IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Case Number: 15423 / 2020

In the matter between:

ANTHONY PETER FREEDENDAL Applicant

and

MINISTER OF JUSTICE AND

CORRECTIONAL SERVICES First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS,

(WESTERN CAPE) Second Respondent

Coram: Wille, J

Heard: 10th of February 2021

Delivered: 18th of February 2021

JUDGMENT

WILLE, J:

Introduction

[1] These are application proceedings which were initially set down for hearing on the 30th of October 2020. This application came before me on the 16th of November 2020 in the urgent fast lane. The matter was subsequently postponed to the 27th of November 2020, in order for the first respondent to file its opposing papers. Again, the matter was postponed for hearing on the 8th of December 2020. The reason for the latter postponement was because the first respondent did not file its opposing papers in the court file and because the applicant desired to file a replying affidavit. Again, the matter was the subject of a postponement due to certain medical difficulties experienced by the applicant's attorney of record. The application was eventually heard on the 10th of February 2021.

Further Affidavit

[2] Very tardily, and a mere (5) days prior to the hearing of the application, the applicant sought to pioneer a further supplementary affidavit. No clarification was tendered for the reasons for the late filing of the further supplementary affidavit. Specifically, no explanation was tendered as to what had transpired between the 8th of December 2020 and the 4th February 2021, when the belated application was launched for the introduction of the supplementary affidavit.

[3] Further, the footing for the introduction of the supplementary affidavit is not clear. It seems to me that the solitary purpose of the affidavit was to attempt to reveal the difficult circumstances that the applicant faces due to his incarceration. The first respondent voiced no objection to the introduction of the further supplementary affidavit as the viewpoint was taken that the material contained therein was not of great moment. On this, I agree. It is for this reason that the application for the introduction of a further

supplementary affidavit by the applicant was granted and the further supplementary affidavit was introduced into the record for the purposes of the hearing.

Factual Matrix

[4] The applicant in this matter is currently (79) years old. The first respondent is the Minister of Justice and Correctional Services and the second respondent is the Director of Public Prosecutions. The second respondent takes no part in these proceedings and abides the decision of the court. The first respondent vigorously opposes the application.

[5] The application consists of two parts, namely Part A and Part B. In accordance with Part A, the applicant seeks an order that the applicant's extradition be stayed and that the applicant be released from detention, pending the determination of the relief sought in Part B of the application. In Part B of the application, the applicant seeks an order that the determination by the first respondent that the applicant be extradited, be reviewed and set aside.

[6] The applicant is currently incarcerated in prison. He is an elderly gentleman and has been married for (51) years. He has (3) children and (5) grandchildren. He has resided with his wife, in the same house in Sea Point for more than (16) years. This property is jointly owned by him with his wife and is unencumbered.

[7] The applicant was arrested on the 30th of April 2014, on charges of sexual assault and has been detained ever since. He was convicted of sexual assault in April 2015 and was sentenced to a period of (5) years imprisonment in terms of section 276 (1) (i) of the Act.[1] He became eligible for release under correctional supervision during August 2016. Because of the nature of his sentence, his sentence would endure for a period of (5) years,

[1] Act 51 of 1977

but he would not ordinarily have been incarcerated in prison for the remaining portion of his sentence.

[8] The applicant's extradition enquiry proceeded in the magistrate's court in Wynberg during 2017. The presiding officer held that the applicant was liable for extradition and handed down a judgment in this connection on the 4th of October 2017. Ultimately, the first respondent was vested with the discretion to evaluate and decide whether the applicant fell to be surrendered to Australia.

[9] At the outset, the applicant's legal team sought to appeal the decision handed down by the magistrate. This appeal was subsequently withdrawn by the applicant. Thereafter, the applicant's attorneys made representations to the first respondent in an effort to persuade the first respondent not to surrender the applicant. This process commenced in June 2018. In the interim, pending the decision from the first respondent, the applicant completed the entire period of his (5) year sentence, in prison.

[10] The first respondent rendered a decision that the applicant was to be surrendered on the 27th of July 2020. For some unknown reason, a copy of the decision by the first respondent was transmitted to the applicant's attorney only on the 2nd of October 2020. This, undoubtedly triggered the launching of the application which, was originally set down for hearing on the 30th of October 2020.

[11] As far as the proceedings in Australia were concerned, the applicant was arrested on the 5th of October 2000 and charged with (1) charge of indecent assault. The charge was provisionally dismissed for want of prosecution on the 21st of March 2001. The applicant was again arrested on the 19th of January 2002 and was charged with (3) charges of indecent assault. During the course of July 2002, the charges were provisionally

withdrawn and later re-instated and substituted with (2) charges of unlawful sexual intercourse, together with additional charges of indecent assault and a further charge of persistent sexual exploitation. The charges were again provisionally dismissed during December 2002. This, because the requisite statements were not supplied to the applicant's legal representatives within the stipulated time period.

[12] During the course of March 2003, the police were advised that the applicant fell to be re-arrested and charged on certain of the offences, as referred to above. The police attempted to locate the applicant. However, the applicant could not be located. It was later established that the applicant was in South Africa, with plans to return to Australia, during April 2003.

[13] During the course of April 2003, the police again attempted to locate the applicant, again without any success. Detective Hope, from the Port Lincoln Criminal Investigation Branch, communicated with the applicant's then legal team and advised him that he intended to arrest and formally charge the applicant. Detective Hope subsequently received written communication from the applicant's solicitor to the effect that the applicant would not be presenting himself to the police station.

[14] Detective Hope thereafter received information from a travel agent during April 2003, that the applicant had returned to South Africa, whereafter a passenger alert was placed on his passport. During March 2006, the applicant's solicitor requested that the abovementioned alert be withdrawn. This request was refused. Subsequently, and during July 2011, the applicant was arrested in Port Lincoln and charged with (10) charges of indecent assault and one charge of unlawful sexual intercourse. Later, a further (5) charges of indecent assault, (3) charges of unlawful sexual intercourse and (5) charges of persistent sexual exploitation were preferred against the applicant.

[15] On the 14th July 2011, the applicant was granted bail in Australia. On the 10th August 2011, he made an application for his bail to be amended to allow him to travel to South Africa on the basis that he wanted to do certain charitable work in South Africa. Despite numerous objections raised by the prosecution to this request, the applicant was granted permission to leave Australia.

[16] The applicant signed a bail agreement in terms of which he agreed to return to court in Adelaide on the 23rd of November 2011, so as to answer to the charges preferred against him. He also provided $10,000.00 in the form of a cash bond as security for his release. The applicant flew to South Africa on the 13th of August 2011. He did not return. The investigating officer subsequently received confirmation[2], that the applicant had been arrested in South Africa on alleged child sex offence charges and that he would be held in custody on these charges for some not inconsiderable period of time.

[17] In April 2015, the investigating officer was informed by Interpol that the applicant had pleaded guilty to certain of the charges in South Africa and would be due for release in early 2016. The investigating officer subsequently made enquiries regarding the extradition of the applicant to Australia and on or about the 19th of May 2016, a warrant was issued for the arrest of the applicant in connection with the alleged (24) charges that were still pending in Australia.

[18] In anticipation, during September 2019, the investigating officer contacted (7) of the victims and (6) of them have confirmed that they would be willing to testify against the applicant. The bail agreement signed by the applicant at the magistrate's court of South Australia on the 10th of August 2011, reflects that the applicant undertook to return to

[2] During 2014

Australia by the 21st of November 2011. The applicant understood that if he did not appear in court when so required, he could be arrested with or without a warrant and further that he rendered himself liable to be sentenced to a fine, alternatively up to two years imprisonment, for want of his appearance at court.

[19] In September 2016, the first respondent received a request for the extradition of the applicant from the Department of International Relations and Co-Operation, which was received from the High Commission of Australia. The Australian Government sought the extradition of the applicant in order for him to stand trial on (24) charges relating to the sexual abuse of eight children ranging from (7) to (11) years old. The offences were allegedly committed between June 1999 and January 2003, in South Australia.

Discussion

[20] It is common cause that as matters currently stand, the applicant falls to be extradited to Australia. The argument to be preferred at the hearing of the review application is that the first respondent has failed to act in accordance with the Extradition Treaty between South Africa and Australia. The point is also made that the applicant has never received a response to its comprehensive representations, save for having received a copy of his extradition order. I mention that since the filing of the application by the applicant, a comprehensive response to the applicant's representations has now been filed by the first respondent.

[21] It is submitted that the applicant suffers from serious health issues and his further detention is severely infringing upon his human rights and dignity. The health issues contended for by the applicant are; that he suffers type (2) diabetes; that he suffers tuberculosis; that he has skin cancer; that he has vascular disorder; that he has fluid on

his heart and that he suffers from epilepsy. In addition, it is advanced that the applicant would not physically be able to 'cope' with an air flight back to Australia.

[22] Finally, it is submitted that the first respondent has failed to act in accordance with the provisions of Article 3.2 (g) of the Extradition Treaty between South Africa and Australia, which provides, inter alia, as follows:

> *'...a request for extradition may be refused if the "Requested State" while taking into account the nature of the offence and the interests of the "Requesting State", considers that in the circumstances of the case, including the age, health or other personal circumstances of the person whose extradition is sought, the extradition of that person would be unjust, oppressive, incompatible with humanitarian considerations or too severe a punishment'*

[23] The first respondent has given the applicant an undertaking that he will not be extradited until his review application has been finalized. This undertaking was given on the 30th of October 2020. The first respondent however opposes the release of the applicant from his incarceration, pending the determination of his review application.

[24] The first respondent opposes the release of the applicant, inter alia, on the basis that he is facing no less than (24) charges in connection with indecent assault in Australia. A warrant of apprehension has been issued out by the magistrate's court in South Australia for the applicant. The applicant also breached his bail conditions by failing to attend court on the 23rd of November 2011, in Australia.

[25] It is the first respondent's case; that the applicant chose not to return to Australia in November 2011; that he elected to become a fugitive from justice; that he thereafter sexually exploited children in South Africa; that the applicant has shown through his past

conduct that there is a real likelihood that he will attempt to evade his extradition to Australia by fleeing from South Africa once released. Further, it is the first respondent's case that since the first respondent has now ordered the surrender of the applicant to Australia, the applicant falls to remain in custody pending his extradition to Australia.

[26] The first respondent contends for the position that the medical condition of the applicant has been the subject of much exaggeration and has not been the subject of any cogent proof by a medical expert. In support of this disputed issue, the first respondent attached to its opposing affidavit, an affidavit from a medical officer and a professional nurse, who are the applicant's primary health care providers at the prison where he is incarcerated.

[27] These affidavits, indeed do reveal that the applicant suffers from a number of medical ailments. Significantly, however, the affidavits also reveal that he is receiving medical treatment for these ailments on an almost daily basis. Further, the conclusion is drawn that no reason can be advanced why the ailments that the applicant suffers from, cannot be the subject of the necessary medical treatment in Australia.

[28] Further, it is recorded by the medical health care workers that most of the applicant's conditions can be treated at primary health care level and that his chronic conditions are currently well controlled. In addition, applicant is fit enough to travel overseas.

[29] Finally, the first respondent argues that the current conditions in terms of which the applicant is housed in prison are not unjust, oppressive or incompatible with humanitarian considerations. The first respondent contends that there is no constitutional breach in connection with the conditions under which the applicant is incarcerated.

[30] This is so because, it is alleged; that the applicant is housed in a single cell and that most significantly, due to the applicant's age and medical health, the applicant was given the option of sleeping at the prison clinic. The applicant refused. This offer still stands and the applicant simply does not in any manner deal with this option in his papers. It is also contended that the likelihood of contracting the coronavirus in a single cell is also remote**.**

[31] From an evaluation of the material placed before me it is clear on the facts that the applicant is indeed a fugitive from justice. Further, he was previously released on bail and he has abused this privilege. In the event that he is released, pending the outcome of his review application, he may very well flee from the jurisdiction of South Africa, so as to avoid his extradition to Australia.

[32] I agree that his medical condition has been exaggerated as well as the conditions of his incarceration in prison. It is so that prisons are not places of Nirvana, but it is submitted that he is housed in a single cell and was offered the opportunity of sleeping at the prison clinic, which he declined.

[33] On the material before me, it has been demonstrated that the applicant is receiving sufficient health care in prison and when necessary he is referred for external specialist care. It is also patently clear that the applicant will receive sufficient health care in Australia and that these prison authorities are more that capable of providing the necessary care and skill to attend to the applicant's ailments.

[34] In my view, the applicant's health status is not so dire and his medical ailments are currently well controlled and his release for health reasons, pending the review application,

is accordingly not justified. Further, his detention is neither unjust, nor incompatible with humanitarian considerations. He is also facing a number of serious charges in Australia.

[35] I now turn to the legal issue of the lawfulness of the applicant's detention raised during argument. At the conclusion of the extradition enquiry and after the hearing of the evidence, the judicial officer concerned must either commit or discharge the sought person. Section 10 (1) of the Act[3], stipulates the requirements that must be satisfied before a judicial officer may commit the sought person.

[36] If the conditions are met, then the judicial officer must make an order committing the sought person to prison. The conditions that must be met before a committal order is made are: - that the person must be liable to be surrendered and: - that in the case where such person is accused of an offence, there must be sufficient evidence to warrant a prosecution for the offence.

[37] After the judicial officer issues a committal order, the enquiry comes to an end. The person is committed to prison to await the decision with regard to his or her surrender in accordance with section 11 of the Act. This constitutes the start of the executive phase of the extradition process under section 11. The Minister may then decide to surrender the sought person, alternatively, he can decline to surrender the sought person. It follows as a matter of logic that if a committal order has not been issued, then the Minister has no lawful power to exercise his powers in terms of section 11 of the Act.

[38] The legal procedure to be followed under the Act was most aptly described in *Robinson*[4], as follows:

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[3] Extradition Act, 67 of 1962

[4] *Director of Public Prosecutions: Cape of Good Hope v Robinson* 2005 (2) BCLR 103 (CC), paragraph 7

> *'In summary therefore, a person whose extradition is requested by a foreign state in terms of section 4(1) must be brought before an extradition magistrate who determines whether the person is liable to be surrendered in terms of section 10 of the Act. The Minister cannot make an order for the extradition of any person unless a magistrate has committed that person to prison after a section 10 enquiry. An order of committal by a magistrate is a prerequisite to the Minister's decision to surrender. The extradition magistrate and the Minister both play a role in the extradition if there is a section 10 enquiry'*

[39] It is clear to me that the surrender decision under section 11 of the Act, is subject to judicial control. This was discussed in *Robinson*[5] as follows:

> 'It is not appropriate to determine in this case the principles that would govern a challenge to a decision by the Minister to extradite. That had better be done when the occasion arises. There is no need to say more than that the Act expressly contemplates that any Provincial or Local Division of the Supreme Court [could] upon application made after reasonable notice to the Minister, [order the] discharge from custody [of the person sought to be extradited] on the ground that there is not sufficient cause for his further detention'

[40] In my view, upon a proper evaluation and interpretation of *Robinson,* the applicant falls to remain in custody pending his extradition to Australia since his committal to custody is a requirement for his surrender to take place.

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[5] Robinson at paragraph 55

[41] According to the applicant, the review application in this matter is a review as contemplated in terms of section 14 (e) (i) of the Act. In this connection the applicant has put up scant material in support of his review to be advanced in Part B of his application. For this reason, it is very difficult, if not impossible to assess, even on a superficial level, the applicant's prospects of success in connection with his pending review application. To the extent that it may be argued that the first respondent bears the onus to demonstrate there is not sufficient cause for the applicant's further detention, this in my view would only occur in circumstances where the applicant avers that he is the subject of an unlawful detention

[42] This is not readily apparent in the present case as the applicant does not allege that his incarceration is per se unlawful and he further acknowledges that if it had not been for the extradition warrant, he could have been released from the custodial portion of his sentence in August 2016. Accordingly, in my view, as a matter of logic, the onus does not rest on the first respondent to justify the detention of the applicant. Even if I am wrong on this score, I hold the view that insufficient facts have been set out by the applicant which, in turn, would justify the applicant's release from detention in these somewhat peculiar circumstances.

[43] Further, taking into account the representations made to the first respondent and the reasons which have now been supplied, I hold the view that the applicant's prospects of success in connection with his review application are not by any means a racing certainty and that accordingly the interests of justice do not favour his release from detention. This particularly where there is a strong likelihood that the applicant, if he were so released, would attempt to evade his trial in Australia. I say this because this is what he precisely did in the past.

[44] At the conclusion of the extradition enquiry and after the hearing of the evidence, the magistrate must either commit or discharge the sought person. After a magistrate issues a committal order, the section 10 enquiry is at an end and the Minister may then decide to surrender the sought person, or he can decline to surrender the committed person for various reasons and on certain conditions. In the event that a decision is rendered to surrender the sought person, then in that event, the sought person, falls to remain in custody, pending his extradition, since his committal to custody is a requirement for the surrender to take place.

[45] In *Robinson*[6], the comment is made that a sought person's remedy in these circumstances is to review the Minister's decision in terms of the Act. The application must be brought by the sought person and the applicant bears the onus of proof to show that there is not sufficient cause for the applicant's further detention.

[46] As mentioned before, it is significant that in this case that the appeal by the applicant was withdrawn and the applicant elected rather to pursue review proceedings against the decision of the first respondent. This review procedure is completely discrete from the position where an appeal has been heard or is to be heard under section 13 of the Act.

[47] This must undoubtedly be the correct position in law. In my view, it is accordingly of crucial importance to consider the provisions of section 13 and section 14 of the Act, which provide as follows: -

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[6] At paragraph 55

Section 13 Appeal

'(1) Any person against whom an order has been issued under section ten or twelve may within fifteen days after the issue thereof, appeal against such order to the provincial or local division of the Supreme Court having jurisdiction.

(2) On appeal such division may make such order in the matter as it may deem fit.

(3) Any person who has lodged an appeal in terms of subsection (1) may at any time before such appeal has been disposed of, apply to the magistrate who issued the order in terms of section 10 or 12 to be released on bail on condition that such person deposits with the clerk of court, or with a member of the Department of Correctional Services, or with any police official at the place where such person is in custody, the sum of money determined by the magistrate.

(4) If the magistrate orders that the applicant be released on bail in terms of subsection (3), the provisions of sections 66, 67, 68 and 307 (3), (4) and (5) of the Criminal Procedure Act, 1977 (Act 51 of 1977), shall mutatis mutandis apply to bail so granted, and any reference in those sections to-

(a) the prosecutor who may act under those sections, shall be deemed to be a reference to such person who may appear at an enquiry held under this Act;

(b) the accused, shall be deemed to be a reference to the person released on bail under subsection (3);

(c) the court, shall be deemed to be a reference to the magistrate who released such person on bail; and

(d) the trial or sentence, shall be deemed to be a reference to the magistrate's order under section 10 or 12'

Section 14 Limitation of execution of orders for the surrender of any person

'No order for the surrender of any person shall be executed-

(a) before the period allowed for an appeal under section thirteen has expired, unless he has in writing waived his right of appeal;

(b) before such an appeal has been disposed of;

(c) if upon such an appeal his discharge from custody is ordered;

(d) para was (d) deleted by section 21 of Act 101 of 1969;

(e) in the case of an order of the Minister, if after the expiration of two months-

(i) after the issue of an order of committal under section ten, where no appeal has been or is to be heard under section thirteen; or

(ii) after an appeal under section thirteen has been dismissed, ...any provincial or local division of the Supreme Court has upon application made after reasonable notice to the Minister, ordered his discharge from custody on the ground that there is not sufficient cause for his further detention;

(f) in the case of an order of a magistrate, if after the expiration of one month after the order becomes operative, any provincial or local division of the Supreme Court

> *has upon application made after reasonable notice to the Minister, ordered his discharge from custody on the ground that there is not sufficient cause for his further detention*'

[48] The magistrate's order in this matter is consistent with the requirements as set out in the Act and is not the subject of any appeal or review. The applicant does not seek to review or appeal the magistrate's order. On a proper construction of the provisions of section 13, read with section 14 of the Act, in my view, the applicant falls to remain in custody pending his extradition, alternatively, pending this court's judgment in the review application in connection with the surrender of the applicant.

[49] This must be so, because it is not the decision of the magistrate, which is subject to the review process, but rather the decision by the first respondent. I fail to see on what basis, and I am not persuaded, that this court has the necessary authority in law, to release the applicant on bail, pending the outcome of his review application, albeit in these peculiar circumstances. I am also not persuaded that I have any authority to stay the extradition process. In paragraph [2.1.] of the notice of motion, an order is sought for the extradition process to be stayed pending the determination of the review application. No case has been made out for this relief.

[50] The Constitutional Court in *Geuking*[7], made the legal position clear once a surrender has been ordered by stating, inter alia, the following: -

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[7] *Geuking v President of the Republic of South Africa and Others* (CCT35/02) [2002] ZACC 29 at para 1

> '*Extraditing a person, especially a citizen, constitutes an invasion of fundamental human rights. The person will usually be subject to arrest and detention, with or without bail, pending a decision on the request from the foreign state. If surrender is ordered, the person will be taken in custody to the foreign state'*

[51] In the result, the following order is granted:

1. That the applicant's application as set out in Part A of the notice of motion dated the 15th of October 2020, is dismissed.

2. That the costs of and incidental to Part A of the application shall stand over for determination with Part B of the relief contended for on behalf of the applicant.

3. That in the event that the applicant does not take the necessary steps to set down for hearing the Part B of the application within a period of (30) days from date of this order, then in that event, the first respondent shall be entitled to re-enrol this matter on the same papers (supplemented in so far as may be necessary), for the determination of payment of the costs of and incidental to the proceedings incurred in the hearing of Part A of the application.

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E. D. WILLE

(Judge of the High Court)