



**IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN**

Not reportable
Case no: A130/2025

In the matter between:

MODISANA SEKOALA

APPELLANT

and

**MAGISTRATE MATROOS,
FICKSBURG MAGISTRATE'S COURT**

FIRST RESPONDENT

**NATIONAL DIRECTOR OF PUBLIC
PROSECUTIONS**

SECOND RESPONDENT

Neutral citation: *Sekoala v Magistrate Moos and Another* (A130/2025) [2026]
ZAFSHC 275 (8 May 2026)

Coram: DANISO J et CRONJÉ AJ

Heard: 13 April 2026

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email and released to SAFLII. The date and time for hand-down is deemed to be 8 May 2026 at 12h00.

Summary: Extradition Act 67 of 1962 — International Co-operation in Criminal Matters Act 75 of 1996 – Extradition Treaty between the Republic of South Africa and the Kingdom of Lesotho – Lesotho national accused of committing murder, malicious damage to property and arson under the Lesotho Penal Code in Lesotho - requirements of s 10 of the Extradition Act – protection order against Lesotho police and the Lesotho Defence

Force providing comprehensive protection of fundamental human rights and a right to a fair trial – appeal dismissed.

ORDER

- 1 Condonation for the late prosecution of the appeal is granted.
 - 2 The appeal is dismissed.
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JUDGMENT

Cronjé, AJ

[1] On 13 January 2025, the Government of Lesotho applied to the Government of the Republic of South Africa for the appellant's extradition. The first respondent granted an order that the appellant be committed to prison in terms of s 10(1) of the Extradition Act 67 of 1962 (the Extradition Act). The is appeal lies against this order

Condonation and other points in liminé

[2] Section 10 of the Extradition Act provides that an appellant may appeal within 15 days of an order being granted. The order was granted on 30 May 2025, and on 2 June 2025, he instructed his attorney to prosecute the appeal. However, he had no funds, and his spouse then secured funds by selling some of their livestock in Lesotho. On 10 June 2025, his attorney received the transcripts from the court a quo and had to consider them. On or about 24 June 2025, he consulted with his attorney at the Kroonstad correctional facility. Only by 5 July 2025 was he able to secure funds. His counsel had to study the judgment and transcript, and on 29 July 2025, the appeal was filed at the Magistrate's Court.

[3] On 1 August 2025, the appeal was noted in the High Court. He submits that the appeal was 28 days late, which is not a substantial delay. In support of his prospects of success, he merely refers to the grounds of appeal. He states that he will suffer immense prejudice if condonation is not granted. It is trite that the prejudice to the other party is material.

[4] The respondents oppose the condonation application, complaining of an

unexplained delay. Whilst there is merit in the complaint and such delays are often fatal to condonation applications, I am of the view that, given the high premium placed by both the Constitutions of the Republic of South Africa, 1996 and the Kingdom of Lesotho on fundamental human rights, condonation should be granted. This is not to be understood as indicating that prospects are good. In respect of the defective commissioning of the affidavits, I do not believe that this is fatal to the application. Similarly, the so-called misjoinder of the National Director of Public Prosecutions is not fatal.

The requirements to be met on appeal and the grounds of appeal

[5] It is important to affirm the principles applicable to interference on appeal. In *Bernert v ABSA Bank Ltd*¹ (*Bernert*), it was held:

'[106] What must be stressed here, is the point that has been repeatedly made. The principle that an appellate court will not ordinarily interfere with a factual finding by a trial court is not an inflexible rule. It is a recognition of the advantages that the trial court enjoys which the appellate court does not. These advantages flow from observing and hearing witnesses as opposed to reading "the cold printed word." The main advantage being the opportunity to observe the demeanour of the witnesses. But this rule of practice should not be used to "tie the hands of appellate courts". It should be used to assist, and not to hamper, an appellate court to do justice to the case before it. Thus, where there is a misdirection on the facts by the trial court, the appellate court is entitled to disregard the findings on facts and come to its own conclusion on the facts as they appear on the record. Similarly, where the appellate court is convinced that the conclusion reached by the trial court is clearly wrong, it will reverse it. (Footnotes omitted.)

[6] The grounds of appeal are succinctly that the first respondent failed to find that: the second respondent met all the requirements of the Extradition Act; failed to place sufficient weight on the Lesotho High Court Order (which he obtained against inter alia the Lesotho Mountain Police Services (LMPS) and the Lesotho Defence Force (LDF)) on allegations of torture and harassment; failed to find that there is a real likelihood that the appellant will not be afforded a fair trial in Lesotho; and neglected and/or ignoring the undisputed evidence of the appellant and his spouse about threats against them.

Interstate obligations

[7] South Africa enacted the International Co-operation in Criminal Matters Act 75 of 1996, which commenced on 1 January 1998. Lesotho is one of the states listed in

¹ *Bernert v ABSA Bank Ltd* [2010] ZACC 28 (CC); 2011 (4) BCLR 329 (CC) [2010] JOL 26562 (CC) para 106.

Schedule I. On 28 May 2004, the Minister for Justice and Constitutional Development (the Minister) gave notice in terms of s 2(3)*ter* of the Extradition Act, that the Parliament of the Republic of South Africa, on 15 November 2001, agreed to the ratification of the Extradition Treaty between the Republic of South Africa and the Kingdom of Lesotho (the Treaty).² Article 1 records that each party agrees to extradite to the other, in accordance with the provisions of the Treaty and their respective domestic law, persons who are wanted for the imposition or enforcement of a sentence in the requesting state, or for an extraditable offence.

The provisions of the Extradition Act

[8] It is imperative to bear the requirements that have to be met under s 10 of the Extradition Act in mind when the grounds of appeal and the evidence are considered. In *Director of Public Prosecutions, Western Cape v Tucker*³ (*Tucker*), the requirements to be met at the s 10 enquiry were affirmed as follows:

'[69] A section 10 extradition enquiry is limited to establishing these two jurisdictional facts. If they are established, the magistrate shall commit the sought person to prison, pending the Minister's decision to surrender the person. Unlike in respect of extradition enquiries held in terms of section 12 read with section 9 (where extradition has been requested by an associated State), the magistrate does not consider whether to *surrender* the person before them. *The enquiry before the magistrate involves establishing liability for extradition and sufficient evidence warranting prosecution in the foreign State and the section 10 decision is solely whether to commit or discharge. The committal determination is "a narrow and specific issue" that does not "involve deliberation on human rights issues" or "whether it is unjust or unreasonable to surrender the applicant"*. These are questions that are relevant to the Minister's decision to surrender the sought person, which is made in terms of section 11 (surrender decision).' (Own emphasis.)

[9] Section 3 of the Extradition Act provides that any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign state shall, subject to the provisions of the Extradition Act, be liable to be surrendered to a requesting state in accordance with the terms of such agreement. Section 9, on which the appellant did not rely in his heads of argument, provides that any person detained under a warrant of arrest or a warrant for his further detention, shall as

² Extradition Treaty between the Republic of South Africa and the Kingdom of Lesotho, GN R644, GG 26375, 28 May 2004.

³ *Director of Public Prosecutions, Western Cape v Tucker* [2021] ZACC 25; 2021 (12) BCLR 1345 (CC); 2022 (1) SACR 339 (CC). (Footnotes omitted.)

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. Section 9(3) of the Act provides that any deposition, statement on oath or affirmation taken, whether or not taken in the presence of the accused person, or any record of any conviction or any warrant issued in a foreign state, or any copy or sworn conciliation thereof, may be received in evidence at such enquiry if such document complies with s 9(3)(a).

[10] Section 10 provides that if upon consideration of the evidence adduced at the enquiry referred to in s 9(4)(a) and (b)(i) 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 decision with regard to his/her surrender, at the same time informing such person that he/she may within 15 days appeal against such order to the High Court. Section 10(2) provides:

'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'.

The proceedings in the court a quo

[11] The appellant first appeared in the Magistrate's Court for Ficksburg. The charge sheet refers to an Interpol warrant 35/06/2024. It states that a request under the Treaty has been received for the provisional arrest of the appellant to stand trial and answer to the following offences under the Lesotho Penal Code: five counts of murder in contravention of s 40(1), three counts of unlawful damage to property in contravention of s 72, and arson in contravention of s 73. The warrant states that the Magistrate is of the opinion, based upon information placed before him/her that the issuing of a warrant of arrest under s 5(1)(b) of the Extradition Act, would have been justified on similar charges of murder, malicious damage to property, as well as arson had it been alleged that he committed the said offences within South Africa.

[12] The appellant was at all material times represented by a legal practitioner. Mr Roodtman, for the prosecuting authority, handed in a bundle of documents received

from the Kingdom of Lesotho in respect of the extradition application, as well as the Minister's authorisation of extradition. The appellant had no objection to the documents being handed in and did not request that they be read out into the record.

[13] The appellant, in turn, handed in the heads of argument and the Lesotho High Court's order.⁴ He also presented an order of the Lesotho High Court wherein one Marethabile Motlaase obtained a protection order against the Commander of the Lesotho Defence Force and the Attorney General.⁵ The order that was granted reads:

'IT IS HEREBY ORDERED THAT:

- (a) First and Second Respondents and the officers subordinate to them are ordered (or interdicted) not to assault Applicants and/or subject them to any form of torture or inhumane treatment.
- (b) First Respondents and officers subordinate to them are directed to allow applicants to have their lawyers present during the interrogation by officers subordinate to First Respondent in terms of their fair pre-trial rights.
- (c) It is declared that the Lesotho Defence Force has no jurisdiction to arrest applicants and keep anyone of them under their custody.⁶

[14] Mr Khalo, appearing for the appellant, indicated that the appellant wished to lead evidence that his life might be in danger should the Court accept and issue a warrant for his extradition. The appellant avers that the requirements for committal under s 10(1) of the Extradition Act have not been met as the first respondent failed to place sufficient probative weight on the order of the Lesotho High Court and on other allegations of torture and harassment of him and his family members by the Lesotho police and military. According to him, the first respondent failed to consider that, in line with the dual criminality principle and by virtue of the Lesotho Court order, there is a real likelihood that, should he be extradited, he will not be afforded a fair trial in Lesotho. Evidence of torture and harassment by the Government of Lesotho will inevitably affect the right to a fair trial. He avers that the first respondent found it incomprehensible that, if the appellant had managed to obtain a court order in Lesotho and his life is in danger, he would not be able to obtain a contempt order. The first respondent allegedly neglected or ignored undisputed evidence before her that the appellant and his wife were threatened after the

⁴ Case No. CIV/APN/0183/2024.

⁵ Case No. CIV/APN/0271/2024.

⁶ The appellant is the first applicant. The first respondent is the Commissioner of Police, the second respondent is the Commander of the Lesotho Defence Force, and the third respondent is the Attorney General.

protection order was granted. The Court allegedly also erred in her assessment and/or evaluation of the evidence.

[15] Mr Khalo placed on record that before the appellant's arrest in 2024, the appellant received information that he was wanted on a specific case for the commission of an offence. The appellant then initiated urgent court proceedings in Lesotho to prevent the Lesotho police from either harassing, assaulting or threatening to kill him. Mr Khalo extracted certain averments from the appellant's affidavit in the Lesotho High Court. It is appropriate to capture some of them.

'... The relevant factors [indistinct] that occurred on the 25th April 2024. Several members of the *Lesotho Defence Force* arrived at Peka, Liphakoeng, the district of Leribe, at one of Radebe's Place... Soldiers separated members of the community to groups according to age and gender. *Soldiers* forced the gathered people to lie down in the rough surface and roll while being [indistinct] with sticks on their buttocks, thighs and necks. One, Mohaila Mokotsho is deceased as a result of the torture ...' (Own emphasis.)

[16] It appears that one Litheboho Mokge Mahloane was also arrested. Mr Khalo placed on record:

'He sustained serious injuries and now permanently disabled at the hands of the *soldiers*. On the 7th July 2024, they arrested and tortured one, Thabelo Mbiti, and Kabelo Lefosa, and [indistinct] them without [indistinct]... They asked them about the applicants whereabouts, and told them that they will arrest them and do the same, subject them to torture. Applicants hold a firm belief that they will have featured as dead like Mohaila Mokotjo, had they been present on that fateful day... The *soldiers* have been arresting members of the community and torturing them. Members of the LDF⁷ arrived at the first applicant's place in a violent manner threatening his wife and children. They [indistinct] and jabbed the wall and fiercely took the wife and children's phones while they searched the house and leaving everything upside down.' (Own emphasis.)

[17] The appellant testified that after the court order was granted, soldiers and police officers went to his place of residence, where they harassed his wife and children. At one stage, a soldier spoke to him over the telephone and informed him that, if he ever came to Lesotho, they would kill him. It appears that his spouse also left Lesotho to reside with him in Gauteng.

[18] When the court enquired of Mr Khalo whether it was in dispute that the allegations

⁷ Lesotho Defence Force.

regarding the offences committed in Lesotho constituted a prima facie case, he stated that if the State argued it, he would accept it. When asked by Mr Roodtman whether the only point of his concern was that, if he were extradited, he would be assaulted or intimidated, the appellant stated that the only reason was that he might be killed. According to the appellant, despite having obtained the protection order in Lesotho, he did not know that the police and military would breach it.

[19] It appears that the appellant was not personally present when the order was granted but was represented by an attorney. When asked why he did not approach the court afresh after the threats that followed the order, he stated that he had informed his attorney of them. When put to him that, if he was threatened and could approach the court afresh for relief for contravention, he merely stated that he understood it. When put to him that, when he is extradited, he would be handed over to the Lesotho police and not the military, he stated that they work together. He later confirmed that he fears the military and not the police.⁸

[20] The appellant equates the soldiers with the police. In my view, if the evidence is reliable and credible, it is the military that poses the threat, not so much the police. The first respondent took note of the appellant and his spouse's evidence, as well as the documentary evidence they presented. She concluded that the appellant has an operative protection order in Lesotho and nothing prevents him from informing his attorney of the soldiers' contraventions of the order. She noted that the appellant could not explain why he did not report contraventions of the court order, and that he knew such a remedy was available.

[21] The court a quo noted that the Lesotho Government requested the extradition for justice to prevail, and if that is so, it would not jeopardise its own case by allowing soldiers to kill him. It would not be in the interests of justice to deny extradition.

The appellant's submissions

[22] Mr Chaka, for the appellant, placed much reliance on the Lesotho court order. He argues that the police, military and Attorney General did not appeal the judgment and torture, or a real apprehension of torture and harassment can therefore be accepted. He submits that the first respondent had no regard to the order and its probative value.

⁸ Record, transcript, p. 34

[23] It is incumbent on a requesting state to have regard to what the South African courts promote and protect. Any act or incident of torture or harassment should be suspect, and the court should guard against committal to avoid an adverse outcome. He refers to *Mohamed and Another v President of the Republic of South Africa and Others*,⁹ wherein the Constitutional Court affirmed the constitutional obligation to ensure that all people enjoy the protection of their dignity, the right to life, and the right not to be subjected to cruel, inhuman, or degrading treatment or punishment. The facts in that matter, however, differ vastly from the facts before us.

[24] He also refers to *Director of Public Prosecutions: Cape of Good Hope v Robinson*¹⁰ (*Robinson*), where the powers and duties of a magistrate considering extradition are set out. It does not, in my view, support the case for the appellant much. The court held:

'[71] This judgment holds that an extradition magistrate conducting an enquiry in terms of section 10(1) of the Act has no power to consider whether the constitutional rights of the person sought may be infringed upon extradition. That aspect must be considered by the Minister in terms of section 11 of the Act. The correctness or otherwise of the decision of the Minister to extradite the respondent is subject to judicial control. This judgment also holds that the documents before the extradition magistrate were all properly authenticated as required by the extradition agreement. The consequences of this judgment are that the extradition magistrate's order for the committal of the respondent to prison stands and that it is for the Minister to decide whether the respondent should be extradited in all the relevant circumstances including the fact that he will, if extradited, have to serve a term of imprisonment that was imposed upon him in his absence.' (Own emphasis.)

[25] According to him, the first respondent did not consider the evidence and failed to consider the factors that might militate against the committal. According to him, the critical question to ask is why the appellant would go as far as to approach the High Court of Lesotho to seek assistance to interdict the police and soldiers from torture and harassment, and, pursuant thereto, several incidents of intimidation and harassment directed at the spouse and children of the appellant if it did not take place.

⁹ *Mohamed and Another v President of the Republic of South Africa and Others* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC); 2001 (2) SACR 66 (CC) para 53.

¹⁰ *Director of Public Prosecutions: Cape of Good Hope v Robinson* [2004] ZACC 22; 2005 (4) SA 1 (CC); 2005 (2) BCLR 103 (CC); 2005 (1) SACR 1 (CC).

The respondents' arguments

[26] Mr Roothman submits that the Lesotho order does not establish a real risk of torture or an unfair trial. It directs the respondents in the Lesotho order not to assault the appellant or subject him to inhumane treatment and requires the presence of his legal representatives during interrogation. The evidence of the appellant and his spouse remains vague, uncorroborated, and self-serving. The offences satisfy the dual criminality requirement, and the Constitutional values of South Africa (the right to a fair trial and freedom from torture) are adequately protected by the Lesotho order itself and by the Minister's ultimate decision under s 11.

Evaluation

[27] I emphasised the distinctions drawn between the military and the police in the evidence presented. The dominant impression to be gained from that is that it is primarily, if the appellant's version is accepted, the military that allegedly acts unlawfully. Even if the police, on the version of the appellant, join the unlawful conduct, he is still protected by the Lesotho order. It is not the applicant's case that the protection order is worthless. He conceded that he took no further steps after alleged contraventions of the order.

[28] The first respondent appreciated the appellant's concerns, and his criticism of her failure to evaluate the evidence is unfounded. The first respondent followed a fair procedure during the enquiry. The requirements in s 10 of the Act were met. The Lesotho Government approached the South African authorities under a binding treaty. They provided everything required to satisfy the extradition requirements. The appellant will be handed over to the Lesotho police and not the military. The Lesotho order affords the appellant the right to legal representation during interrogation and fair pretrial rights. Section 4 of the Lesotho Constitution, inter alia, protects the rights to life, personal liberty, freedom from inhumane treatment, and a fair trial. All those rights are also protected in our Constitution.

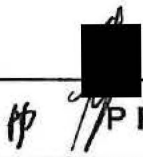
[29] The charges preferred against the appellant in Lesotho are serious. Should he be found guilty in Lesotho, he will not meet a sentence exceeding what may be imposed in South Africa.

[30] Reverting to the principles stated in *Bernert*,¹¹ the tests set out in *Tucker*¹² and *Robinson*,¹³ I cannot find any basis to find that the first respondent misdirected herself on the facts or the law. It follows that we cannot interfere with the order of the first respondent, and the appeal therefore fails.

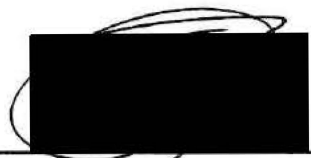
ORDER

[31] In line with practise, the following order is made:

- 1 Condonation for the late prosecution of the appeal is granted.
- 2 The appeal is dismissed.


 P R CRONJÉ
 ACTING JUDGE OF THE HIGH COURT

I concur.


 N DANISO
 JUDGE OF THE HIGH COURT

¹¹ Ibid *Bernert*.

¹² Ibid *Tucker*.

¹³ Ibid *Robinson*.

Appearances:

For the appellant:

P Chaka

Instructed by:

Mtaye Attorneys

Bloemfontein

For Respondents:

J Roothman

Instructed by:

Director of Public Prosecutions: Free State,
Bloemfontein.