

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

REPUBLIC OF SOUTH AFRICA

Case No. 28126/07

DATE:01/09/2010

In the matter between:

DIRECTOR OF PUBLIC PROSECUTIONS;
SOUTH GAUTENG HIGH COURT

Applicant

and

STEPHEN HOLZEN N.O.
DISTRICT COURT MAGISTRATE, KEMPTON PARK

First Respondent

RADOVAN KREJCIR

Second Respondent

JUDGMENT

MEYER, J

[1] The present review application arises from an extradition enquiry in terms of s 9 of the Extradition Act 67 of 1962 ('the Act') relating to the surrender of the second respondent to the Czech Republic. The Director of Public Prosecutions, South Gauteng High Court applies for the review and setting aside of the presiding magistrate's refusal to recuse himself from presiding at the second respondent's extradition enquiry. The presiding magistrate, who is cited as the first respondent, abides the decision of this court. The second respondent opposes the relief claimed in this application.

[2] The presiding magistrate reached a decision on a bail application for the second respondent, who, in terms of such decision, was released on bail *inter alia* on condition that an amount of R1 million bail money be paid despite the second respondent's offer to pay an amount of R5 million. One of the pertinent issues raised in the bail application was the strength of the case against the second respondent, which is obviously relevant in determining the incentive that he in consequence might have to attempt to evade his extradition enquiry if he was released from detention. In giving judgment, the presiding magistrate *inter alia* found the strength of the case against the second respondent on certain charges to be 'certainly questionable, seeing most of which depends on the credibility of a single witness' and he stated that he had gained the impression that there was an element of truth to the second respondent's contention that he was fleeing from persecution and not prosecution.

[3] The prosecutor brought an application for the recusal of the presiding magistrate after he had given judgment on the bail application. It was contended that certain findings made in the course of his judgment on the bail application disqualified the first respondent from presiding at the second respondent's extradition enquiry. The application for his recusal was heard by the presiding magistrate and dismissed.

[4] It is appropriate at the outset to refer to the well-known passage in the case of *R v Sussex Justices, ex parte McCarthy* [1924] 1 KB 256 ([123] All ER Rep 233) at p 259:

'A long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.'

[5] In following the approach to an application for judicial recusal as laid down by the Constitutional Court in *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 1999 (4) SA 147 (CC) (paras [35] – [48]) and refined in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafood Division Fish Processing)* 2000 (3) SA 705 (CC) (paras [11] – [17]), and in applying the ‘ultimate test’ or legal standard whether ‘... the reasonable man would reasonably have apprehended that the trial Judge would not be impartial in his adjudication of the case’ (per Brand AJA, in *S v Shackell* 2001 (4) SA 1 (SCA), at p 11A – B), it must, in my judgment, inevitably be concluded that the state discharged the substantial *onus* which rested on it in its application for the recusal of the presiding magistrate from conducting the extradition enquiry. It was not a ‘tenuous or frivolous objection’, but one of ‘substance’.

[6] The second respondent is accused of having committed certain offences in the Czech Republic. A central issue, unless s 10(2) of the Act applied, upon which the presiding magistrate was required to make a finding at the conclusion of the extradition enquiry was whether or not there was ‘sufficient evidence’, as envisaged in s 10(1) of the Act, to warrant the second respondent’s prosecution for such offences in the Czech Republic. The prosecutor indicated to the presiding magistrate that essentially the same evidence would be produced on that issue at the extradition enquiry as was presented by the state on the issue of the strength of the case against the second respondent at the bail proceedings. The presiding magistrate, during the proceedings for his recusal, referred to his earlier finding relating to the strength of the case against the second respondent as ‘... a passing remark’, which it was clearly not. It was a finding on a material issue in the bail

application. There were, in my view, reasonable grounds on the part of the state for apprehending, at the stage when judgment was given on the bail application, that the presiding magistrate would not be impartial in finding on the central issue of the sufficiency or otherwise of the evidence at the conclusion of the extradition enquiry in the light of the findings that the presiding magistrate had already made in his judgment on the bail application *inter alia* about the questionable strength of the case against the second respondent and the element of truth to the second respondent's contention that he was fleeing from persecution and not prosecution.

[7] A reading of the record of the proceedings further shows that the presiding magistrate openly displayed his resentment of the application for his recusal to the parties, the result of which was most likely, to borrow the words of Hefer JA in *Moch v Nedtravel (Pty) Ltd t/a American Express travel Service* 1996 (3) SA 1 (SCA), at p 131 – J, ‘... to fuel the fire of suspicion on the part of the applicant for recusal.’ A few examples suffice. During argument the presiding magistrate admonished the prosecutor, unjustifiably in my view, saying that he was ‘playing games’ and that he was ‘treading on ice’. The presiding magistrate mentioned to the parties that he had discussed the matter with his colleague, Mr. Oberholzer, who indicated to him that ‘... at a stage an application was made by the State to transfer this matter to Johannesburg Court for hearing’, and, in giving judgment, the presiding magistrate said the following:

‘This application is emanating from the Prosecutor himself and I might just place on record that earlier before I was tasked with entertaining the bail application, the very same prosecutor for no apparent reason known to us in any event tried to have the matter transferred to Johannesburg Court and obviously when he realised that he is not going to succeed with this or unable to motivate his request he withdrew the application. But that certainly left the impression that the State was trying to do a bit of forum shopping.’

In giving judgment the magistrate also said this:

'I cannot help but feel that there are a certain element of sour grapes on behalf of the State that bail was granted and that this is in fact the real reason behind the request for my recusal ...'

The presiding magistrate, in my view, lost sight of the fact that, particularly in dealing with the application for his recusal, he was required to act with '*conspicuous impartiality*' and he should have been '*... primarily concerned with the perceptions of the applicant for his recusal*'. *Moch (supra)*, at pp 13I – 14C. What is particularly disturbing is the following statement by the presiding magistrate to the state counsel:

'Alright, so Mr. Barnard, one last aspect from you? *I was actually hoping to spring this on you as a surprise when I gave my judgment on your application* but as correctly pointed out by Mr. van der Westhuizen, the provisions of the Extradition Act clearly indicate that much more weight would be attached to the Extradition request because it is to be regarded as conclusive proof.' (My emphasis).

[8] I am of the view that the matter should be remitted to a magistrate, other than the first respondent, for the conduct of a fresh enquiry in terms of the provisions of the Act. Compare: *S v Harksen* 1999 (2) SACR 448 (CPD), paras [69] – [75].

[9] Finally, the second respondent seeks the costs of an interlocutory application, which he brought in terms of Rule 30 of the Uniform Rules of Court. Various disputed issues of fact arose on the papers in that application. The parties, however, are *ad idem* that the causes of complaint forming the subject-matter of the interlocutory application had all been removed by the time of the hearing of the main review application. One of the grounds of objection relates to the voluminous irrelevant matter (records and annexures) that were included in the main review application. This objection was validly taken. Counsel for both parties furnished us with reading lists of the relevant parts of the record. I am accordingly of the view that the applicant in the main review application should be ordered to pay the second respondent's costs of the interlocutory application.

[10] In the result the following order is made:

1. The review is upheld.
2. The order of the first respondent dismissing the application for his recusal is set aside and replaced with an order granting the application for the first respondent's recusal from the extradition enquiry.
3. The extradition proceedings against the second respondent are set aside and the matter is remitted to the magistrate's court, Kempton Park, for a new enquiry to be conducted by another magistrate in terms of the relevant provisions of the Extradition Act 67 of 1962.
4. The second respondent is ordered to pay the applicant's costs of the review application.
5. The applicant is ordered to pay the second respondent's costs of the interlocutory application.

COPPIN, J

[11] I agree with my brother Meyer, J.

P.A. MEYER
JUDGE OF THE HIGH COURT

P. COPPIN
JUDGE OF THE HIGH COURT