IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NUMBERS: 2016/19992

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED:

In the matter between:

MOTSA, **SENZO**

Applicant

and

THE MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES First

Respondent

DIRECTOR OF PUBLIC PROSECUTIONS

GAUTENG LOCAL DIVISION Second

Respondent

MRS MALETE (MAGISTRATE, KRUGERDORP) Third Respondent

Coram: Wepener J

Heard: 1 June 2020

Delivered: 4 June 2020

Summary: Extradition Act 67 of 1962 – Review of decisions taken by Magistrate and Minister on the basis of illegality and irrationality. There are two different and distinct processes.

JUDGMENT

Wepener, J:

[1] The applicant is a male, committed to the Krugerdorp Prison pursuant to an order issued by the third respondent who is the Magistrate of Krugersdorp (the Magistrate) after holding an enquiry under the Extradition Act[1] (the Act).

[2] The first respondent is the Minister of Justice and Correctional Services (the Minister) who is joined in his official capacity and who issued a decision that the applicant be surrendered to the Kingdom of eSwatini (the Kingdom) at the request of the authorities of that country.

[3] The second respondent is the Director of Public Prosecutions who conducted the enquiry on behalf of the State before the Magistrate.

[4] There exists an extradition agreement between the Republic of South Africa and the Kingdom, the terms and applicability of which are not contentious in this matter. Pursuant to that agreement the Kingdom requested that the applicant (and others) be

[1] Act 67 of 1962.

surrendered to that country to stand trial, inter alia, on a count of murder. It is common cause that the person convicted on a count of murder in the Kingdom, may be liable to receive the death penalty. All the parties before me accepted that the State may not surrender a person to another country if this will expose such person to a real risk of the imposition and execution of the death penalty.[2]

[5] The applicant alleges that his extradition to the Kingdom may result in the death penalty being imposed and executed if he is convicted on the charge of murder and, consequently, resists his extradition to the Kingdom. The resistance is based on the judgment in *Tsebe* in that it was argued that the applicant would run the real risk of a violation of his right to life, right to human dignity and right not to be treated or punished in cruel, inhuman or degrading way in the Kingdom in breach of s 7(2)[3] of the Constitution.[4]

[6] The resistance came before me in the form of a review. The applicant seeks to review two decisions. The first decision is that of the Minister that the applicant be surrendered to the Kingdom on the basis that the decision is irrational and irregular and that it falls to be reviewed and set aside. The second decision is that of the Magistrate who committed the applicant to prison on 14 November 2014, also attacked on the basis that it is irrational and irregular.

[7] I was not addressed on the applicability of these grounds of review and the soundness thereof. For purposes of this judgment, and without a review of the meaning of these terms in review proceedings, I accept that the grounds of review may be applied in this matter without making any finding to that effect.

[8] I will deal with the decision of the Magistrate first. During November 2014, the Magistrate held an enquiry and received evidence and argument pursuant to s 10 of the Act. In terms of s 10:

> '(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(a) and (b)(i) the magistrate finds that the person brought before him or her

[2] *Minister of Home Affairs and Others v Tsebe and Others* 2012 (5) SA 451 (CC).
[3] 'The state must respect, protect, promote and fulfil the rights in the Bill of Rights.'
[4] Act 108 of 1996.

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 or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.

(2) For the 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.

(3) If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him.

(4) The magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary.'

The Magistrate considered the evidence and issued and order committing the applicant to prison. The only issue raised by the applicant in this court is that the decision is irregular and irrational in that the Magistrate did not properly consider the fact that the applicant may be sentenced to death in the event of him being convicted of murder in the Kingdom.

[9] The difficulty with this submission is two-fold. Firstly, the Magistrate did consider this issue. She took into account that there is the possibility of a death penalty being imposed and also considered that the undertaking given on behalf of the government of the Kingdom that the death penalty, if imposed, will not be put into operation.

[10] Secondly, the question of the execution as opposed to the imposition of a death penalty is not an issue which the Magistrate should properly have regard to. In *Director of Public Prosecutions, Cape of Good Hope v Robinson*[5] it was held[6] that the extradition

[5] 2005 (1) SACR 1.

magistrate conducting an enquiry in terms of s 10(1) of the Act has no power to consider whether the constitutional rights of the person sought to be extradited may be infringed upon extradition. This is an aspect to be considered by the Minister when dealing with such an application.

[11] There being no other challenge to the decision of the Magistrate, there is no basis for it being reviewed and set aside and that order stands.[7] I need not consider whether the applicant has other remedies available to him.

[12] Pursuant to the scheme of the Act, the Minister then considered the request to surrender the applicant to the Kingdom. When considering the matter during 2015 the Minister had before him what is referred to as the first undertaking and confirmation. In this document the Minister of Justice and Constitutional Affairs of the Kingdom states:

> 'I undertake that should, for reasons unforeseeable, the court pronounces a death sentence against the fugitives Dumsane Papa Stewart, Nathi Motsa, Senzo Motsa and Aaron Macaroni Motsa, not be sentenced to death and I shall, in terms of the above cited section and as a member of the prerogative of Mercy Committee ensure that His Majesty the King is advised to substitute the death penalty for a life sentence. The King had delegated such of advisory functions to me in this regard.'

The respondents rely on the judgment in *Tsebe* for an argument that the foreign State by this document gave the assurance that it will not impose, or if it does impose the death penalty, not to execute it. The applicant submitted that the wording of the document does not go far enough to constitute such an assurance.

[13] The respondents then relied on a further undertaking and confirmation (the second undertaking) issued on behalf of the Kingdom, in which the Minister said:

> 'I undertake that should, for reasons unforeseeable, the court pronounces a death sentence against the fugitive Senzo Motsa, not be sentenced to death and shall, in terms of the above cited section and as a member of the Prerogative of Mercy Committee shall ensure that the death penalty is substituted for a life sentence. The King had delegated the authority to issue the death penalty undertaking to me.

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[6] At para 71.
[7] See *Robinson* para 71.

[14] The second undertaking seems, on face value, to be an undertaking that the death penalty, if imposed, will not be executed. However, it became common cause that the second undertaking did not serve before the Minister when he took the decision in 2015 and counsel for the respondents conceded that it played no role when the Minister took his decision to surrender the applicant to the Kingdom.

[15] After argument was completed, counsel for the respondents advised that there may indeed be another decision of the Minister where he duly took the second undertaking into account and where he took a new decision based on the facts and the second undertaking. If this is so, that decision may stand unaffected by these proceedings but I need not speculate on those facts save to the extent that, if the second decision of the Minister is unassailable, the reviewing and setting aside of the first decision may be academic. There is no such evidence before me and if the Minister issued a later decision based on the second undertaking that is a different matter and does not fall to be considered here.

[16] The question then to be answered is whether the decision of the Minister taken in 2015 can withstand a review as it was based on the first undertaking. That decision could only lawfully be taken if there was an undertaking in place from the Kingdom that the death penalty would not be imposed or if imposed would not be executed.[8] The test is whether there is a real risk of the imposition and eventual execution of the death penalty.[9] In order to consider this, the undertaking or requisite assurance[10] is to be considered.

[17] Importantly, the death penalty in eSwatini is not mandatory. This fact is common cause or at least is not contentious. In this sense the imposition of the death penalty is only a possibility and not a real risk as was the case with Mr. Phale in *Tsebe*.[11] In addition, the Minister of Justice and Constitutional Affairs of the Kingdom solemnly undertook to ensure that the death penalty, if imposed by a court, will be commuted to a life sentence, a matter which is within his powers, it having been delegated to him by

[8] See *Tsebe* para 42.
[9] See Tsebe para 43 and 53.
[10] See Tsebe para 57.
[11] See Tsebe para 72.

the King. The relevant Minister also says that no death sentence had been imposed since 2001 in the Kingdom and that those sentences that were imposed in 2001 were commuted to life sentences.

[18] I am of the view that the undertaking given by the government of the Kingdom removes any real risk of a death sentence being executed in the unlikely event of it being imposed.

[19] The Minister, in my view, correctly relied upon the undertaking in order to come a decision. In these circumstances the decision is neither irregular nor irrational but based on the facts before the Minister.

[20] In all the circumstances, the application to review both the decisions the Magistrate and the Minister must fail and the application is dismissed with costs.

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W.L. Wepener

Judge of the High Court of South Africa

APPEARANCES

Counsel for the Applicant: T. Matimbi

Attorney for the Applicant: Randela Attorneys Inc.

Counsel for First Respondent: N. Makopo

Attorney for First Respondent: State Attorney

Counsel for Second Respondent: F. Mohamed