

**IN THE HIGH COURT OF SOUTH AFRICA (GAUTENG NORTH AND SOUTH
PROVINCIAL DIVISION)**

CASE NO.: A972/2007

**DATE: /0
3/2009**

In the matter between

RICARDO MLOTSHWATHE STATE

JUDGMENT

WEBSTER 3

1. This is an appeal in terms of section 13 of the Extradition Act No. 67 of 1962, against an order of a Magistrate in the Sebokeng District Court granting an order that the appellant be extradited to the Republic of Botswana to stand trial on various charges including a charge of armed robbery committed by the appellant and other persons at the Gaborone Airport, Botswana on 18 December, 2006.
2. Having heard argument the appeal was dismissed and we undertook to furnish our reasons therefore in due course. They are now set out below.
3. It was common cause that at all relevant times hereto, extradition between the Republic of Botswana and the Republic of South Africa was governed by the provisions by the Extraditions Act No. 67 of 1962 ("the Act") and an Extradition Treaty entered into between the respective parties in 1969, as set out in Proclamation No. R118

of 1969 as contained in Government Gazette No. 2376 dated 2 May, 1969.

4. Before dealing with the issues raised in the appeal, it is necessary to place certain background facts on record. Among the persons suspected of having been implicated in the robbery were Tebogo Mafisa and the appellant. Tebogo Mafisa was arrested by Interpol Police on 6 January, 2007, in Sebokeng. He appeared in the Sebokeng Magistrate's Court charged individually. On 16 January, 2007, an application for the provisional arrest of the appellant as well as Tebogo Mafisa as provided for in article 15 of the Extradition Treaty was faxed from the Interpol Police in Gabarone to the South African Interpol authorities. The appellant was arrested by Interpol in Everton and appeared in the Johannesburg Magistrate's

Court on 19 February, 2007. On his appearance the matter was transferred to the Sebokeng Magistrate's Court. A different charge sheet was prepared in respect of the appellant. In due course an official application for the extradition of Mafisa and the appellant was received by the South African authorities. In the meantime the matters in the Sebokeng Magistrate's Court continued to be dealt with separately until the date when the application was heard when both matters were then consolidated.

5. At the hearing various documents were handed into court. These included *inter alia*
- (i) a request for the extradition in terms of section 9 and 10 (later amended to section 12) of the Extradition Act.
 - (ii) An application for the extradition of Mafisa and others by the Republic of Botswana with various official documents annexed thereto. The documents include affidavits which were signed and attested by various commissioners of oaths and other State officials. The documents were all duly

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authenticated and two *apostilles* were included in the bundle so handed in. The documents referred to were admitted in accordance with the provisions of article 11 of the Treaty which provides that "... any deposition, statement on oath or affirmation, any record of a conviction, any warrant... may be permitted by the law of the requested party" shall be admitted in evidence. No evidence was led by either of the parties.

6. Various grounds were initially raised in the notice of appeal. When the matter was argued before us, however, Mr Van Vuuren, who appeared for the appellant, intimated that he was restricting his argument to the jurisdictional point relating to the transfer of the matter from the Johannesburg District Court to the Sebokeng District Court. He did not formally abandon his other grounds of appeal and I shall touch on such grounds therefore in the judgment in due course.

7. The grounds of appeal relied upon were firstly the jurisdictional point alluded to above and in particular reliance had been placed on the fact that the trial Magistrate in the Johannesburg District Court had lacked the jurisdiction to transfer the matter from the district in which the appellant was arrested to the Sebokeng District Court. I shall innumerate the other grounds namely:

- (ii) that the documents submitted by the Botswana Government and handed into court and accepted by the trial court were not properly authenticated and therefore ought not to have been accepted as evidence;
- (iii) the trial Magistrate erred in finding that the possibility of corporal punishment on the appellant was a remote possibility;

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- (iv) reliance on a section 125 certificate in accordance with the provisions of the Criminal Procedure Act from Johannesburg to Sebokeng was irregular as in provisions of section 125 of the Criminal Procedure Act cannot override peremptory provisions of section 9 of the Extradition Act;
- (v) that the provisions of section 9(3) of the Extradition Act were not complied with.

Section 9 of the Extradition Act reads as follows:

"9. Persons detained under warrant to be brought before magistrate for holding of an enquiry. - (1) Any person detained under a warrant of arrest or a warrant for his further detention, shall, as soon as possible be brought before a magistrate in whose area of jurisdiction he has been arrested, whereupon such magistrate shall hold an enquiry with a view to the surrender of such person to the foreign State concerned.

(2) Subject to the provisions of this Act 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 the Republic and shall, for the purpose of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he has at a preparatory examination so held."

8. My understanding of section 9(1) is that its provisions are peremptory i.e. the Magistrate in whose area of jurisdiction a person has been arrested is obliged to hold the enquiry for the surrender of the person whose extradition is sought. (Garrigo v DPP WLD and Others 2007(1) SACR 1 (para 4)) Section 9(2) of the Act specifies the procedure or manner in which the Magistrate holding the enquiry is to conduct such enquiry, namely "a preparatory examination ... of a person charged with having

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committed an offence in the Republic of South Africa ... and shall, for the purposes of holding such enquiry, have the same powers ... as he has at the preparatory examination so held".

9. The Extradition Act does not define what a preparatory examination is. In my view this was clearly not necessary for the legislature to do. The Act is specifically directed at a person who has allegedly committed criminal acts: that is clearly basic and fundamental. The only statute that provides for procedures and related criminal procedures in this country is Criminal Procedure Act 51 of 1977.

10. In my view the preparatory examination referred to in section 9(2) of the Extradition Act can be none other than that which is provided for in chapter 20 (sections 123 to 138 of the Criminal Procedure Act).

11. It is necessary for purposes of determining what "the same powers as he has at the preparatory examination" a Magistrate has under the provisions of section 9(2) of the Extradition Act. The relevant section for purposes of this judgment is section 125 of the Criminal Procedure Act which reads as follows:

"125. Attorney-general may direct that preparatory examination be conducted at a specified place. - (1) Where an attorney-general instructs that a preparatory examination be instituted or that a trial be converted into a preparatory examination, he may, if it appears to him expedient on account of the number of accused involved or of excessive inconvenience or of possible disturbance of the public order, that the preparatory examination be held within his area of jurisdiction in a court other than the court in which the relevant proceedings were commenced, direct that the preparatory examination be instituted in such other

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court or, where a trial has been converted into a preparatory examination, be continued in such other court.

(2) The magistrate or regional magistrate shall, after advice of the decision of the attorney-general, advise the accused of a decision of the attorney-general and adjourn the proceedings to such other court, and thereafter forward a copy of the record of the proceedings, certified as correct by the clerk of the court, to the court to which the proceedings have been adjourned.

(3) The court to which the proceedings are adjourned under subsection (2), shall receive the copy of the record referred to in that subsection, which shall then form part of the proceedings of that court, and shall proceed to conduct the preparatory examination as if it were a preparatory examination instituted in that court."

12. It is clear from a reading of section 125(2) that the transfer of Extradition proceedings is based essentially on expedience and not primary jurisdiction. Even though it is the Director of Public Prosecutions (Attorney-General) who initiates the transfer of the preparatory examination, from one court to another, the court before which the preparatory examination is pending has to consider the interests of the arrested person who are accused and safeguard their interests. The transfer may not be ordered in my view, simply at the behest of the Director of Public Prosecutions and for the convenience of only the State. The court is obliged to take into account the interests of the accused and satisfy himself/herself that such a transfer is in accordance with justice and does not adversely affect the interests of the accused person. At the expense of repetition, it is important to bear in mind that there were two persons arrested in the same case; it was the same two persons the application for extradition related to. As it transpired later both these persons were represented by the same

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counsel. Again at the expense of repetition, the appellant was transferred to Sebokeng with his express consent and with his agreement. Upon appearing in the Sebokeng case he again confirmed his consent when he first appeared without his legal representative. He did so again when his legal representative was present in court. The legal representative confirmed this. The Magistrate in Sebokeng therefore commenced the hearing with the express consent of the appellant to the jurisdiction of the court. In addition the court was furnished with a certificate issued by the Director of Public Prosecutions in terms of section 125 of the Criminal Procedure Act. For the record, the consent of the appellant was withdrawn in the course of argument whether extradition should be granted or not: the Magistrate declined to accept such a withdrawal of consent.

It is against this background that the question of whether the Magistrate in Johannesburg before whom the appellant first appeared was ignorant of the provisions of section 9(1) and (2) of the Extradition Act as well as section 75 and section 125(2) of the Criminal Procedure Act arises. There is no way in the absence of the charge sheet of the proceedings in the Johannesburg court that one can determine the answer to the first question. There is further nothing in the record to indicate that the Magistrate in the Johannesburg court referred to either section 75 or section 125(2) of the Criminal Procedure Act 51 of 1977 ("the CPA") when the appellant appeared before him and the matter was transferred to Sebokeng. There is nothing in section 75 of the Criminal Procedure Act which suggests that (i) a Magistrate has the power to transfer any matter before him/her to another court save where the court before which the accused is appearing for the first time in respect of such offence either lacks jurisdiction (section 75(l)(a) and (b) of the Criminal Procedure Act); or (ii) where the court has been

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informed that the case is of such a nature or magnitude that it merits punishment in excess of the jurisdiction of the Magistrate's Court but not the jurisdiction of a Regional Court" (Section 75(2)(b) of the Criminal Procedure Act); (iii) where the court only for the purposes of bail and the prosecutor has designated a court for the purposes of trial (Section 75(3) of the Criminal Procedure Act). It is clear from all these instances, that the consent of an accused person is not sought. It is my considered view that the Johannesburg Magistrate could not have acted arbitrarily when he transferred the matter from Johannesburg to Sebokeng. It will be recalled that at the time that the appellant was arrested, Mafisa had already been arrested and had appeared in the Sebokeng Magistrate's Court. The probabilities are also that the officials that were dealing with the extradition of Mr Mafisa are likely to be the same officials who would have been dealing with the extradition of the appellant herein. In this regard it is important to take account of the fact that even the original application for the arrest of the appellant, Mafisa and the others had been contained in one document. The record indicates that the Magistrate in Johannesburg transferred the matter to Sebokeng for the convenience of the appellant. That convenience is clearly the consolidation of the application for extradition and the sharing of legal representation. In my view it is unlikely that a Magistrate would have confused the powers set out in section 75 of the Criminal Procedure Act and would have ordered a transfer in accordance with the provisions of that section. What appears more probable in my view is that, being aware of the provision in section 9(2) of the Extradition Act that the proceedings for expatriation are in the form of a preparatory examination, the Magistrate would either have been invited to invoke the provisions of section 125(2) to then transfer the matter to another court for purposes of convenience or taking into account the interests of the appellant

- and his convenience, such transfer was then ordered. It is regrettable that the reasons for the transfer were never officially placed on record at any stage before the hearing of the application for his extradition. It is my considered view therefore that the Magistrate in Johannesburg is less likely to have acted in conflict with the provisions of section 75 and would have been ignorant of a provision in the Criminal Procedure Act which would have authorised him to act legitimately and in accordance with the Criminal Procedure Act in ordering the transfer of the hearing to Sebokeng where Mafisa was appearing.
14. No prejudice appears to have been suffered by the appellant as a result of the transfer. Nowhere in the record is there any indication of such prejudice. It is the court's considered view that even if the Magistrate in Johannesburg may have purported to act in accordance with the provisions of section 75 of the CPA, this court is entitled to substitute the section under which he allegedly acted with the correct section in the Criminal Procedure Act. Authority for this is the inherent jurisdiction of the court of appeal to correct a patent error. Accordingly the transfer of the matter to Sebokeng was legally valid.
15. I turn now to consider the other grounds of appeal which were not persisted in. An examination of all the official documents that were submitted by the State during the application for the extradition shows that all documents in support of the application were properly authenticated. Article 11 of the Treaty has been referred to above in this judgment. Every affidavit was properly commissioned and it is the court's view that authentication was executed and that all the documents handed into court and accepted by the court were validly executed documents. It did not

come as a surprise that Mr Van Vuuren did not persist with any argument on this issue.

16. The documents constituting the application disclose sufficient evidence of the commission of armed robbery. There is also in addition, a certificate issued in terms of section 10(2) of the Extradition Act, indicating that there is sufficient evidence to warrant a prosecution in Botswana. The application therefore is in accordance with the requirements for extradition.

17. I turn now to deal with the issue of corporal punishment. The penal code of Botswana provides for the imposition of corporal punishment (section 28(4) of the Botswana Penal Code). The Magistrate dealing with the application for the extradition dealt with this issue in his judgment. He pointed out that the imposition of corporal punishment in accordance with the Botswana Penal Code is discretionary. I agree with his interpretation. He further referred to the case of *State v Williams* 1988(4) SALR 49 (W) at 54E where VAN SCHALKWYK AJ made the following remarks:

"As a matter of public policy it is, in my opinion, preferable that a criminal should be punished according to the comparatively harsh laws of the country where the offence was committed than that he should escape punishment altogether." As the trial Magistrate correctly points out, this remark must be understood in the context of the time then prevailing and that corporal punishment itself was still a competent sentence in South Africa as well.

18. Corporal punishment was declared to be unconstitutional and to constitute an infringement of the dignity of a person (*State v Williams and Others* 1995(2) SACR 251 (CC)). It is no longer imposed in this country. The question is, whether based on this,

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the appellant's extradition should have been refused or whether, if granted, preconditions should have been imposed that corporal punishment be not imposed on the appellant or alternatively an undertaking be furnished by the Government of Botswana that if convicted, it would not be imposed on the appellant.

19. Our government has an obligation to protect fundamental human rights of its citizens. The question is whether it would be proper for this court to refuse to surrender the appellant because of the possibility that, if convicted in Botswana on the charges to be preferred against the appellant the Botswana trial court may, in exercising its discretion, impose corporal punishment. The starting point, in my view, is that every country is "entitled to demand that ... [its laws] ... be respected by everyone within its territorial jurisdiction, and also by other States. The ... [appellant] ... [has] ... no right to demand that the government take action to prevent those laws being applied ..." (*Kaunda and Others v President of the Republic of South Africa* 2005(4) SA 235 at page 257 (para 57).

20. The next issue is that this court is to accord the necessary respect and dignity to the Botswana government by not interfering in its judicial process "... for as long as the proceedings are prescribed punishment consistent with international law ... South Africans who commit offences in foreign countries are liable to be dealt with in accordance with the laws of those countries, and not the requirements of our constitution and are subject to the penalties prescribed by such laws" (*Kaunda and Others* (*supra*) at page 267 (para 100). It is my considered view that representation

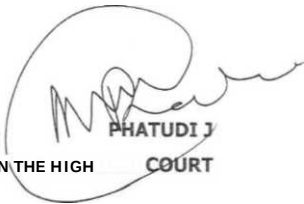
against any sentence that may be inconsistent with the basic human rights as enshrined in our constitution may not constitute a ground for refusal to extradite a person who is wanted for commission of serious crimes. (Kaunda case - *supra*)

21. My understanding of case law on this issue is that only if and when a person in the position of the appellant is convicted and a sentence of corporal punishment ordered that the authorities in government in this country may then apply to the Botswana government that corporal punishment be not carried out on the appellant. This appears to be the *ratio decidendi* in the Kaunda case *{supra}*.
22. It is my considered view therefore that even if the other grounds of appeal had been persisted in, that the appeal would not have succeeded.
23. It is my considered view that all the fundamental principles of fairness, equity and justice were complied with and that the order for the appellant's extradition was correctly granted. The order for his extradition is confirmed.



WEBSTER J
JUDGE IN THE HIGH COURT

I agree



PHATUDI J
JUDGE IN THE HIGH COURT