

SOUTH AFRICA / JUDGMENT

Moti and Others v President of the Republic of South Africa and Others (52776/2017)

[2017] ZAGPPHC 501 (18 August 2017)

[2017] ZAGPPHC 501

COURT

North Gauteng High Court, Pretoria

BEFORE

Fabricius

CASE / FILE NUMBER

52776/2017

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IN THE HIGH COURT OF
SOUTH AFRICA
(GAUTENG HIGH COURT,
PRETORIA)
Case Number: 52776/2017
REPORTABLE
OF
INTEREST TO OTHER JUDGES
REVISED
18/8/2017
In

the matter between:

MOTI,
ZUNAID
ABBAS 1ST
APPLICANT
MOTI,
ABBAS ABOO
BAKER 2ND
APPLICANT
KAKA,
ASHRUF 3RD
APPLICANT
BOBAT,
SALIM
AHMED 4TH
APPLICANT
And

THE
PRESIDENT OF THE
REPUBLIC
OF SOUTH
AFRICA 1ST
RESPONDENT
THE
MINISTER OF THE SOUTH
AFRICAN
POLICE
SERVICE 2ND
RESPONDENT
THE
NATIONAL COMMISSIONER OF THE
SOUTH
AFRICAN POLICE
SERVICE 3RD
RESPONDENT
THE
MINISTER OF HOME AFFAIRS
THE
HEAD OF THE NATIONAL CENTRAL
BUREAU
OF THE
INTERNATIONAL 4TH
RESPONDENT
CRIMINAL
POLICE
ORGANISATION 5TH
RESPONDENT

JUDGMENT

Fabricius J,

1.

The Applicants herein, South African citizens and businessmen, seek an urgent order for the following relief:

2. "Pending the outcome of the proceedings referred to in paragraph 3 below,

2.1 Interdicting and preventing the Second to Fifth Respondents and, through them, all members of the South African Police Service and all immigration officials, from:

2.1.1 Taking any action of whatsoever nature as a consequence of or on the Red Notice that was posted by the International Criminal Police Organisation ("Interpol") in respect of the First Applicant, of which a copy is attached hereto as "X" and any further Red Notices posted by Interpol pertaining to any of the Applicants relating to the "Verdict" that was issued against the Applicants in Baabda Mount Lebanon on 25 April ("the Verdict") of which a copy is attached as "Y", "the Red Notices";

2.1.2 Without derogating from the generality of the aforesaid, interdicting and preventing the said Respondents from:

2.1.2.1 Responding to the Red Notices by informing any official of the Government of Mount Lebanon, including any Lebanese Interpol

representative or official, of the fact that the Applicants are within the Republic of South Africa or in any other manner alerting

any Lebanese official of the fact thereby directly or indirectly inviting the said Government of Mount Lebanon to request the surrender of the Applicants to Lebanon to be tried for any act referred to, or implied by, the "Verdict" or any request

for the Applicants' surrender to Lebanon pursuant to the Verdict

2.1.2.2 Arresting or detaining any of the Applicants on the basis of the Red Notices, the Verdict;

2.1.2.3 Preventing the Applicants from leaving the territory of the Republic of South Africa on their duly issued South African passports.

2.2 Interdicting and restraining the First Respondent from consenting in writing to the surrender of the Applicants to Mount Lebanon in terms of section 3 (2) of the Extradition Act 67 of 1962, upon the latter's request.

3. The proceedings contemplated in paragraph 2 above are proceedings:

3.1 Brought by the Applicants in the Commission for the control of Interpol's Files or to the appropriate Court as they may be advised,

for the review or setting aside of the aforesaid Red Notices; and

3.2 Brought by the Applicants in Mount Lebanon to have the Verdict reviewed or, appealed or otherwise set aside in terms of Lebanese

law, and such proceedings must be concluded within 180 days or such further time as the Applicants may be granted upon an approach to this honourable Court.

4. In the event of the proceedings not being finalized within 180 days, and no extension being granted, directing the First Respondent to consider the contents of the Founding Affidavit attached hereto when contemplating any request of Mount Lebanon in terms of section 4 of the Extradition Act for the surrender of any or all of the Applicants relating to the Verdict in terms of section 3 (2) of the Extradition Act, to inform the Applicants of such request, when

made, and to afford the Applicants a reasonable opportunity to make written representations prior to the First Respondent making any decision in terms of the said section.

5. Permitting the Applicants to retain copies of this order on his person and to display it to any member of the South African Police Service, immigration official or any other Officer of the Peace should such member, official or officer attempt to arrest the Applicant in order to warn him or her not to arrest the Applicant in question.
6. Ordering the Respondents to pay the costs of this application, including the costs consequent upon the employment of two Counsel.

2.

According to Applicants' Counsel, Mr P. Lauw SC, a broad summary of their case is the following: Applicants are permanently resident in South Africa and travel on South African passports. They have recently learned that they are wanted on warrants of arrest that were issued by some judicial authority in Lebanon and have established that the warrants are based on a particular "Verdict" of a "Court" of that country. They also established that based on this verdict, the "Red Notices" (notices issued by Interpol) have been circulated to police services around the globe. In terms of the rules by which "Red Notices" are dealt with by participating police services (of which South Africa is one), the Applicants have immediately to be arrested and detained pending an extradition request by Lebanon.

3.

The Applicants have also established that the Verdict was based on "charges" that were brought against them by an erstwhile

business partner. According to the charges, the Applicants committed fraud in Beirut, Lebanon, during the period August to December 2013. These charges are wholly fictitious - which is proven by the simple fact that the Applicants have never set foot in Lebanon at all. The Applicants prove their whereabouts in this context by the entry and exit stamps and their passports, and the Respondents have raised no dispute about this evidence. It is not said whether or not Applicants are holders of any other passports.

4.

It is alleged that the Verdict, the Lebanese warrants and the Red Notices are all part of a scheme to pervert the course of justice,

and to have the Applicants arrested and detained, wherever they may be, including South Africa, under the colour of law.

5.

It is common cause that the Applicants are not fugitives for justice, and that by this application they have informed the Respondents of the fraudulent process that they have been subjected to, on their version.

6.

Applicants' application falls into two parts (the prayer for diplomatic assistance was not proceeded with). The first, immediately urgent part is to prevent the South African Police from arresting the Applicants on the back of the notices, or as the immediate

consequence of a decision to allow the extradition process. It is alleged that the threat of arrest is imminent, in that the Rules by which the Red Notices are administered, require the immediate arrest of "Red Noticed" fugitives. It is Applicants' case that Section 40 (1) (k) of the Criminal Procedure Act 51 of 1977, moreover provides for such an arrest.

7.

It is said that the Police Respondents have raised a startling defence inasmuch as they had decided not to arrest anyone on the strength of a Red Notice. According to Applicants this is in clear breach of the obligations of the South African Police Service in terms of the Rules that bind it as a member of Interpol. It is alleged that this attitude is unfortunately reminiscent of the Al-Bashir saga. (*Minister of Justice v South African Litigation Centre* 2016

(3) SA 317 (SCA), and in the Constitutional Court in case number 75/ 2016.) It is therefore Applicants' case that they are indeed subject to immediate arrest in an illegal process, and are fully entitled to approach the Court to protect them from such arrests.

8.

The second part concerns the President's consent in terms of the provisions of Section 3 (2) of the Extradition Act 67 of 1962. Section 3 deals with persons liable to be extradited and Section 3

(2) deals with the instance, such as the present one, where no extradition agreement exists between the particular states. The Section reads as follows: "(2) 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 ". It is clear that this power only exists where there is no extradition agreement, and the power of the President is not to determine whether or not the person should be extradited, but whether the extradition process should be applied to the specific request. The requester of such consent is a foreign state and the request is ad hominem, i.e. it is request for a specific person, in a specific set of circumstances, to be surrendered. It is alleged in the present context that if the request for surrender is not made in good faith or in the interests of justice, and the President knows this, the President would be acting irrationally if he did not allow the requested person the time to take the required steps to expose the fraudulent scheme in the requesting state before giving written consent. The

President, so it is argued, is obliged to protect the rights of all citizens and residents , which includes the right not to be arrested save where due process has been followed. A fraudulent process is not due process in this context. The second purpose of these proceedings was therefore simply to obtain an order that the President should not consider an extradition request from Lebanon until the Applicants have had the opportunity to have the Verdict and the consequential Lebanese warrants set aside in the Lebanon.

9.

According to the Applicants, this case raises two questions of jurisprudential gravity. The first is whether the State President and the High Police Leadership may wash their hands in feigned innocence to allow a citizen to be arrested and detained for something that he or she never did, knowing that the arrest and detention are elements of a wrongful scheme of retribution and vengeance . The second is whether this Court can take measures to deny them the Pontius Pilate option. The Applicants answer the first question with an emphatic "no", and the second "yes". Applicants' case was therefore based on two simple propositions, as it was put: the first is that the President and the police leaders, as organs of state as defined in Section 239 of the Constitution, do not have the right to look away where the rights of citizens are infringed, or are to be infringed by unlawful, illegal and unconstitutional conduct. They have a duty to act by Section 7 (2) of the Constitution of the Republic of South Africa to respect, protect, promote and fulfil the rights in the Bill of Rights. For present purposes these rights includes rights to human dignity and the right to freedom and security of their person. Other rights include the right not to be detained without a trial, the right to freedom of movement and residence and the right to access to the Court. It was submitted that the State President and the relevant police officers are therefore compelled to act to protect the Applicants against invasions of their rights and that they must act to protect the integrity of the processes and institutions of justice.

10.

The second part of Applicants ' case is that the unlawful arrest and detention that is imminent, of a citizen, is self-evidently an infringement upon such citizens' mentioned rights, and that this Court, in the exercise of its general jurisdiction in terms Section 21 of the Superior Courts Act 10 of 2013, is obliged to uphold the law and has the power, and indeed the duty, to prevent any such abuses.

11.

It was therefore submitted that at one level this case concerns the protection of human rights, but at another it concerns the integrity

of the international and local criminal justice system, in particular, to avoid the abuse of the South African legal system and

to ensure that the good officers of the State President and police officials, are not perverted and collapse into the miscarriage of justice.

12.

The Respondents obviously have no knowledge of the facts that the Applicants relied on, and that were dealt with in some detail in the Founding Affidavits and annexures. These facts read like a bad crime novel in the context of allegations, which I accept for present purposes, that the Applicants have never been to Lebanon. (Unless of course they hold passports of other countries as well.)

13.

The Extradition Act distinguishes between two types of extradition. The first is where South Africa has an extradition treaty with the requesting foreign state. In such a case the foreign state requests the surrender of a person, through diplomatic channels from the Minister of Justice and Constitutional Development and upon receipt thereof, a Magistrate issues a warrant for the arrest of the person. Thereafter, an extradition hearing is held by a Magistrate in terms of Section 10 of the Act, whereafter the Minister of Justice exercises a discretion whether or not to surrender that person to the foreign state. Applicants concede that the process has checks and balances in the form of appeals and reviews, with reference to Section 13 of the Act.

The Minister of Justice and Constitutional Development is not a party to these proceedings.

14.

The second type extradition is where there is no extradition treaty, such as in the present case. This may be called an "ad hoc" request for the surrender of the person. The whole process that applies where there is an extradition treaty, applies with full force to an ad hoc request, but with one important addition: the President must first consider the request for the surrender and give written consent for it. Should the President refuse the request by not providing his consent in writing, the extradition procedures are not activated. If he does provide written consent, the procedures are engaged and proceed along the same lines as the process where the Minister is notified of the request through diplomatic channels. The written consent contemplated in Section 3 (2) of the Act thus takes the place of a duly concluded extradition treaty with the requesting foreign state.

15.

It was argued that the President's power in this context is the exercise of an executive power and that this exercise may indeed be subjected to judicial review on the constitutional principle of legality that governs the use of all public power.

See: *Geuking v President of the Republic of South Africa* 2003 (2) SA 34 (CC) and *Democratic Alliance v President of the Republic of South Africa* 2013 (1) SA 248 (CC) par. [29] to [30] and [32], in the context of the concept of irrationality. It was therefore argued that if the President knows that the request for extradition

is an abuse of process, the real purpose falls away, and by then refusing to allow the resident citizen to exhaust the remedies to neutralize the foreign warrant of arrest, his decision is irrational.

16.

Applicants say that this case does not challenge the ultimate exercise of the Section 3 (2) power of the State President. It does not purport to describe how the President should decide and does not seek to influence what the President ought to take into account when deciding upon an extradition request of the Lebanon. It merely asked that the President should not begin to consider a Lebanese request - as and when made - for the surrender of the four Applicants, until they have had the opportunity to have a Lebanese Verdict and the Red Notices set aside.

17.

It was argued that the State President was not obliged to give a Section 3 (2) written consent within any given time period. He could for instance undertake, or cause to be undertaken any investigation into any fact that may play a role in his decision in order to identify relevant factors, to investigate them and to come to a conclusion. This may take an undetermined period, which by implication means that the President may pend taking a decision until he has made adequate enquiries and has adequately reflected on the issues involved to be able to take an informed and thus rational decision. The Minister of Justice and Constitutional Development may of course also refuse to surrender a person if the surrender has not been required in good faith or in the interests of justice.

See: Section 1 (b) (iii) of the Extradition Act in this context.

It was argued that the President ought therefore rationally to take these considerations into account as well when considering a Section 3 (2) request.

18.

In the context of Section 3 (2) of the Extradition Act, I am in agreement that the President is obliged to act rationally in that exercise. I also agree that the President may cause an investigation to be undertaken into any fact that may play a role in his decision. I also agree that a relevant consideration would be that to surrender a citizen of the Republic is a far-reaching decision, inasmuch as the State then loses its sovereignty over the citizen, and the citizen loses the protection of the State and his or her constitutional rights.

19.

As far as the interdict against the President is concerned, I am of the view that this prayer ought not to be granted for the following

reasons:

1. Applicants ' right to a rational process in the context of the provisions of Section 3 (2) of the Extradition Act need not to be protected by a Court order now. The nature of this right, is not such, that if it is not protected by an interdict now, irreparable harm would ensue;
2. It is common cause that this application has reached the offices of the State President, and it is also common cause that nothing prohibits the Applicants from making further representations to the State President;
3. No extradition treaty exists between Lebanon and South Africa;
4. No request by Lebanon for the extradition of the Applicants has as yet been made.

20.

It is clear that if no request by the State of Lebanon has as yet been made, and upon a proper interpretation of sections 3 and 4 of the Extradition Act, the State President's involvement is not an issue if such request is not before him.

As far as the requirements for an urgent interdict are concerned, and the question of when a right needs to be protected by an urgent

interdict, see the discussion of the relevant authorities in *Afrisake NPC and Others v City of Tshwane Metropolitan Municipality and Others* [2014] ZAGPPHC 191 (14 March 2014).

21.

Respondents referred to the fact that the Minister of Justice and Constitutional Development was not joined and that the President was in fact unnecessarily joined inasmuch as the members of the Executive, i.e. the relevant Ministers, are responsible for certain executive functions. In this context reference was made to *Von Abo v President of the Republic of South Africa* 2009 (5) SA 345 (CC), paragraphs 45 and 49.

It is indeed an unfortunate and regular occurrence in this Court that the State President is regularly cited as a Respondent where in fact a particular Minister responsible for the functioning of a particular Government Department is the person upon whom the primary responsibility rests for the administration of that department.

In this particular case it is clear that the Minister of Justice and Correctional Services is directly responsible for the procedure

involving the execution of all steps relevant to extradition. In the present instance, the Minister of Home Affairs has nothing to do with the administration of any extradition process, but obviously would have been in a position to say whether or not the Applicants had ever been in the State of Lebanon. On behalf of Respondents, it was therefore argued by Mr P. de Jager SC, that the Applicants want to interdict the President from exercising his statutory obligation to consider a formal application (which does not even exist), for the extradition of individuals from a state

who has no extradition treaty with South Africa.

It is clear that an interdict against an entity, or organ of State that exercises statutory powers should only be granted in the clearest of cases.

See: National Treasury and Others v Opposition to Urban Tolling Alliance and Others 2012 (6) SA 223 at 231 par. 26, and Goo/ v Minister of Justice 1955 (2) SA 682 (C) at 687 to 688.

In Harkson v President of the Republic of South Africa and Others 2000 (2) SA 825 (CC), and Geuking supra, it was clearly decided that the President's discretion in terms of Section 3

(2) is limited to a mere permission to commence extradition

proceedings in terms of the Act itself. It was argued that neither the Courts, nor anybody else can prescribe to the President what considerations should be taken into account when he takes such a decision. Once the President has given such a permission, which should be requested through formal diplomatic channels, the process in terms of the Act is initiated, and from there on the discretion lies with the particular Magistrate, and finally with the Minister of Justice and Correctional Services. All this would be open to appeal to this Court.

22.

In general terms I agree with Respondents' contention, save to say that the decision of the President in that particular context, must be rational, and if representations are made to him, he must bona fide consider them. This is part of the process of legality, and as I have said, if the President does not act rational, his decision

would be subject to review.

23.

Respondents' Counsel therefore argued that the application was completely premature and did not meet the most basic requirements of an interim interdict.

24.

I agree with these contentions for the reasons set out above.

25.

As far as the interdict against the other Respondents is concerned to prevent an arrest, I need to refer to the Answering Affidavit of Lieutenant-Colonel Nkuna, who is employed by the Fifth Respondent. She states that she was aware that the Interpol Red Notices were issued by Interpol on 15 June 2017 when they came to the knowledge of Interpol South Africa. These notices were investigated and it was confirmed that the Applicants were indeed wanted by the authorities in Lebanon and were present in the Republic of South Africa. Lebanon was therefore informed of their presence through Interpol channels late in June 2017. Since the Red Notice was issued and until today, no further communication was received from Lebanon, and there was also no formal request for the extradition of the Applicants. As far as the status and consequences of the Red

Notice are concerned, it was said that in the past the Fifth Respondent reacted to Red Notices issued by foreign states in respect of individuals within the borders of the Republic. If the foreign state had a formal extradition treaty with the Republic. This was done by a so-called "provisional arrest" which set in motion the proceedings set out in the SADC Protocol and Bi-lateral Agreement. Such a person was then formally brought before a Magistrate for the enquiry provided for in the Extradition Act. Such enquiries could not proceed without a formal request for extradition by the foreign state and on many occasions that never occurred. It was then decided that no action should be taken by the Fifth Respondent and its employees, or the South African Police, merely on account of a Red Notice in respect of a particular individual, and that an arrest should only be made once a formal and valid request for extradition had been made. As for states that have no extradition treaty with the Republic, no action is taken by the Fifth Respondent on a Red Notice, save to inform the state that issued the Red Notice of the presence of such individual

in the Republic. It was said that they were acutely aware of the fact that no process can be initiated in terms of the Extradition Act if a formal request was not received from a state with no extradition treaty, pending formal permission to do so from the President of the Republic in terms of the provisions of Section 3 (

2) of the Act.

26 .

For those reasons the Fifth Respondent and the police, have no intention to make an arrest, and will not make an arrest of the First to Fourth Applicants, except if Lebanon should formally request the extradition, and then only after the First Respondent had given written permission that the process prescribed by the Extradition Act may be followed. I do not agree with the criticism of Applicants' Counsel of these contentions. It is clear from the *Geuking* decision *supra*, paragraph [12], and the *Harkson* decision *supra*, that where there is no extradition agreement between the relevant countries, but a request for extradition had been received, the provisions of Section 3 (2) of the Act must apply and be followed. Failing that, no warrant of arrest can be issued by a Magistrate under Section 5 (1) (a) of the Act. Applicants' Counsel relied on the provisions of Art. 87 of the INTERPOL RULES ON THE PROCESSING OF DATA. Article 87 for present

purposes, reads as follows:

"Article 87: Steps to be taken following the location of the person:

If a person who is a subject of a Red Notice is located, the following steps shall be taken:

- a. The country where the person has been located shall:
 - i) Immediately inform the requesting National Central Bureau or international entity and the general secretariat of the fact that the person has been located, subject to limitations deriving from national law and applicable international treaties;

ii) Take all other measures permitted under national law and applicable international treaties, such as provisionally arresting the wanted person or monitoring or restricting his or her movement".

Interpol's Rules in this context have not been made part of our domestic law. The reference to our national law, having regard to the definition of "law" in the Interpretation Act 33 of 1957, means any law, proclamation, ordinances, Act of Parliament or other enactment having the force of law. In *Rustenburg Platinum Mines v Molotgedi* 1954 (3) SA 871 AD at 874, it was said with reference to "law" that this would include the definition of "law" in the Interpretation Act as well as statutory and common law.

27.

Applicants' Counsel in this context relied on the provisions of Section 40 (1)

(k) of the Criminal Procedure Act 51 of 1977 as amended. Section 40 deals with an arrest by a Peace Officer without a warrant and Section 40 (1) (k) reads as follows:

(1) "A Peace Officer may without a warrant arrest any person -

(k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or be detained in custody in the Republic".

On the present facts it is my view that the Applicants are not liable to be arrested or detained under "any law relating to extradition or fugitive offenders". It is common cause that they are not fugitive offenders, and they are not liable to be arrested in terms of the Extradition Act, inasmuch as there is no request for extradition from Lebanon and the procedures required by Section 3 (

2) of the Extradition Act have not yet commenced, and cannot yet be commenced. A warrant for their arrest can therefore not be lawfully issued at this stage. I agree with the comment of the authors Du Toit et al, in *Commentary on the Criminal Procedure Act Vol. 2 APP 817*, where they discussed the Procedure of Extradition: Foreign states and Associated states. In the context of the "provisional arrest" referred to in the Rules of Interpol, they say that neither the Extradition Act, nor the Criminal Procedure Act provides for such a "provisional arrest". I agree with their view. It is sound in law.

28.

Accordingly, there is at present no lawful basis for such an arrest or even threat of such an arrest.

The result is therefore that the Applicants are not entitled to an interdict in this context either.

29.

The following order is therefore made:

The application is dismissed with costs, including the costs of two Counsel.

JUDGE H.J FABRICIUS

JUDGE OF THE GAUTENG HIGH COURT, PRETORIA DIVISION

Case number: 52776 / 17

Counsel for the Applicants:

Adv P. F. Lauw SC SC

Adv D. Vetten

Instructed by: Edward S. Classen & Associates

Counsel for the Respondents: Adv P. J. J. De Jager SC

Adv H. A. Mpshe

Instructed by: The State Attorney

Date of Hearing: 15 August 2017

Date of Judgment: 18 August 2017 at 11:30

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