

SOUTH AFRICA / JUDGMENT

Mbele and Another v Minister of Justice & Constitutional Development and Another (1116/2013) [2015] ZANWHC 17 (18 June 2015)

[2015] ZANWHC 17

COURT

North West High Court, Mafikeng

BEFORE

A M Kgoele, Samkelo Gura

CASE / FILE NUMBER

1116/2013

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IN THE NORTH WEST HIGH

COURT

MAHIKENG

CASE NO.: 1116/2013

DATE: 18 JUNE 2015

In the matter between:

NGQOBUTHU

MBELE.....1st

Applicant

(Also known as Nkosinathi Sibanda)

STANLEY

NDLOVU.....2nd

Applicant

(Also known as Khanyisile Sibanda)

AND

MINISTER OF JUSTICE &

CONSTITUTIONAL DEV.....1ST

Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS,

N.W.....2ND

Respondent

APPLICATION FOR LEAVE

TO APPEAL

GURA J, KGOELE J

DATE OF HEARING : 29 MAY 2015

DATE OF JUDGMENT : 18 JUNE 2015

FOR THE APPLICANTS : Adv. N. Skibi

FOR THE RESPONDENT : Adv. Hodes (SC)

With Him Adv. Seboko

JUDGMENT**KGOELE J:**

- [1] The first applicant, a Zimbabwean National and the second applicant a South African citizen are charged with having committed the crime of robbery in Botswana. They are presently in detention in South Africa (the Republic), having been arrested by the South African Police on 2 May 2011.
- [2] The application for the extradition of the two applicants was made by the Botswana Government through Diplomatic channels to the Minister of International Relations and Cooperation, who then forwarded the request to the Department of Justice and Constitutional Development in terms of sections 4(1) and 5(1) (a) of the Extradition Act, No. 67 of 1962 (the Act).
- [3] At the initial application in the Magistrate's Court, the Magistrate ordered that the applicants be extradited to Botswana.
- [4] The applicants subsequently pursued an appeal against this decision, which was heard in this Court and dismissed on 19 July 2012 by Hendricks and Landman JJ.
- [5] Subsequent to this Court dismissing their Appeal, the applicants approached the Constitutional Court in an endeavour to secure leave to appeal against this decision. This application for leave to appeal was dismissed by the Constitutional Court on 5 November 2012.
- [6] Subsequent to these judicial decisions, in November 2012, the applicants made representations to the first respondent (the Minister). In this regard, the request was for an assurance from the Botswana Government that they will receive medical treatment if extradited to Botswana before a final decision is made by the Minister to extradite them to Botswana. The representations further provided that the applicants are sick persons, the first applicant being HIV positive and receiving anti-retroviral medication whilst in custody in a South African correctional facility and the second applicant suffering from tuberculosis.
- [7] The Minister responded by way of two orders in terms of Section 11(a) of the Act, confirming that the applicants would be surrendered to Botswana. The Minister further responded (to the representations) in a letter that is annexed to the founding affidavit as annexure "NM4", wherein he outlined the reasons for the decision he took. The Minister dealt with four aspects which he regarded as relevant to his decision. They are:

7.1 Corporal punishment;

7.2 The right to health;

7.3 The right (of a detainee) to adequate nutrition; and

7.4 The right to legal representation.

[8] The applicants launched a review application to this Court (the Review Court) which focussed on two aspects only, namely, corporal punishment and the right to health. It was argued on behalf of the applicants that the reasoning of the Minister was factually flawed, irrational, unreasonable and unconstitutional and ought to be set aside. This Court found that the Minister's reasoning in confirming the surrender of the two applicants to Botswana in terms of Section 11(a) of the Act was rational and the application by both applicants for reviewing and setting aside the decision of the Minister was dismissed with costs. It is this order that the applicants are requesting leave to appeal against to either the Full Bench of this Court or the Supreme Court of Appeal (SCA).

[9] The application was set down to be heard on the 14 November 2014. In August 2014 the Botswana High Court adjudicated on a matter of Dickson Tapela and another: Case No. MAHGB – 000057-14 wherein the issue for determination was whether the exclusion of non-Botswana citizens to HIV treatment was justified or not. The Court order as per Sechele J was that:-

“The refusal to provide HAART to the 1st and 2nd applicants is in breach of the duty owed to them by the respondents, to be provided with basic health care services”

and further

“The respondents shall enrol the 1st and 2nd applicants and other non- citizens inmates whole CD4 cell counts has reached the threshold for HAART enrolment under the treatment guidelines on HAART”.

[10] The application was on the 14 November 2014 not proceeded with as the Court was informed that the Botswana matter was taken on Appeal and the Court deemed it fit to postpone the matter for some time awaiting the result of the Appeal. To date there is no indication from Counsel of both parties as to how far the process of the Appeal is and when it will be heard; hence this Court directed that the matter should in the interest of justice be proceeded with.

[11] Mr Skibi on behalf of the applicants argued that the review Court erred in dismissing the review application and that there are reasonable prospects of success on the merits of the Appeal. The health status of both applicants, one being HIV positive and the other suffering from Tuberculosis will be compromised as Botswana Government discriminates against inmates who are not Botswana nationals by refusing to provide them with access to medical treatment. The applicants further face the possibility of corporal punishment should they be convicted.

[12] He submitted that prior to the advent of the Superior Courts Act 10 of 2013 (The Superior Courts Act), the test for the granting of leave to appeal was whether or not the Appeal would have reasonable prospects of success. Under the Superior Courts Act, however, the question of prospects of success is one of the two grounds on which leave to appeal may now be granted. The second ground is that there must be other compelling reasons. These two grounds are according to Mr Skibi disjunctive. This is clear from the use of the word “or”

between subsections 17(1)(a)(i) and (ii).

- [13] He submitted further that, in the event that the Court does not support a purely textual, disjunctive interpretation of section 17(1)(a)(ii), the two grounds must be read as mutually supportive: that is, the stronger the one ground, the weaker the other ground may be. His contention is that for each of the two grounds of review, not only is there a reasonable prospect of success, but the nature of the issues raised are such that there are compelling reasons for them to be considered by the Appellate Courts.
- [14] In an effort to further expand on this aspect, Mr Skibi argued that the fact that the Tapela matter was appealed against, means that the status quo in Botswana still prevails and the SCA in South Africa may come to a different conclusion on Appeal than what the review Court had arrived at. Mr Hodes on the other hand persists that in the light of the Botswana Court Order our case has become moot and academic.
- [15] The ground that relates to the health status of the appellants was comprehensively dealt with in the review judgment and need not be repeated except to consider the Tapela matter as it was decided after the review Court's decision. In paragraph 33 of the Tapela matter the following was said:-

“It is impermissible for the respondents to indirectly extend the limits of punishment by withholding certain services to which inmates are lawfully entitled on account of their status as ‘convicted non citizen inmates.’ The position espoused by the respondents also cast doubt on the bonafides of their claim that it is rather through lack of resources that they are unable to provide HAART to non citizen inmates. To wrap up on this point, the deprivation of life saving HAART to the 1st and 2nd applicants, and indeed to other non citizen inmates run counter to the letter and spirit of section 4 of the constitution of Botswana and is unlawful. Before I conclude however, I need to address the respondent’s argument to the effect that it is justifiable for them to discriminate against the applicants and that what they term ‘positive’ discrimination is sanctioned by section 15(4) (b) of the Constitution of Botswana. Section 15 provides as follows:-

- ‘(1) Subject to the provision of subsection (4), (5) and (7) of this section, no law shall make my provision that is discriminatory either of itself or in its effect.
- (2) Subject to the provisions of subsection (6), (7) and (8) of this section, no person shall be treated in a discriminatory manner by any person acting by virtue of any written law or in the performance of the functions of any public office or any public authority.
- (3)
- (4) Subsection (1) of the section shall not apply to any law so far as that law makes provision
- (a)
- (b) with respect to person who are not citizens of Botswana
- (c)

(d)

(e) Whereby persons of any such description as is mentioned in subsection (3) of this action may be subjected to any disability or restriction or may be accorded any privilege or advantage which, having regard to the nature and special circumstances pertaining to those persons or to persons of any other such description, is reasonably justifiable in a democratic society.’

34. “The exclusion of non citizen inmates from HAART therapy can only be justified if it is reasonably justifiable in a democratic society and in the public interest. The following statement by the Court of Appeal in *Unity Dow v The Attorney General* 1992 BLR 119 at page 154 D-E holds good to this day.

‘.....Botswana is a member of the community of civilized states which has undertaken to abide by certain standards of conduct, and, unless it is impossible to do otherwise, it would be wrong for its courts to interpret its legislation in a manner which conflicts with the international obligations Botswana has undertaken.’

[16] The quoted paragraphs strengthen the view the review Court always held and based its decision upon. See paragraphs 37 and 38 of the review judgment in this regard.

[17] The submission by Mr Skibi revolved mainly around the fact that the Minister did not apply his mind properly when making the decision to surrender the applicants. The crux of his arguments is to the effect that how could the Minister have properly applied his mind to the rights of the applicants if the deponent to the only answering affidavit filed on his behalf was “manifestly wrong” (in the words of the review Court judgment) on any aspect of the case? The mistake according to him is crucial to the dignity, and indeed rights to life and health of the applicants. The applicants based this proposition on paragraph 35 of the review Court’s judgment which reads thus:-

“In Annexure IFG5, Keikantse Phele explains that ARV treatment is provided to Botswana nationals only and that the NGO which she represents does not supply ARV’s to foreigners. Unfortunately however, Gelderblom understood this letter (from Phele) to mean that her NGO supplies ARV’s to foreigners. He is manifestly wrong in this regard. He seems to have misunderstood the contents of Annexure IFG5. Accordingly, Gelderblom misled the Minister if he told him that an NGO called Ditshwanelo provides ARV medication to non-Botswana citizens. However, this is not the only NGO which the Minister mentioned in Annexure NM4. He also named organisations such as Botusa and Bonela who also assist in ARV treatment. In my view, the wrong information about Ditshwanelo

did not taint the Minister’s discretion and his decision”.

- [18] Counsel for the applicant obviously did not quote paragraph 35 of the review judgment as a whole, conveniently so and in my view, to suite his arguments. I am saying this because the last sentence of this paragraph qualifies what the review Court has said in this paragraph which speaks volumes in as far as its decision is concerned. The said sentence which was omitted is the following:-

“In my view, the wrong information about Ditshwanelo did not taint the Minister’s discretion and his decision”.

This last sentence is borne out by the fact that the Minister also relied on several Constitutional Court matters he referred to in this matter which the review Court also re-iterated in the paragraphs that followed paragraph 35 in its

judgment.

- [19] Lastly on this issue, it is apparent from the judgment that the stance the Botswana High Court took in the Tapela matter is an internationally recognized one, hence it referred to its international obligations stemming from the International Protocols the Botswana Government ratified which bind it. Furthermore, the Botswana Court also referred to its Constitution mainly in arriving at the conclusion it reached. In my view, the prospects of another Court coming to a different conclusion to that in Tapela matter is also nil.
- [20] As far as the ground that relates to corporal punishment is concerned, it was also dealt with comprehensively in the judgment of the review Court to such an extent that I am of the view that there is no need to repeat same except to emphasize the fact that was stated therein that the Botswana authorities have indicated that given the nature of the offence allegedly committed by the accused (applicants), such an offence, upon conviction, will probably attract a ten years sentence. This is in terms of section 292 (1) and 292 (2) of the Botswana Penal Code. In the Mokgadi case referred to by the Minister and subsequently by the review Court, the accused were sentenced to eight years which is less than the 10 years anticipated in this matter. There is therefore no prospect that another Court would come to a different conclusion than what the review Court had arrived at on this ground as well.
- [21] The applicants’ second ground upon which their application is based is that leave to appeal should be granted as compelling reasons exist for this matter to be considered by the Appellate Courts. Applicants’ first reason on this aspect is that this matter is *res novae* because no other Court has considered the Constitutional duties that rest on the State when considering the extradition of individuals with HIV to Countries that may not provide ARVs. According to Mr` Skibi, cases concerning similar issues such as Tsebe, which considered the duties on the State when extraditing individuals to Countries that practice the death penalty, and Mohamed, have all been finally determined at the Appellate level.

- [22] Secondly, his argument continued, the resolution and decision in this matter has implications beyond this case. It is an unfortunate reality that many individuals in Southern Africa suffer from HIV/AIDS. Some of these individuals will commit crimes in other Southern African Countries, and will ultimately find themselves in a position similar to that of the applicants. The precedent set by this case will have a significant impact on all of these future matters.
- [23] Lastly he submitted that, this is a matter of great importance because if the facts on which the surrender decision and the Review Judgment are incorrect as already indicated above, it will result in the slow and painful death of the applicants.
- [24] I am in agreement with the respondent's submission that there are no compelling reasons that exist for this matter to be considered by the Appellate Courts. Firstly, Mr Skibi loses sight of the fact that it is trite law that each case is decided on its own merits. Secondly, it is not a foregone conclusion that because the other cases such as Tsebe et al concerning similar issues had been finally determined at the Appellate level then there is a need that this matter should be finally determined there too.

[25] The following order is thus made:-

25.1 The application for leave to appeal by both applicants is hereby dismissed with costs including costs occasioned by the employment of two counsels.

A M KGOELE

JUDGE OF THE HIGH COURT

I agree

SAMKELO GURA

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