 10.3 he states that:

"This will also give me the time and, with the assistance of my attorneys, to apply and reinstate my former status to wit Asylum Seeker. A permit which I have already obtained in 2000 and which would still have been valid if I had not obtained a false work permit through the corrupt actions of an official of the Department of Home Affairs."

In the light of the decision of the Refugee Appeal Board, even if released, the applicant cannot successfully apply and reinstate his former status to wit Asylum Seeker.

During oral argument, the applicant's counsel submitted that the applicant might want to take the decision of the Refugee Appeal Board on review, but he could not advance any justifiable reasons on the basis of which the applicant can take the decision of the Refugee Appeal Board on review.

It is not clear on the papers what preparations the applicant needs to make for his departure from the Republic of South Africa.

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Section 7(1)(g) of the Immigration Act, *supra*, authorises the Minister to make regulations relating to the forms of warrants, permits, certificates or other documents to be issued or used, or of declarations to be made, or of registers to be kept for purposes of the Act, and the particulars to be provided on or inserted in any such document, declaration or register.

Section 32 of the Immigration Act, *supra*, reads as follows:

- "(1) Any illegal foreigner shall depart, unless authorised by the Director-General in the prescribed manner to remain in the Republic pending his or her application for a status.
- (2) Any illegal foreigner shall be deported."

Regulation 26(4) of the Regulations promulgated in terms of section 7 of the Immigration Act, *supra*, reads as follows:

"An illegal foreigner who has satisfied an immigration officer that he or she will depart from the Republic as required in section 32(1) of the Act, shall be ordered by that immigration officer on a form substantially corresponding to Form 21 contained in Annexure A to depart from the Republic within a period of 14 days of having so been ordered: Provided that such period may, for good cause, be extended."

On the papers, the applicant, in my view, has not made a case to be released in accordance with regulation 26(4) mentioned above. In fact, the applicant, as

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mentioned above alleges that if he is released, with the assistance of his attorneys he will apply in order to reinstate his former status, namely asylum seeker, and at the same time states that he wants to be released so that he can prepare for his departure.

The court therefore makes the following order:

1. Application is dismissed.
2. Applicant is ordered to pay the costs of the respondents.