THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case No: 377/2018

In the matter between:

REATILE THABO MOCHEBELELE **APPELLANT**

and

DIRECTOR OF PUBLIC PROSECUTIONS GAUTENG LOCAL DIVISION, JOHANNESBURG **FIRST RESPONDENT**

MAGISTRATE, RANDBURG **SECOND RESPONDENT**

THE GOVERNMENT OF THE KINGDOM OF LESOTHO **THIRD RESPONDENT**

Neutral citation: *Mochebelele v Director of Public Prosecutions, Gauteng & others* (377/2018) [2019] ZASCA 82 (31 May 2019)

Coram: Wallis, Makgoka and Schippers JJA and Plasket and Gorven AJJA

Heard: 21 May 2019

Delivered: 31 May 2019

Summary: Enquiry in terms of s 10 of the Extradition Act 67 of 1962 – powers of magistrate – whether magistrate entitled to consider extraneous factors – Minister's powers in terms of s 11 of the Extradition Act.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Matojane J sitting as court of first instance):

1 Save to the extent reflected in paragraph 2 hereof, the appeal is dismissed with costs.

2 The order of the court a quo is substituted with the following:

'1 The order of the magistrate Randburg dated 16 November 2012, discharging Mr Reatile Thabo Mochebelele in terms of section 10(3) of the Extradition Act 67 of 1962, is set aside.

2 A warrant of arrest is hereby authorized against the said Mr Reatile Thabo Mochebelele, who is to be committed to prison to await the decision of the Minister of Justice and Correctional Services with regard to his surrender to the Kingdom of Lesotho.'

3 The Registrar of this court is directed to forward to the Minister of Justice and Correctional Services a copy of the record of proceedings in the Randburg Magistrates' Court, together with a copy of the judgments of the magistrate, the Gauteng Division of the High Court, Johannesburg, and this court.

JUDGMENT

Makgoka JA (Wallis and Schippers JJA and Plasket and Gorven AJJA concurring):

[1] The appellant, Mr Reatile Thabo Mochebelele, a Lesotho national, appeals, with leave of this court, against the judgment and order of the Gauteng Division of the High Court, Johannesburg (the court a quo). That court upheld an appeal by the first respondent, the Director of Public Prosecutions, Johannesburg (the DPP) and set aside an order by the second respondent, the magistrate Randburg, discharging the appellant in terms of s 10(3) of the Extradition Act 67 of 1962 (the Act). Instead, the court a quo ordered that the appellant is liable to be surrendered to the Kingdom of Lesotho to serve a prison sentence in that country.

[2] The appellant was convicted of the offence of bribery after an appeal to the Court of Appeal of Lesotho on 17 October 2008. On 10 December 2009 he was sentenced to an effective five years' imprisonment. The case against him and a co-accused arose from their involvement with a German company in the implementation of the Lesotho Highlands Water Project. By the time he was sentenced, the appellant had fled to South Africa, and he was sentenced in his absence. He applied for refugee status, which was refused by the Refugee Status Determination Officer on 4 December 2009.

[3] In a *note verbale* dated 25 February 2010 the third respondent, the Kingdom of Lesotho (the Lesotho government) requested the Republic of South Africa to extradite the appellant 'in order to effect the enforcement' of a

sentence imposed on him. The request was made in terms of the extradition treaty between South Africa and the Lesotho government signed on 19 April 2001 and subsequently ratified by South Africa on 29 November 2003.

[4] Pursuant to that request, the appellant was arrested in terms of s 5(1)(*b*) of the Act on 10 March 2010. He first appeared in court on 12 March 2010 and remained in custody until his discharge by the magistrate. On 23 November 2010, while the extradition proceedings were under way, the appellant's appeal to the Refugee Appeal Board against the decision of the Refugee Status Determination Officer, referred to in paragraph 2 above, was dismissed. The appellant then launched an application in the then North Gauteng High Court to review the dismissal of his refugee status application.

[5] That application was still pending when the appellant was discharged, but was subsequently dismissed on 17 March 2014. The appellant's application for leave to appeal against that order was dismissed by the high court on 19 September 2014. His further application for leave to appeal to this court was dismissed on 20 February 2015, and so was his application to the Constitutional Court, on 13 May 2015.

[6] On 16 September 2015 the appellant filed a notice with the African Commission for Human and Peoples' Rights (the African Commission) in the Gambia. In that notice, the appellant sought an order among others, that the South African government grant him refugee status. This was based on his assertion that his trial and conviction in Lesotho amounted to political persecution. That application was still pending when this matter was determined in the court a quo.

[7] There is a preliminary issue of condonation. The DPP was late in filing its review application. As already stated, the impugned order was granted on 16 November 2012. The review application was only launched on 11 August 2015, some two and half years after the event. The explanation was essentially that the delay was occasioned in the Randburg Magistrates' court, among others by the resignation of the magistrate who heard the extradition application, and the backlog in the office of the clerk of the court. This delayed the preparation of the record.

[8] The court a quo accepted the explanation and granted condonation. In this court, counsel for the appellant asserted that there was insufficient explanation for the delay, and that the court a quo erroneously granted condonation. Counsel initially submitted that the order of the magistrate amounted to administrative action. If so, the DPP would have been required, in terms of s 7 of the Promotion of Administrative Justice Act 3 of 2000 (the PAJA) to have launched the review application no later than 180 days after the date of it obtaining knowledge of the impugned order. However, after debate with the bench, counsel accepted the proposition that the PAJA is not applicable, and therefore the condonation application should be determined on the common law basis.

[9] It is now well settled that in considering applications for condonation, the court has a discretion, to be exercised judicially upon a consideration of all of the facts. In essence it is a question of fairness to both sides.[1] In the present case, one must adopt a practical and sensible approach. Although the delay was admittedly inordinate, the DPP cannot be blamed for it. Like any litigant, it had to grapple with the bureaucratic bottle-necks and ineptitude in the office of the clerk of the court in the Randburg Magistrates' Court. Perhaps the DPP could

[1] *United Plant Hire (Pty) Ltd v Hills & others* 1976 (1) SA 717 (A) at 720E-F; *Buffalo City Municipality v Asla Construction (Pty) Ltd* [2019] ZACC 15 para 54.

have been more persistent and made enquiries with greater frequency than it did. Even if the DPP must shoulder some blame, that is not so of the Lesotho government. It was not a party to the application, and had absolutely no power to do anything about the delay.

[10] Furthermore, in the ultimate end, the delay has not occasioned any prejudice to the appellant. Instead, it enured to his benefit. By the time the impugned order was made on 16 November 2012, the appellant's application to review and set aside the refusal to grant him refugee status was still pending in the high court. The high court delivered its judgment in that application on 17 March 2014. The appellant sought leave to appeal that decision, culminating in the dismissal of his application for leave to appeal on 15 May 2015 by the Constitutional Court.

[11] Had the DPP launched the application any time between the granting of the impugned order on 16 November 2012 and 14 May 2015 (when the Constitutional Court dismissed the application for leave to appeal) it would have been met with a response, either that the high court application was pending, or that the application for leave to appeal was pending. Viewed in this light, the delay worked to the appellant's advantage. It kept him out of prison for as long as it took to exhaust his appeal options. In effect the delay gave him precisely what he had sought before the magistrate, namely that his application for refugee status be disposed of before the extradition request was considered.

[12] Another consideration is the desirability of having finality of matters. The refusal of condonation to the DPP would not bring finality in the matter, as the Lesotho government would likely submit a fresh extradition request. This would further delay the matter. For all these reasons, I am of the view that it was in the

interests of justice that condonation was granted. There is no basis on which to interfere with the grant of condonation by the court a quo.

[13] I turn now to the merits of the appeal, which must be determined with reference to the framework of the Act and the relevant provisions of the extradition treaty. The relevant sections of the Act are ss 9, 10 and 11. In terms of s 9(1) an extradition enquiry has to be held before a magistrate in whose area of jurisdiction a person whose extradition to a foreign state is sought, has been arrested. Section 9(2) provides that the magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in South Africa.

[14] Section 10 sets out the issues the magistrate should consider at such an enquiry, and the competent orders the magistrate is entitled to make. The section, in relevant parts, reads:

'(1) If upon the consideration of the evidence adduced at the enquiry . . . the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's[2] decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.

(2) For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.

[2] The relevant Minister referred to in the Act is the Minister of Justice and Correctional Services.

(3) If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him.

(4) The magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary.'

[15] Section 11 reads:

'The Minister may –

(a) order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her; or

(b) order that a person shall not be surrendered –

(i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;

(ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;

(iii) at all, before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or

(iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion.'

[16] On a simple reading of ss 10 and 11, the magistrate and the Minister both play a role, but with carefully delineated duties and responsibilities. The magistrate's duties are confined to making certain preparatory findings, while

the Minister makes substantive and political decisions as regards the extradition or otherwise of a person sought by the requesting state.

[17] Section 10 makes plain that the magistrate who conducts an extradition enquiry must determine whether the person is liable to be surrendered to the foreign state concerned and, in the case where the person is accused of the commission of an offence, whether there is sufficient evidence to warrant a prosecution in the foreign state. If the magistrate makes a positive finding in relation to these matters, he or she has no residual discretion but to make an order committing that person to prison 'to await the Minister's decision with regard to his or her surrender.'[3]

[18] Before the magistrate, it was submitted on behalf of the appellant that the extradition request was not made in good faith, but for political purposes. It was alleged that the prosecution authority in Lesotho was being used by the Lesotho government as an instrument for political persecution of the appellant. Also, that the application to review the refusal of his refugee status was pending in the high court. For those reasons, it was contended, the appellant should be discharged.

[19] The magistrate's judgment is not a model of clarity. He devoted a considerable portion of it to the fair trial provisions enshrined in s 35(3) of the Constitution, without explaining the relevance thereof to the issue before him. Needless to say, those provisions bear no relevance to an extradition enquiry in terms of s 10. Very importantly, however, the magistrate made a finding that the provisions of s 10 were satisfied. In other words, he was satisfied that the

[3] See *Geuking v President of the Republic of South Africa and others* [2002] ZACC 29; 2003 (3) SA 34 (CC) para 15.

appellant had been convicted of an extraditable offence in Lesotho, and was thus liable to be surrendered to that country. I pause here to mention that on this finding, the magistrate was obliged to order the committal of the appellant to prison to there await the decision of the Minister with regard to his surrender. Despite being satisfied that the requirements of s 10, as stated above, were satisfied, the magistrate took the view that he was entitled to take into consideration the fact that the refugee status application was pending, and to decide that it should be determined first. On that basis, he made an order discharging the appellant.

[20] Aggrieved by that order, the DPP applied to the court a quo to review and set aside the decision. The application came before Matojane J who, on 25 August 2017, granted the order sought by the DPP. The learned judge concluded that the magistrate had acted ultra vires his powers conferred in s 10. He substituted the magistrate's order with one that the appellant was liable to be surrendered to the Lesotho government, and that, pending the decision of the Minister whether the appellant ought to be extradited, the appellant be detained in prison. The appellant appeals against that order.

[21] In this court, as he did in the court a quo, the appellant supports the decision of the magistrate. It was contended on his behalf that the magistrate was correct to find that in arriving at his decision, he was not limited to the provisions of s 10 only, but could take into consideration extraneous factors such as the admitted political instability in Lesotho at the time. Counsel sought to buttress his argument with reference to article 4(4) of the extradition treaty, which provides for discretionary refusal of extradition where, in 'exceptional cases,' the requested state, while also taking into account the seriousness of the offence and the interests of the requesting state, considers that, because of the

personal circumstances of the person sought to be extradited, the extradition would be incompatible with humanitarian considerations.

[22] The argument based on article 4(4) suffers the same fate. Apart from the fact that the magistrate did not purport to rely on this article in his judgment, there is, in any event, no merit in the contention. The magistrate could not competently discharge the appellant based on the circumstances set out in article 4(4). The discretionary power to refuse an extradition in 'exceptional circumstances,' properly construed, belongs to the Minister, and not the magistrate. That is plain from s 11 of the Act which incorporates the provisions of article 4(4). That must be so because of the clear wording of the article. The power is given to the 'requested state' which might consider the interests of 'the requesting state' to consider whether the extradition would be incompatible with humanitarian considerations. Clearly, this falls squarely within the purview of international relations between states, and not of the courts.

[23] It was therefore not within the magistrate's remit to determine whether it would be unjust or unreasonable to extradite the appellant. The magistrate's power to discharge the person is limited to only two instances in terms of s 10(3): if he or she finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time.

[24] In *Director of Public Prosecutions: Cape of Good Hope v Robinson*[4] it was concluded that a magistrate conducting an enquiry in terms of s 10(1) has no power to consider whether the constitutional rights of the person sought by a

[4] *Director of Public Prosecutions: Cape of Good Hope v Robinson* [2004] ZACC 22; 2005 (4) SA 1 (CC) para 49.

requesting state may be infringed upon extradition. That aspect must be considered by the Minister in terms of s 11.

[25] It follows that the magistrate was wrong to take into consideration the pending refugee status review application. As correctly pointed out by the court a quo, it was open to the magistrate in terms of s 10(4) to note his concerns in his report to the Minister, including the fact that there was a pending review application. The court a quo was accordingly correct in setting aside the order of the magistrate.

[26] It was submitted on behalf of the appellant that upon setting aside the decision of the magistrate, the court a quo ought to have remitted the matter to the magistrates' court for determination, instead of 'attempting to correct the decision by substituting it with its own.' It was contended that s 9(1) was peremptory that an extradition enquiry ought to be held by a magistrate. In this case, so went the submission, the enquiry was not completed on account of the pending refugee status review application.

[27] It is trite that a court should be slow to substitute its own decision for that of an administrative authority, and should do so sparingly and in exceptional circumstances.[5] In considering whether such exceptional circumstances are present warranting substitution in a given case, the Constitutional Court in *Trencon Construction v Industrial Development Corporation of South Africa (Pty) Ltd & another* [2015] ZACC 22; 2015 (5) SA 245 (CC) paras 44- 55, stated two key factors to be considered in such an enquiry: whether a court is in as good a position as the administrator to make the decision, and whether the

[5] *Gauteng Gambling Board v Silverstar Development Ltd & others* [2005] ZASCA 19*;* 2005 (4) SA 67 (SCA) paras 28-29.

decision of an administrator is a foregone conclusion. Other relevant factors would include delay, bias or the incompetence of an administrator.

[28] The court further explained that a court will not be in as good a position as the administrator where the application of the administrator's expertise is still required and a court does not have all the pertinent information before it. Once a court has established that it is in as good a position as the administrator, it is competent to enquire into whether the decision of the administrator is a foregone conclusion. A foregone conclusion exists where there is only one proper outcome of the exercise of an administrator's discretion and it would merely be a waste of time to order the administrator to reconsider the matter. There can never be a foregone conclusion unless a court is in as good a position as the administrator.

[29] In the present case, the function which a magistrate performs in terms of s 10 requires no technical knowledge or expertise. It concerns a simple application of the law. Thus, the court a quo was in as good a position as the magistrate. All the facts were before it. What is more, the provisions of s 10(1) had been met by the finding of the magistrate that the appellant was liable for surrender. Besides, the only basis on which the appellant was discharged, namely the pending refugee status review application, has dissipated. The appellant has exhausted all his appeal remedies as far as the refugee status application is concerned.

[30] Given these considerations, it follows that the remittal would have been an exercise in futility. The outcome of the enquiry was a foregone conclusion. The court a quo was accordingly correct in not remitting the enquiry. However, in its substituted order, it omitted to comply with the provisions of s 10(4), in terms of which a copy of the record of the proceedings has to be forwarded to

the Minister immediately. That should be rectified, and it is reflected in the order of this court.

[31] There remains the question of costs. Counsel for the appellant submitted that the case raises issues of general importance and public interest, particularly the applicability of s 10 of the Act. Therefore, seeking the protection of the *Biowatch* principle,[6] counsel urged us to make no order as to costs. I am of the view that, important as the case undoubtedly is to the appellant, it raises no issues of public importance or public interest. The issue involved the application of settled law to the facts. Costs should follow the result.

[32] In the result, the following order is made:

1 Save to the extent reflected in paragraph 2 hereof, the appeal is dismissed with costs.

2 The order of the high court is substituted with the following:

'1 The order of the magistrate Randburg dated 16 November 2012, discharging Mr Reatile Thabo Mochebelele in terms of section 10(3) of the Extradition Treaty Act 67 of 1962, is set aside.

2 A warrant of arrest is hereby authorized against the said Mr Reatile Thabo Mochebelele, who is to be committed to prison to await the decision of the Minister of Justice and Correctional Services with regard to his surrender to the Kingdom of Lesotho.'

3 The Registrar of this court is directed to forward to the Minister of Justice and Correctional Services a copy of the record of proceedings in the Randburg magistrates' court, together with a copy of the judgments of the magistrate, the Gauteng Division of the High Court, Johannesburg, and this court.

---

[6] *Biowatch Trust v Registrar Generic Resources & others* [2009] ZACC 14; 2009 (6) SA 232 (CC).

T M Makgoka
Judge of Appeal

APPEARANCES:

For the Appellant:	CA da Silva SC (with him TR Masevhe) Instructed by: Rammutla-at-Law Inc., Pretoria Maree & Partners, Bloemfontein
For the First Respondent:	D Barnard Instructed by: State Attorney, Johannesburg State Attorney, Bloemfontein
For the Third Respondent:	T Mpaka Instructed by: Du Preez Liebertrau & Co., Maseru Kramer Wiehmann & Joubert, Bloemfontein