



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A437/17

In the matter between

LEE NIGEL TUCKER

APPELLANT

And

THE STATE

RESPONDENT

CORAM: DOLAMO J; THULARE AJ

DATE: 21 FEBRUARY 2018

JUDGMENT

THULARE AJ

[1] The Appellant has noted two appeals against the decisions of the magistrate of Cape Town. It is the section 13(1) of the Extradition Act 67 of 1962 (the Act) appeal against the decision of the magistrate to issue a committal order in respect of appellant's surrender for extradition to the United Kingdom, as well as a section 13(3) decision to refuse his application for bail pending the determination of the first appeal, in terms of the Act. This judgment is on the point raised in the context of the appeal from the order for the refusal of bail.

[2] The appeal served before Binns-Ward J sitting as a single Judge during the recess before the commencement of the first term of the High Court for 2018. The learned Judge held the view that appeal proceedings in terms of the Act, whether they be the section 13(1) appeal itself or an appeal from an order made by the magistrate in respect of bail in terms of section 13(3) of the Act are primarily of a civil rather than a criminal nature.

[3] The reasoning of Binns-Ward J is that Municipal Courts in extradition proceedings are not concerned with the guilt or innocence of the party whose extradition has been requested, and at no stage fall to be seized of the trial of the allegations giving rise to the alleged offence in respect of which the person's surrender is sought. The proposition is that the position is therefore distinguishable from, and not governed by the provisions of section 65(1)(b) of the Criminal Procedure Act 51 of 1977 (CPA) which, exceptionally, afford a judge of the High Court, sitting alone, jurisdiction to entertain and determine appeals against the refusal of bail by a magistrate. According to Binns-Ward J the position is instead governed by the provisions of section 14(3) of the Superior Courts Act 10 of 2013 which reads:

"Except where it is in terms of any law required or permitted to be otherwise constituted, a court of a Division must be constituted before two Judges for the hearing of any civil or criminal appeal."

The learned Judge concluded that he did not have jurisdiction, sitting alone, to hear or decide the matter and postponed the matter for arrangements to be made for its re-enrollment for hearing by two Judges.

[4] The issue raised is whether an appeal against the decision of a magistrate on a bail application in extradition proceedings is proceedings of a civil or criminal nature. This question has an impact in these proceedings as it is a relevant, if not a decisive factor, as to whether the appeal was dealt with procedurally correct in respect of time frames for its prosecution, for it helps amongst others to determine whether an application for condonation to comply with timelines was necessary or not. We are not sitting as a court of appeal on the decision of Binns-Ward J, but as a court of first instance following his ruling.

[5] In *Banger v S* (195/2015) [2015] ZASCA 79 (28 May 2015) (*Banger*) it is said:

"[5] There is no doubt that the appellant has the right to appeal against the refusal of bail. That is provided for in s 35(3)(o) of the Constitution. What is in issue is the procedure applicable to an appeal against the refusal of bail ..."

[6] In *Sita and Another v Olivier NO and Another* 1967(2) SA 442 (A) the court said at 449 B-E:

"It is in my view not the form of the procedure adopted but the subject matter of the proceedings which determines their character as either a civil or criminal matter ... Nor in my view does the fact that the relief was sought by way of a declaratory order, interdict and mandamus make the proceedings before the Court a quo a civil matter originating in that Court."

[7] In *S v Botha* 2002 (1) SACR 222 (SCA) (*Botha*) at paragraph 5 the court held that a bail application is clearly related to the arrest, detention and prosecution of an offence and that it is in essence criminal in nature. The position that a bail

application is in essence criminal in nature was confirmed recently by the SCA in *Banger, supra* [para 6].

[8] The preamble to the Act reads as follows:

“To provide for the extradition of persons accused or convicted of certain offences and for other incidental matters.”

The role of a magistrate in extradition matters is related to the arrest, detention and prosecution of persons accused or convicted of extraditable offences or offences included in an extradition agreement between party States. The enquiries that magistrates conduct are to determine whether persons accused or convicted are liable on the basis of sufficient evidence to warrant their surrender for prosecution. The substance of the industry of the magistrate, in my view, makes the proceedings criminal in nature - [*Minister of Justice v Bagattini and Others* 1975 (4) SA 251 at 267G-H].

[9] Amongst others, the judicial officer should duly and honestly apply his or her mind to the question of the nature, scope and content of the available evidence, what is alleged to have happened and the nature of and role played by the arrested person in that which is alleged to have happened, as the facts which inform the presence of the arrested person before him or her.

[10] With specific reference to an appeal against a refusal to grant bail, the Act itself makes reference to the application of section 66, 67, 68, 307(3), (4) and (5) of the CPA applicable. It leaves no doubt that the proceedings are criminal in nature. Furthermore, the Act does not itself provide for its own process of a bail

application. In my view, it cannot be gainsaid that an application for bail in terms of section 13(3) of the Act is considered by a magistrate applying the provisions regulating a bail application of an accused in court in terms of section 60 of the CPA, guided by section 13(4) with regard to referencing. It follows, in my view that section 50, 60 and 65 of the CPA cannot be said to be not applicable to bail proceedings arising out of extradition matters simply because they are not expressly referred to in the Act.

[11] It would be absurd in my view to suggest that the CPA only applies to the Act when bail is granted as envisaged in section 13(4), but that it does not apply when bail is refused. In my view, the reasonable explanation as to why the Act does not refer expressly to section 65, is simply because section 13(1) of the Act already provides for appeal rights against the decision of the lower court.

[12] Furthermore, the Act provides that an enquiry before a lower court 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 the Republic and have the same powers including that of admitting to bail any person detained as he has at a preparatory examination - [section 9(2) of the Act]. Where in a preparatory examination, an accused is arraigned for trial by another court, section 141(4)(c) of the CPA provides as follows:

“141 Procedure where accused arraigned for trial

4(c) If the accused is committed for trial by another court, the court committing the accused may direct that he be detained in custody, whereupon the provisions of Chapter 9 shall apply with reference to the release of the accused on bail.”

It is inherent in the nature of extradition matters that the person who is the subject matter of those proceedings would be tried by another court other than the lower court seized with the enquiry. Sections 58 to section 71 of the CPA are within Chapter 9, which deals with bail. It follows in my view, that section 65 of the CPA is applicable to bail applications in extradition proceedings.

[13] At para 10 of *Banger, supra*, the court continued:

"[10] Section 65 of the Criminal Procedure Act provides for an appeal to the High Court against the refusal of bail or the imposition of a condition of bail by a lower court. In terms of s 65A(1), the Director of Public Prosecutions (DPP) may appeal to the High Court against a decision of a lower court to release an accused person on bail or against the imposition of a condition of bail."

Commenting on the predecessor to section 65, the court said in *S v Mohamed* 1977 (2) SA 531 (A) at 539G-540A:

"However, the proceedings under sec 97 of the Code originate in and are closely associated with the accused's arrest, detention and prosecution for a criminal offence. Hence, although they are civil in form, they are criminal in substance, and must be so regarded for the purposes of the relevant sections of the Supreme Court Act. See Sita's case, supra, 1967(2) SA at pp 448 in fin. to 449E, which is directly in point."

[14] In my view, the premise from which Binns-Ward J moved is problematic. Bail applications throughout the Republic are generally heard in the district courts, including for matters triable in the Regional Courts and the High Courts. In bail proceedings, just like in extradition proceedings which are also heard by the district courts, magistrates are not concerned with the guilt or innocence of the party whose status is being determined, and at no stage fall to be seized of the

trial of the allegations giving rise to the alleged offence in respect of which the person's freedom is sought in matters triable in the Regional and High Courts. I am therefore unable to find the distinction that forms the basis to conclude that the position is therefore distinguishable from, and is not to be governed by the provisions of section 65(1)(b) of the CPA.

[15] At para 14 in *Banger supra* it is said:

"[14] Bail appeals are inherently urgent in nature. An accused person should not be deprived of his or her constitutional rights to freedom and to freedom of movement for longer than is reasonably necessary."

The majority of appeals against the refusal of bail by the lower courts do not necessarily require the attention of a full bench. The appeals are generally noted immediately after the refusal of bail and a single Judge of the High Court should generally dispose of these appeals more expeditiously and cost-effectively, as envisaged in section 65 of the CPA. In my view, a bail application does not become complex to warrant the attention of two Judges simply because it arises out of extradition proceedings.

[16] Furthermore, this question directly impacts on case-flow management, with specific reference to maximum allocation of minimum human resources, as an English man would say, the right horses for the course. I am not inclined to understand the Act, read together with the Superior Courts Act and the CPA, to enjoin a Judge President to allocate two Judges for urgent matters even where the matters do not necessarily require such attention. In my understanding, the appeal from a person aggrieved by the decision of a magistrate in relation to bail proceedings may be heard by a single Judge.

[17] The Supreme Court of Appeal has decided that bail application proceedings are in essence criminal in nature [*Botha, supra*], a position which the same court confirmed in *Banger, supra*. In my view, bail application proceedings in extradition proceedings are in essence criminal in nature, as they in substance deal with the determination of sufficient evidence to warrant the arrest, detention and surrender for prosecution of persons accused or convicted of certain offences and for incidental matters. *Banger, supra*, further confirms that Section 65 of the CPA is a mechanism for an appeal to the High Court against the refusal of bail or the imposition of a condition of bail by a lower court and that bail appeals are inherently urgent in nature.

[18] It is necessary to conclude by making the observation that the duty of a lower court in extradition proceedings includes administrative work, for example, furnishing the Minister of Justice (the Minister) with particulars relating to the issue of warrants which the magistrate issued – [section 8(1)] as well as *quasi-judicial* work which includes cancelling warrants issued, at the direction of the Minister, or oversight of directions by the Minister for the immediate discharge of a person arrested pursuant a warrant issued by a magistrate – [section 8(2)] as well as furnishing the Minister with reports on enquiries – [section 10(4)]. Extradition proceedings are *sui generis*.

For these reasons I find that:

Extradition proceedings are *sui generis*, bail application in extradition proceedings are in essence criminal in nature, inherently urgent in nature, that section 65 of the CPA is the applicable provision for an appeal to the High Court against a decision of the lower court and therefore may be heard by a single Judge of the High Court.

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DM THULARE
ACTING JUDGE OF THE HIGH COURT

I agree.

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MJ DOLAMO
JUDGE OF THE HIGH COURT

Counsel

Appellant: Advocate L Van Der Berg
Respondent: Advocate C Burke

Instructing Attorneys

Appellant: Mathewson Gess Inc. Attorneys
Respondent: Director of Public Prosecutions
JUDGMENT READ AND DAY(S) IN COURT: 21 February 2018