

SOUTH AFRICA / JUDGMENT

Marsland v Additional District Court Magistrate, Kempton Park and Another (29827/2019) [2019] ZAGPJHC 545 (10 September 2019) [2019] ZAGPJHC 545

COURT

South Gauteng High Court, Johannesburg

BEFORE

K E Matojane, F Dippenaar

CASE / FILE NUMBER

29827/2019

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REPUBLIC

OF SOUTH AFRICA

IN

THE HIGH COURT OF SOUTH AFRICA

GAUTENG

LOCAL DIVISION, JOHANNESBURG

CASE

NO: 29827/2019

In

the matter between:

MARSLAND,TIMOTHY

GORDON

Applicant

And

THE

ADDITIONAL DISTRICT COURT MAGISTRATE,

KEMPTON

PARK

First

Respondent

THE

DIRECTOR OF PUBLIC PROSECUTIONS,

JOHANNESBURG

Second

Respondent

JUDGMENT

MATOJANE J

Introduction

[1] The applicant brings an urgent review application, amongst others, to set aside the decision by the first respondent ('the

Magistrate') on 23 August 2019 to not release the applicant from his provisional arrest in terms of article 10(5)(a) of the Southern African Development Community Protocol on Extradition. In the alternative, the applicant relies on article 15(4) of the 1969 Treaty on Extradition between the Republic of South Africa and the Republic of Botswana (the 'Treaty').

Background

[2] The applicant holds dual citizenship for South Africa and the United Kingdom. He was born in the United Kingdom in 1966 and was resident in Botswana, but is currently living in South Africa.

[3] The applicant was arrested at the OR Tambo International Airport on 12 July 2019 as he was about to board a plane to Germany. The arrest was under a warrant issued by the Magistrate in terms of s 5(1)(b) of the Extradition Act 67 of 1962 ('the Act').

[4] Interpol had issued a 'Red Notice' for the applicant to be provisionally arrested, pending his extradition to Botswana, where a warrant for his arrest was issued on charges of money laundering. It is alleged that while the applicant was a director of a company in Botswana, he misappropriated funds amounting to BWP 200 000.00 from the Botswana Public Officers Fund.

[5] It is further alleged that the applicant, on 25 January 2018, attempted to obtain by false pretences from the First National Bank of Botswana, an amount of BPW 71 000 000. The maximum penalty possible for the two offences is said to be 28 years

imprisonment.

[6] The applicant appeared before the Magistrate on 15 July 2019 for a bail application. The matter was postponed on several occasions. On 23 July 2019, by way of a report in terms of s 8 of the Act, the Magistrate informed the Minister that the matter had been adjourned until 26 July 2019 for a further bail hearing. The applicant was denied bail on 8 August 2019. The matter was then postponed to 23 August 2019 for the receipt of the formal extradition documentation from the Republic of Botswana. The applicant has in the meantime noted an appeal against the refusal of bail, which bail appeal is currently pending.

- [7] On 23 August 2019, the second respondent indicated to the Court that the original extradition application had been received by the Director of Public Prosecutions. Copies of the following documents were placed before the Court as exhibits, namely: a note verbale from the Republic of Botswana dated 17 July 2019; a letter on behalf of the Director-General of the Department of International Relations & Cooperation dated 19 July 2019; and a letter by the Chief Directorate: International Legal Relations on behalf of the Department of Justice and Constitutional Development, dated 12 August 2019.
- [8] The second respondent requested a postponement for the extradition enquiry to be held in terms of s 9 and s 10 of the Act. The applicant opposed the application; it was argued on his behalf that as the Minister has not issued a notice in terms of s 5(1)(a) of the Act within the specified period, he was entitled to be discharged as no extradition request can be said to have been received by the Minister.
- [9] The Magistrate rejected the applicant's arguments and dismissed the application. The matter was postponed to 10 September 2019 for the extradition enquiry to be conducted in terms of s 9 and s 10 of the Act. It is this decision of the Magistrate that the applicant now wishes to have reviewed and set aside.

The issue

- [10] In order to determine whether the Magistrate erred in dismissing the application to discharge the applicant, it must first be determined whether an extradition request can be said to have been received where the Minister has not issued a notice in terms of s 5(1)(a) of the Act.

The relevant legislation

- [11] In determining this issue, ss 3, 4, 5(1)(a), 5(1)(b) of the Act and article 6 of the Southern African Development Community Protocol on Extradition^[1] (the 'SADC Protocol') set out below, must first be considered.
- [12] The extradition process generally commences when a requesting state issues a request for a provisional arrest to the requested state. The purpose is to detain fugitives who are likely to flee once they become aware of proceedings to extradite them.
- [13] Section 3(1)[2] of the Act makes provision for extradition of the fugitive to a foreign state in terms of an extradition agreement. Where there is no extradition agreement with such a foreign state, the President has to consent, in writing, to the extradition as provided for in section 3(2)[3] of the Act. The third type of extradition is to a designated state.^[4]

- [14] The SADC Protocol outlines the general judicial procedure for extraditing a person to the requesting state. It sets out specific deadlines within which the request for extradition must be received and within which the authority to proceed must be issued. In this case Botswana, as a requesting state, had 30 days within which to provide a formal request for extradition. These deadlines exist to protect the accused from being detained without charge.[5]
- [15] In terms of article 2 of the SADC Protocol, South Africa, as a State Party to the Treaty, has agreed to extradite to other member states, in accordance with the provisions of the Protocol and their respective domestic law, any person within its jurisdiction who is wanted for prosecution or the imposition or enforcement of a sentence in the requesting state for an extraditable offence.
- [16] In terms of s 233 of the Constitution, when interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.
- [17] The Protocol is self-executing, in that it is effective immediately after the Minister had ratified it without any further implementing legislation. It carries the same legal status as domestic legislation and is subject to limitations by the Constitution. The Constitution is supreme and therefore limits the power of treaties.
- [18] Where South Africa has an extradition treaty with the requesting state, as in the present matter, the Act requires the request for extradition to be made to the Minister of Justice as communicated through diplomatic channels. Where the request is received by any person other than the Minister, any such request must be handed to the Minister.[6]
- [19] Section 4 must be read with article 6 of the protocol which deals with the channels of communication and the required document as follows:
- ‘A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the Ministries of Justice or any other authority designated by the State Parties.’
- [20] Section 4 of the Act is subject to article 6 of the Protocol, which provides for a different manner of receipt of the request for extradition. The request for extradition can also be transmitted through the diplomatic channel to any other authority designated by the State Parties (own emphasis). The note verbale dated 17 July 2019 was directed to the Department of International Relations and Cooperation. The Department, in turn, duly forwarded the documents to the Director-General: Department of Constitutional Development. I find that South Africa received the extradition documents and they were forwarded to the second respondent on 12 August 2019.
- [21] Article 10 deals with provisional arrest and provides:

1. In all cases, the competent authority of the Requesting State may apply by any means which allows for a written record for the provisional arrest of the person sought.
2. A request for provisional arrest shall be sent to the competent authority of the Requested State either through the diplomatic channel or directly by post or telegraph or through the International Criminal Police Organisation (INTERPOL) or by any other means affording evidence in writing or accepted by the Requested State.

[22] The submission by the applicant that it must be the Minister only who should receive the request for extradition and that until such time that the Minister has issued the s 5(1)(a) notice, no extradition request can be said to have been received must be rejected. There is no requirement in the Protocol that the Minister must issue a section 5(1)(a) notice as proof of such receipt where the arrest is pursuant to a warrant issued by the Magistrate in terms of section 5(1)(b) of the Act.

[23] There are three forms of arrest under the Act to bring a person before a court to face an extradition enquiry: first, a 'straight'

arrest pursuant to s 5(1)(a)[7] of the Act in terms whereof the Minister confirms that he has received an extradition request as contemplated by s 4(1) of the Act by issuing a so-called s 5(1)(a) notice. The Minister by implication is required to conclude, at least prima facie, that, ex facie the request, the person sought has been convicted or is accused of an extraditable offence. This will avoid a situation where a person who has not committed an extraditable offence is requested. See *Palazzolo v Minister of Justice and Constitutional Development and Others* (4731/2010) ZAWCHC 42 (14 June 2010) at para 13; *S v Von Schlicht* 2000 (1) SACR 558 (C) at para 4; and *Patel v S* 2016 (2) SACR 141 at para 10.

[24] The second form of arrest is a 'provisional' arrest in terms of section 5(1)(b)[8] of the Act. In this instance, the request for arrest is made on an urgent basis and there is fear that the fugitive will flee if not detained immediately. Section 5(1)(b) of the Act expressly authorises the Magistrate, and not the Minister, to trigger the extradition process by ordering the detention of a suspect pending an extradition hearing – if sufficient information is placed before the court that the fugitive has

committed an extraditable offence in a foreign state which would justify the issue of the warrant if such an offence was committed in the Republic.

[25] In terms of s 8 of the Act, the Magistrate, after issuing a warrant for the arrest of further detention of a fugitive, shall forthwith furnish the Minister with particulars relating to the issue of such warrant. The Minister may at any time after having been notified that a warrant has been issued, in the case where the warrant has not yet been executed, direct the Magistrate concerned to cancel the warrant; in the case where the warrant has been executed, direct that the person who has been arrested be discharged forthwith.[9]

- [26] By its terms, s 5(1)(b) applies only to those who have been provisionally arrested. The Minister is not called upon to decide whether a valid extradition request was received. The Minister is given wide authority to intervene at any given time during the extradition proceedings which has already started before the Magistrate. It is not correct to argue, as the applicant does, that this extradition application cannot proceed because the Minister did not issue a notification in terms of s 5(1)(a) of the Act. In my view, it is not necessary under the circumstances for s 5(1)(a) notice to be issued as the extradition process has already commenced.
- [27] A plain reading of the subsection confirms that the Magistrate does not require the section 5(1)(a) notice from the Minister to trigger the extradition process by the issue of a warrant of arrest. Logic compels the same conclusion. For clarity, there is no reason for the Minister to issue a notice to proceed with issuing a warrant of arrest when the magistrate has already done so. A straight arrest warrant, on the other hand, may be obtained only after a request for extradition has been received and the notice to proceed has been issued by the Minister.
- [28] Therefore, the Magistrate did not err in concluding that the applicant was not entitled to be discharged on the basis that the Minister did not issue a notice in terms of s 5(1)(a) of the Act.

Conclusion

- [29] The Magistrate committed no error in not releasing the applicant from his provisional arrest in terms of article 10(5)(a) of the SADC Protocol on Extradition.
- [30] The Magistrate further did not err in postponing the extradition enquiry hearing to 10 September 2019.

Order

1. The application is dismissed with costs, including reserved costs.

K E MATOJANE

JUDGE OF THE HIGH COURT

I agree.

F DIPPENAAR

Date of hearing: 6 September 2019

Date of judgment: 10 September 2019

Appearances:

Counsel for the Applicant: Adv. C E Thompson

Instructing Attorneys: Bernard L Du Plessis Inc

Counsel for the 2nd Respondent: Adv. PJ Schutte, Adv D Barnard

[1] The Minister of Justice and Constitutional Development gave notice in terms of section 2(3) of the extradition Act, 1962 that Parliament has on 14 April 2003 agreed to the ratification of the protocol which entered into force on 1 September 2006. GG NO 35368 of 25 May 2012.

[2]

(1) Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence.

[3] Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered.

[4] Any person accused or convicted of an extraditable offence committed within the jurisdiction of a designated State shall be liable to be surrendered to such designated State, whether or not the offence was committed before or after the designation of such State and whether or not a court in the Republic has jurisdiction to try such person for such offence.

[5] 10.5(a) Provisional arrest shall be terminated if the Requested State has not received the request for extradition and supporting

documents through the channel provided for in Article 6 within thirty (30) days after the arrest.

[6] 4 (1) Subject to the terms of any extradition agreement any request for the surrender of any person to a foreign State shall be made to the Minister by a person recognized by the Minister as a diplomatic or consular representative of that State or by any Minister of that State communicating with the Minister through diplomatic channels existing between the Republic and such State. (2) Any such request received in terms of an extradition agreement by any person other than the Minister shall be handed to the Minister.

[6] 4 (1) Subject to the terms of any extradition agreement any request for the surrender of any person to a foreign State shall be made to the Minister by a person recognized by the Minister as a diplomatic or consular representative of that State or by any Minister of that State communicating with the Minister through diplomatic channels existing between the Republic and such State.

- (2) Any such request received in terms of an extradition agreement by any person other than the Minister shall be handed to the Minister.
- [7] Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person- 1.
- (a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister; or ...
- [7] Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person-
- 1.
- (a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister; or ...
- [8] Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person- 1.
- (b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic.
- [8] Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person-
- 1.
- (b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic.
- [9] Section 8(2)(a) and (b).

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