IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG NORTH, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: YES/NO.

(2) OF INTEREST TO OTHER JUDGES: YES/NO.

(3) REVISED.

23/12/2014 DATE SIGNATURE

Case No 60113/2014

In the matter between:

EDWIN SAMOTSE **First Applicant**

LAWYERS FOR HUMAN RIGHTS **Second Applicant**

and

23/12/2013

THE MINISTER OF HOME AFFAIRS **First Respondent**

MR MATLOU **Second Respondent**

MR MADIMETJA MOGALE **Third Respondent**

THE PRESIDENT OF THE REPUBLIC

OF SOUTH AFRICA **Fourth Respondent**

THE MINISTER OF INTERNATIONAL RELATIONS

AND CO-OPERATION **Fifth Respondent**

JUDGMENT

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1. The parties are the same as identified in the court's judgment of the 23rd September 2014 and they are referred to as before.

2. The first applicant is a Botswana citizen and is alleged to have murdered his girlfriend in that country in 2010. He has been charged with murder in that country and may, if tried and convicted, face the death penalty because Botswana is a retentionist state.
3. The first applicant escaped to South Africa, was apprehended as an illegal alien. He escaped again and, having been arrested and convicted of escaping, incarcerated in the Polokwane correctional institution until the 13th August 2014. On that date he was extradited to Botswana by officials of the Department of Home Affairs ("DHA"), represented in these proceedings by its political head, the first respondent.
4. The first applicant's surrender occurred in spite of an order by the Minister of Justice and Correctional Services in terms of section 11(b) of the Extradition Act 67 of 1962 that the former should not be extradited in view of the fact that Botswana refused to give an undertaking that the first applicant would not be executed should he be convicted of the charge against him. At the same time, it transgressed an interdict issued by this court that ordered the officials of the first respondent concerned to refrain from executing the extradition warrant that had been issued and signed by Ms Dlamini, a senior official of the DHA.
5. The applicants approached the court on a basis of urgency seeking a declaratory order that first applicant's deportation was unlawful and unconstitutional, coupled with further prayers which read:

1.1 *It is declared that the deportation/surrender of the first applicant by immigration officials in the employ of the First Respondent to officials of the Government of Botswana on 13 August 2014 to stand trial on criminal charges in respect of which*

the First Applicant could, if convicted, be sentenced to death was unlawful and unconstitutional.

1.2 *It is declared that the conduct of the immigration officials in the employ of the First Respondent infringed the First Applicant's rights to human dignity, to life and not to be subjected to cruel, inhuman or degrading treatment under section 10, 11 and 12(1)(d) of the Constitution respectively because they deported/surrendered him to officials of Botswana in the absence of the requisite undertaking.*

1.3 *The Registrar of this Court is authorised and directed to cause this order, to be immediately drawn to the attention of and to be delivered to the Registrar or equivalent administrative head of the High Court of the Republic of Botswana as a matter of urgency;*

1.4 *By 14 October 2014, the First Respondent is directed to conduct an investigation into the circumstances under which the First Applicant was removed from the Republic of South Africa and the remedial action taken in this regard;*

1.5 *The Fifth Respondent is directed to immediately submit a written request to H.E, Mr P.T.C Skelemani, the Minister of Foreign Affairs and International Cooperation, Republic of Botswana, seeking a written assurance that the death penalty will not be sought or imposed on the First Applicant or, if imposed, will not be executed;*

1.6 *The Fifth Respondent is directed to immediately intervene on behalf of the First Applicant through all other diplomatic channels available to it to seek a written assurance from the Government of Botswana that the death penalty will not be sought or imposed on the First Applicant or, if imposed, will not be executed; and*

1.7 *The Respondents are directed to return to Court on 15 October 2014 and to report on oath as follows:*

1.7.1 *The Fifth Respondent is directed to report on whether it has made a written request to H.E, Mr P.T.C Skelemani, the Minister of Foreign Affairs and International Cooperation, Republic of Botswana for a written assurance that the death penalty will not be sought or imposed on the First Applicant or, if imposed, will not be executed and any responses received in response to such request;*

1.7.2 *The Fifth Respondent is directed to report on the steps taken by her to intervene on behalf of the First Applicant through any other diplomatic channels and any responses received on behalf of the Government of Botswana; and*

1.7.3 *The First Respondent is directed to report on the steps taken by him to investigate the circumstances under which the Applicant was removed from the Republic of South Africa and the outcome of the remedial action taken in this regard.*

1.8 *Directing the first respondent to enact Standing Operating Procedures which specifically set out:*

1.8.1 *The findings by the Constitutional Court in Mohamed and Tsebe that it is unlawful for the Department of deport or otherwise surrender a foreign national when they face the risk of being subjected to the death penalty if deported or surrender without the requisite assurance being obtained;*

1.8.2 *A specific procedure to deal with foreign nationals who are at risk of being subjected to the death penalty if deported or otherwise surrendered;*

1.8.3 *A specific procedure for checking for extradition requests from other countries;*

1.8.4 *A specific procedure for checking for order of no-surrender issued by the Minister of Justice; and*

1.8.5 *A specific procedure for ensuring that orders of no-surrender from the Minister of Justice are brought to the attention of every immigration official who is authorised to sign a deportation warrant.*

1.9 *Directing the First Respondent to report to the Court by 15 October 2014 on the steps taken to implement the relief set out above.*

6. As the fifth respondent had already engaged her Botswana counterpart by the time the matter was argued, and had undertaken to report to the Court upon the outcome of her efforts, no order need be made against the fifth respondent. In respect of the further relief sought the following orders were issued:

6.1.1 *It is declared that the deportation/surrender of the first applicant by immigration officials in the employ of the first respondent to officials of the Government of Botswana on 13 August 2014 to stand trial on criminal charges in respect of which the first applicant could, if convicted, be sentenced to death was unlawful and unconstitutional.*

6.1.2 *It is declared that the conduct of the immigration officials in the employ of the first respondent infringed the first applicant's rights to human dignity, to life and not to be subjected to cruel, inhuman or degrading treatment under section 10, 11 and 12(1)(d) of the Constitution respectively because they deported/surrendered him to officials of Botswana in the absence of the requisite undertaking by that country's government not to seek the imposition of the death penalty in the event of the first applicant being found guilty of murder; or, if imposed, that the death penalty would not be imposed.*

6.1.3 *The Registrar of this Court is authorised and directed to cause this order to be immediately drawn to the attention of and to be delivered to the Registrar or equivalent administrative head of the High Court of the Republic of Botswana as a matter of urgency;*

6.1.4 *By 14 October 2014, the first respondent is directed to conduct an investigation into the circumstances under which the First Applicant was removed from the Republic of South Africa and the remedial action taken in this regard;*

6.1.5 *Directing the first respondent to enact Standing Operating Procedures which specifically set out:*

6.1.5.1 *The findings by the Constitutional Court in Mohamed and Tsebe that it is unlawful for the Department to deport or otherwise surrender a foreign national facing the risk of being subjected to the death penalty if deported or surrendered without the requisite assurance being obtained;*

6.1.5.2 *A specific procedure to deal with foreign nationals who are at risk of being subjected to the death penalty if deported or otherwise surrendered;*

6.1.5.3 *A specific procedure for checking for extradition requests from other countries;*

6.1.5.4 *A specific procedure for checking for orders of no-surrender issued by the Minister of Justice; and*

6.1.5.5 *A specific procedure for ensuring that orders of no-surrender from the Minister of Justice are brought to the attention of every immigration official who is authorised to sign a deportation warrant.*

6.2 *The first respondent is directed to report to the Court by 15 October 2014 on the steps taken to implement the relief set out above.*

7. The first respondent was unable to meet the deadline of the 15th October 2014 to present the report the court had ordered. Counsel for the first respondent addressed a letter by e-mail to the Court and the other parties requesting an extension of the return date to the 31st October 2014, setting out over his own signature the reasons why his client could not adhere to the report date. No affidavit was prepared by the official in the Office of the State Attorney dealing with this matter, or any official in the DHA, to explain the failure to observe a return day the parties had agreed to determine at the first hearing.

8. The practice to present a letter to the Court to explain the failure to comply with an order of Court or to observe a time limit imposed by the Rules of Court appears to have been devised in recent times. It is a practice that should be terminated immediately. It clearly conflicts with the provisions of Rule 27 and flies in the face of our positive law. The latter requires a party that finds itself unable to comply with an order or a time limit determined by the Rules, to apply for condonation as early as possible by filing an appropriate notice supported by an affidavit setting out in detail the reasons for the party's failure to observe the relevant date. See in this connection, i.a. *Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & Others* Case No 619/12 (SCA) (not yet reported):

> *"[11] Factors which usually weigh with this court in considering an application for condonation include the degree of non-compliance, the explanation therefor, the importance of the case, a respondent's interest in the finality of the judgment of the court below, the convenience of this*

court and the avoidance of unnecessary delay in the administration of justice (per Holmes JA in Federated Employers Fire & General Insurance Co Ltd & another v McKenzie 1969 (3) SA 360 (A) at 362F-G). I shall assume in Dentenge's favour that the matter is of substantial importance to it. I also accept that there has been no or minimal inconvenience to the court. I, however, cannot be as charitable to the appellant in respect of the remaining factors.

[12] In Uitenhage Transitional Local Council v South African Revenue Service 2004 (1) SA 292 (SCA) para 6 this court stated:

'One would have hoped that the many admonitions concerning what is required of an applikant in a condonation application would be trite knowledge among practitioners who are entrusted with the preparation of appeals to this Court: condonation is not to be had merely for the asking;a full, detailed and accurate account of the causes of the delay and their effects must be furnished so as to enable the Court to understand clearly the reasons and to assess the responsibility. It must be obvious that, if the non-compliance is time-related then the date, duration and extent of any obstacle on which reliance is placed must be spelled out.'

[13] What calls for some acceptable explanation is not only the delay in the filing of the heads argument, but also the delay in seeking condonation. An appellant should, whenever it realises that it has not complied with a rule of court, apply for condonation without delay (Commissioner for Inland Revenue v Burger 1956 (4) SA 446 (A) at 449 G-H). "

See further: *Anton Killian Incorporated & Another v Rodel Financial Services (Pty) Ltd* ZAGPJHC 56 [2013] (not yet reported):

'[4] Rule 27 of the Uniform Rules of court deals with condonation and provides that a court may on application on notice and on good cause shown, make an order extending or abridging any time prescribed by the rules or by an order of court. This rule affords the court a wide discretion to grant condonation. Two requirements have to be met for a favourable exercise of this discretion. The first is that the applicant should file an affidavit which satisfactorily explains the delay fully to enable the court to understand how the default came about. The applicant must also satisfy the court that the application is made bona fide and that there is no intention to delay the other party's claim. The second requirement is that the applicant must show a bona fide defence. In this regard the applicant is required to show that the defence is based on facts which if proved would constitute a defence '

9. A letter cannot be substituted for an affidavit. The preparation thereof appears to be a transparent attempt to avoid having to explain the reasons for the defaulting party's failures under oath. Filing an affidavit requires an identification of the person or persons who were unable to comply with the Rule or order, or whose remissness or negligence caused the failure to

keep to the relevant time limits. In the letter that was sent in this instance no source of the information contained therein was disclosed, ensuring the anonymity of the person or persons who instructed the first respondent's senior counsel. The information conveyed in the letter, without any explanation why no formal application was filed, constitutes hearsay and is therefore inadmissible. Given the seriousness of the issues that have to be addressed in this matter, the failure to place evidence before the court is regrettable.

10. The postponement sought was granted nonetheless as neither applicant opposed the relief the first respondent required to finalise its report and, more importantly, it was and is clearly in the parties' interest and in the public interest to obtain a comprehensive report from the first defendant.

11. When the matter was postponed the court emphasized that it expected every official in the first respondent's department who had been involved in the preparation and issuing of the first applicant's deportation warrant to prepare a comprehensive affidavit setting out his or her role in the matter. This indication was given with particular reference to the apparent attempt made in Mr Matthews' affidavit filed on behalf of the first respondent in preparation for the hearing on the merits, to wrap the DAH's head office officials in Teflon and to place the full blame for the unlawful and unconstitutional deportation at the door of the three Polokwane officials.

12. The first respondent did file its report before the 31st October 2014, the extended return day. It was presented by the 28th October 2014. None of the officials the court had indicated should file affidavits complied with the court's directive, but did so on the basis that each one of them was either

proceedings already or found themselves in the position that they might still face such proceedings. The court readily accepted this explanation.

13. The first respondent argued that the court should refrain from making any supervisory order in respect of the Standing Operating Procedures as the issues that were raised by the applicants were hypothetical in the light of the fact that the first applicant had been deported before the application was launched in its present form. Reliance was placed in this respect upon *Director–General, Department of Home Affairs and Another v Mukhamadiva* 2014 (3) BCLR 306 (CC). A moment's reflection during argument, however, demonstrated that the matters raised in the present proceedings are anything but hypothetical. The present dispute is at least the third case our courts have had to deal with in which officials of the DHA have been responsible for the deportation of a person who could be regarded as being in the country illegally, to a jurisdiction in which he faced criminal charges that carried the death penalty and could lead to his execution if convicted. In each instance the officials were aware of the fact that no undertaking had been given by the appropriate authorities of the country to which the deportee was surrendered that the death penalty would not be imposed if the individual concerned was convicted of the offence he was accused of having committed, or, if imposed, it would not be carried out. In each case the DHA's officials were fully aware that under our Constitution the death penalty is classified as punishment that is cruel and unusual and incompatible with the foundational values our society aspires to: *Mohamed and Another v President of the Republic of South Africa and Others* 2001 (3) SA 893 (CC) (2001 (7) BCLR 865 (CC));

Africa and Others 2001 (3) SA 893 (CC) (2001 (7) BCLR 865 (CC)); *Minister of Home Affairs and others v Tsebe and Others; Minister of Justice and Constitutional Development and Another v Tsebe and Others* 2012 (5) SA 467 (CC) (2012 BCLR 1017 (CC)). These decisions leave no room for any argument that a deportation or extradition of any person facing a capital charge to a retentionist state is anything but unconstitutional and unlawful. It is therefore of grave concern that officials in the service of an organ of State, a Department of State, have yet again been guilty of conduct that flies in the face of the foundational values of the Constitution and the Fundamental Rights to life, dignity, bodily integrity and the right not to be subjected to cruel and unusual punishment. This conduct has been committed while the officials concerned must have been fully aware of the import of the above decisions and in at least one instance, were unsuccessful parties thereto.

14. To suggest that the repeated failure of officials, who are still in the employ of the State, to heed the pronouncements of the highest Court in the Republic is hypothetical, while these officials might at any moment be confronted in the exercise of their duties and functions with a situation similar to that of the first applicant, is to advance a proposition that is nothing short of untenable. It is self-evident that repeated transgressions of the fundamental principles of our democracy by public officials must be of concern to our courts, who are called upon to prevent any repetition thereof by appropriate orders.

15. In fairness to counsel for the first respondent it must be recorded that he did not press the argument that this court was not called upon to consider

the malaise and to craft appropriate remedies to put a stop thereto, while still respecting the separation of powers under our constitutional dispensation.

16. The Director-General of the DHA, Mr Mkuseli Apleni, did in fact prepare a comprehensive report in response to the Court's orders. From the report the following facts emerged:

16.1 The Minister of Justice and Correctional Services signed an order of non-surrender in respect of the first applicant on the 3rd July 2014;

16.2 On the 6th August 2014 Ms B Fourie, employed in the Chief Directorate: International Legal Relations of the Department of Jstice and Correctional Services, addressed a letter to the Head of the Polokwane Correctional Service Facility, advising that the first applicant should not be surrendered to Botswana on the instructions of the Minister of Justice and Correctional Services. A copy of the order was annexed to the Letter;

16.3 On the 7th August 2014 Mr Mogale, an inspector stationed in the DHA's Polokwane offices, received a telephone call from Mr Monama, who is an official in the Department of Correctional Services, that the first applicant was due to be released from the Polokwane Correctional Institution on the 8th August 2014. Mogale was further informed that the first applicant was not entitled to stay in South Africa, but that the Minister of Justice and Correctional Services had issued the order of non-surrender already referred to above;

16.4 On the same date, Mr Mogale furnished Mr Venter with a copy of the said order of non-surrender;

16.5 Mr Venter in turn addressed a letter to Ms Roberts requesting a warrant for the removal of the first applicant from the Republic.to this warrant, Mr Venter attached a copy of the said order of non-surrender;

16.6 On the next day, the 8th August 2014, Mr Venter sent a further letter to Ms Roberts and Mr Masanabo, furnishing both with the relevant documentation, including the order of non-surrender;

16.7 A further note was sent by Venter to Rovine Daniels, an assistant director with the Directorate Deportations (headed by Mr Masanabo), recording the fact that first applicant had been visited by a delegate of the Botswana embassy who had issued him with an Emergency Travel Document preparatory to first applicant's surrender. Again, he attached the relevant documentation to his request for urgent assistance;

16.8 Ms Daniels received a phone call on the same date from Mr Alberts, seeking an assurance that the first applicant would not be deported. Ms Daniels undertook to take the matter up with her superior, Mr Masanabo. She furnished Mr Alberts' particulars to the latter, who failed to contact the first applicant's attorney;

16.9 Mr Deon Erasmus, Chief Legal Advisor to the DHA, was furnished with a copy of the order of non-surrender on the 9th July 2014, and with another message on the 9 the August 2014, to which a letter addressed to the Head of the correctional facility at Polokwane was attached, requesting the discharge of the first applicant in consultation with the DHA. Erasmus was under the impression that the first applicant was at the Lindela Transit Facility and that no further sction was required of him;

16.10 Having received Mr Venter's first e-mail on the 7th August 2014, Erasmus forwarded it on the 8th August 2014 to Ms Norah Maleswena with a note requesting her urgent advice;

16.11 Also on the 8th August 2014, Mr McKay, DeputyDirector-General Immigration Services of the DHA, received a message from Ms Marques from the DHA Directorate of International Relations, attached to which were Botswana's Note Verbale requesting assistance in ensuring the first applicant's extradition, and a copy of the non-surrender note aforesaid. He immediately forwarded this message to Mr Matthews and Mr Masanabo, inquiring whether the first applicant was in the DHA's custody;

16.12 According to what was conveyed to Mr Aplena, Mr Matthews understood that the first applicant was not to be surrendered when he received this e-mail. He was in the company of Mr Masanabo at a meeting on the 11th August 2914 (it is unclear whether this was the same meeting as the management meeting held on that date) and issued a 'clear instruction' to the latter that the first applicant was not to be deported to Botswana; At the management meeting, attended by Mr Matthews and the head of the Lindela facility, Mr Jackson, the whereabouts of the first applicant was discussed. Masanabo knew where the intended deportee was held, and was aware that a warrant had been requested, but failed to inform the meeting thereof. He also failed to ensure that no warrant would be issued.

16.13 Miss Maleswena prepared the warrant of removal while she was aware of the fact that an order of non-surrender had been issued. She presented the warrant to Ms Dlamini for signature without drawing the latter's

attention to the existence of the said order. She acted under the control, and presumably under the instruction, of Mr Masanabo;

16.14 On the 12th August 2014 Mr Venter sent another e-mail to Ms Roberts (Erasmus), seeking a direct deportation order as the first applicant was about to be released;

16.15 The warrant of surrender was eventually signed by Ms Dlamini on the 11th August 2014 after it was prepared by Ms Maleswena. She did not have the full file before her when she did so and did not enquire about documents that were missing out of the said file.

16.16 The deportation of the first applicant was thereafter carried out as recorded above.

17. Mr Apleni further records that the disciplinary proceedings against the three Polokwane officials, Messrs Mogale, Matlou and Venter, which had already been instituted before the first hearing of this matter, were still in progress when he prepared his report. They had all been issued with letters of precautionary suspension.

18. Mr Apleni further states in the report that Mr Masanabo and Ms Maleswena were also issued with letters of precautionary suspension and would face disciplinary charges because of their actions, or lack thereof, in connection with the first applicant's surrender to Botswana.

19. Ms Dlamini, in turn, was issued with a written warning for failiong to inspect all documents relating to the first applicant's deportation before signing the warrant of surrender.

20. The other officials involved in same manner in the case were exonerated as there was, according to Mr Apleni, no evidence to suggest that they had behaved improperly in connection with the deportation.

21. An important chapter of Mr Apleni's report concerns the steps the DHA intends to take, or has taken, in order to prevent a repetition of a deportation of a person facing a capital charge in the requesting country without an assurance that the death penalty would not be imposed or, if imposed, would not be carried out. These corrective measures include:

21.1 The South African Human Rights Commission will be informed of every person issued with a deportation warrant and will be invited to consult with such person within 48 after such warrant was issued. This step should ensure that any potential deportee's fundamental rights are not infringed in an unlawful fashion;

21.2 The most senior officials of the DHA will in future be directly involved in, and informed of, deportations, whether direct deportations or transferrals to the Lindela holding facility;

21.3 In all cases in which extradition requests have been denied, the Director-General of the Department of Justice and Correctional Services will communicate directly with his counterpart at DHA; who will in turn notify the Deputy Director-General; Immigration Services who will notify the Chief Director: Inspectorate of the order of non-surrender, which order will then be disseminated to all the Provincial Managers in all nine provinces; who must inform every immigration officer of this order.

21.4 In addition, every immigration official will undergo a six week training course, accredited by SAQWA and presented by the DHA training

academy, consisting of 9 modules: Interpreting current affairs; receiving and attending to complaints; lawful arrests; lawful search and seizure; investigative interviewing; prevention of fraud and corruption; prevention of aiding and abetting contraventions of the Immigration Act; giving evidence in court; and the use of handcuffs, pepper spray and batons in physical exchanges.

21.5 Each official will also be issued with a booklet containing the Standing Operating Procedures and summaries of the key decisions of South African courts relating to the exercise of an immigration official's functions. The key cases will also be circulated on the DHA's internal communication system.

22. The court is satisfied that these measures adequately address the malaise of unlawful deportations. Provided they are properly put into effect no warrant should be issued in future that causes the surrender of a person facing the death penalty in a retentionist state after the Minister of Justice and Correctional Services has issued an order prohibiting such deportation.

23. The court is, however, of the view that it might be in the interest of the public and of all parties involved in immigration issues if the DHA could develop an SOP in respect of the manner and fashion in which officials record and deal with telephone calls from legal representatives to ensure that problems they wish to discuss are properly addressed.

24. The court further notes that the Director-General indicated through his counsel that the court would be informed of the outcome of the disciplinary proceedings instituted against the various officials identified above.

25. Lastly the court wishes to address a worrisome problem. This application was opposed by the first respondent on whose behalf Mr Matthews deposed to an affidavit in which, as the court remarked in its first judgment, he tried to deflect any blame that might be placed on the DHA's officials upon the three Polokwane officials. When the facts set out in Mr Apleni's report are compared with his affidavit significant differences emerge that might suggest that Matthews deliberately shielded Mr Masanabo from the consequences of his actions. The court invited the parties to consider the significance of the apparent contradictions, but no response was received. It is unnecessary to repeat the catalogue of differences between the Director-General's report and Mr Matthews' affidavit. It is suggested, however, that Mr Matthews' actions should be considered by Mr Apleni in the light of the reflection they might cast upon the DHA.

Signed at Pretoria on this day of December 2014.

E BERTELSMANN

Judge of the High Court