THE REPUBLIC OF SOUTH AFRICA
versus
REGINALD BERNSTEIN

HIGH COURT OF ZIMBABWE
CHATUKUTA & MUSAKWA JJ
HARARE, 2 April 2019, 16 May 2019 & 30 October 2019

Criminal Appeal

C. Mutangadura, for the appellant
T. Zhuwarara, for the respondent

CHATUKUTA J: This is an appeal in terms of s 18 (1) of the Extradition Act [*Chapter 9:08*] (the "Act") against the judgment of the Magistrates Court dismissing a request for the extradition of the respondent.

The background of the appeal is as follows: The respondent is being sought by the South African Police on two counts of fraud/theft relating to sums of ZAR 4 214 177.52 and ZAR 616 172.39. The respondent was employed by Dainfern Golf Estate and Country Club's Home Owner's Association as an accountant. He is alleged to have fraudulently transferred money belonging to the Association into his wife's bank account and into a trust bank account in which he was a signatory. He was charged with fraud/theft and appeared at the Specialised Commercial Crime Court, Johannesburg under case number SCCC 75/2016. The respondent was granted bail. One of the bail conditions was that he surrender his South African passport which he duly did. At the time of hearing of the request, the investigating officer was in possession of the passport. In June 2017, the respondent defaulted attending court and a warrant for his arrest was issued by the Specialised Commercial Crime Court. The respondent holds dual citizenship of Zimbabwe and South Africa. Investigations by the South African Police disclosed that he had fled to Zimbabwe.

A request was made to the Zimbabwean authorities for his extradition. On 6 March 2018, the Minister of Home Affairs of Zimbabwe issued a warrant of provisional arrest in terms of s 25 (3) of the Act following a request by his South African counterpart. He was arrested by the Zimbabwe Republic Police on 16 March 2018.

On 16 April 2018, the appellant made a formal request before the Victoria Falls Magistrates Court for the extradition of the respondent. Unauthenticated photocopies of the request for extradition by the South African authorities (which included statements and affidavits by the appellant state) were placed before the court. The prosecutor handling the matter submitted that the request was premised on an extradition treaty/agreement between the Governments of the Republic of South Africa and the Republic of Zimbabwe.

The production of the documents was challenged in terms of the High Court (Authentication of Documents) Rules, 1971 and ss 275 to 277 of the Criminal Procedure and Evidence Act [*Chapter 9:07*]. The respondent raised the following objections:

a) an affidavit by the police officer with knowledge of the case was not availed;
b) the documents relied upon by the appellant were uncertified copies;
c) the documents relied upon by the appellant were not authenticated;
d) there were no bank statements or audit reports to show the alleged transaction;
e) no viva voce evidence had been adduced

As a result of the above deficiencies, the appellant had not established a prima facie case that the respondent was guilty of any crime.

On 14 May 2018, the request for the extradition of the respondent was dismissed on the basis that the documents produced in support of the request were inadmissible, being uncertified photocopies and unauthenticated documents, and thus their contents could not be relied on to establish the existence or otherwise of a prima facie case against the respondent warranting his extradition. Further, the court ruled that the two countries did not have an extradition treaty/agreement and South Africa was not a designated country to whom fugitives from justice can be extradited. An order for the discharge of the respondent was granted.

The appellant soon thereafter brought a fresh request for the extradition of the respondent before the same Victoria Falls Magistrates court. The request was on this occasion supported by original and authenticated documents and affidavits from the investigating officer (Captain Matsipane Daniel Mothopeng), representatives of the complainant (Jean-Pierre du Preez, the Vice Chairperson of the complainant's Board of Directors and other office holders in the complainant association) and a detailed ledger originating from the complainant, an official from FNB and FNB bank statements linking the stolen money to the respondent, his wife and trust. Also attached was the charge sheet before the Specialised Commercial Crime Court, Johannesburg, South Africa. The appellant State furnished the court with the warrant for the respondent's arrest issued by a magistrate on 12 July 2017 on the date the respondent

was supposed to appear in the Specialised Commercial Crime Court, Johannesburg. It also attached to the application the legal authorities supporting its declaration that fraud and/or theft are common law crimes under the South African criminal law.

At the hearing of the fresh request, the respondent raised three preliminary points that the court was *functus officio* having determined the first request and that the matter was *res judicata*. He further contended that the appellant ought to have appealed against the decision of 14 May 2018 instead of launching a fresh request. The trial magistrate upheld all points on 28 September 2018. It is against that decision that the appellant brings this appeal.

The appellant raised three grounds of appeal that:

(a) The court dismissed the first request on a technicality arising from the production of unauthenticated request for the extradition. It therefore erred in holding that it was *functus officio*;

(b) The court erred in holding that the matter was res judicata when in fact the request was based on the fact that South Africa was a designated country in terms of Part III of the Act. The first request had been wrongly premised on a non-existent extradition treaty/agreement; lastly

(c) That the court erred in holding that the appellant ought to have appealed against the decision of 14 May 2018 instead of making a fresh request as it did.

The respondent took a point *in limine* that the appeal was improperly before the court as the appellant was using the appeal to launch an appeal against the court *a quo*'s decision of 14 May 2018. On the merits, the respondent supported the decision of the court a *quo*.

At the commencement of the hearing, we directed the parties to address the court on the nature of the appeal before us. The impression created in both the appellant and respondent's heads of argument was that the appeal was in the narrow sense and based on the misdirections of the court *a quo*. The heads of argument were restricted on whether the court a quo had misdirected itself. The parties were referred to *Simon Francis Mann* v *The Republic of Equatorial Guinea* 2008 ZLR (1) 49 (the *Mann* case) which is the *locus classicus* on the law on extradition in our jurisdiction.

An appeal in an extradition matter against a decision of a lower court lies with the appeal court in terms of s 18 of the Act. The section reads:

> "(1) Any person, including the government of the designated country concerned, who is aggrieved by an order made in terms of section seventeen may, within seven days thereafter, appeal against the order of the High Court which, may, upon such appeal, make such order in the matter as it thinks the magistrate ought to have made.

(2) In addition to the jurisdiction conferred upon it in terms of subsection (1), in any appeal in terms of that subsection, the High Court may direct the discharge of the person whose extradition has been ordered if the High Court is of the opinion that, having regard to all the circumstances of the case, it would be unjust or oppressive to extradite such a person-

(a) by reason of the trivial nature of the offence concerned; or

(b) by reason of the lapse of time since the commission of the offence concerned or since the person concerned became unlawfully at large, as the case may be; or

(c) because the accusation against the person concerned is not made in good faith in the interests of justice; or

(d) by reason of the state of health or other personal circumstances of the person concerned."

The nature of an appeal under the section was considered at great length in the *Mann* case. MAKARAU JP (as she then was) observed at 52 D -53 C that:

> "The distinction between 'wide' appeals and appeals in the narrow sense as raised in this appeal is not a novel argument in this jurisdiction. It is a distinction that is argued in this court regarding the determination of appeals from the refusal to grant bail by lower courts and in the Supreme Court regarding appeals from labour relations adjudicating bodies set up in terms of the Labour Act.

The position was, in my view, succinctly clarified by MCNALLY J A in *Agricultural Labour Bureau & Anor v Zimbabwe Agro-Industry Workers Union* 1998 (2) ZLR 196 (SC), in the following words:

> "Perhaps one can clarify the position by looking at the widely accepted classification of appeals as formulated by TROLLIP J in Tickly & Ors v Johannes NO & Ors 1963 (2) SA 588 (T), and approved by the Appellate Division in South Africa in S v Mohamed 1977 (2) SA 531 (A) at 538 and again in what is now KwaZulu-Natal in a case similar on the facts to the present one, *Metal and Allied Workers Union* v *Min of Manpower 1983* (3) SA 238 (N) at 242B-D.
>
> The three classes of appeals, re-stated in the last of these cases, are:
>
> 1. an appeal in the wide sense, ie a complete rehearing of and fresh determination on the merits of the matter with or without additional evidence or information;
> 2. an appeal in the ordinary strict sense, ie a rehearing on the merits but limited to the evidence or information on which the decision under appeal was given, and in which the only determination is whether that decision was right or wrong;
> 3. a review in which the question is not whether the decision was correct or not, but whether those who made it had exercised their powers honestly and properly."
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> On the basis of the above, I am of the view that an appeal brought in terms of section 18 of the Act is an appeal in the wide sense. This is due to the language used in the section that gives the appeal court wide discretion to substitute its own decision on the same facts that were before the lower court in addition to granting power to the court to take into account other factors of a humanitarian nature. Thus, in my further view, in determining an appeal such as the one before us, the appeal court need not first establish any misdirection on the part of the lower court and re-hears the request as argued before, together with any additional considerations of a humanitarian nature that may be placed before it during the appeal hearing. The correctness or otherwise of the approach adopted by the lower court in coming to the conclusion that it did are

> therefore not issues before this court." (See also *Watchtower Bible and Tract Society of Pennyslvania & Anor* v *Drum Investments (Pvt) Ltd* 1993 (2) ZLR 67 (S).

It is clear from the above remarks that an appeal under s 18 of the Act is an appeal in the wide sense. It is not an evaluation of the decision of the court a *quo*. It entails a re-hearing of the request and the making of an order that the appeal court considers the lower court should have made in the circumstances of the matter. Although the extradition hearing is conducted in a criminal court, the proceedings are neither criminal nor civil proceedings. They are *sui generis.* (see *Harksen* v *The Director of Public Prosecutions: Cape of Good Hope & Anor* 1999 4 All SA 198.) The question whether the court a quo misdirected itself is therefore of no consequence.

We are indebted to the submissions by counsels in response to our request to consider the *Mann* case. Both counsels conceded that the appeal is an appeal in the wide sense. In light of the decision in *Mann*, the concession is in our view proper. Mr *Zhuwarara* further referred the court to *S* v *McCarthy* 1995 (3) SA 731 (A) where it was held that a plea of *res judicata* is not sustainable in extradition proceedings where the decision of the lower court is not on the merits. The same applies to the plea that a court is *functus officio*. The rationale for the principle of *functus officio* is that once a court has made a determination on the merits of a matter and thus fully and finally adjudicated on the issues before it (that is rendering a definitive decision), it cannot revisit its decision except in very limited circumstances. In *Matanhire* v *BP Shell Marketing (Pvt) Ltd*, CHIDYAUSIKE CJ remarked as follows:

> "The law on this point is very clear in that once a matter has been finalised by a court, that court becomes *functus officio*. It has no authority to adjudicate on the matter again. The only jurisdiction that a court has is to make incidental or consequential corrections. The position was stated as follows in *Kassim* v *Kassim* 1989 (3) ZLR 234 (H) at 242 C-D where it was stated that:
> 'In general, the court will not recall, vary or add to its own judgment **once it has made a final adjudication on the merits**. ……" (own emphasis) (see *National Railways of Zimbabwe* v *Zimbabwe Railway Artisans Union & Ors* SC 8/05 p 10

The court a *quo* did not consider the merits of the first request for extradition. It was therefore not *functus officio*. The plea of *res judicata* was not available to the respondent in the second request. It is therefore trite that a request for extradition resolved on technicalities is still open for determination by the appeal court on the merits. This court is therefore at large and shall proceed to consider the merits of the application.

The procedure to be adopted in extradition matters in respect of designated countries is set out in Part III of the Act. Countries are designated in terms of the Extradition (Designated

Countries) Order, 1990 (SI 133 of 1990). A request for extradition is made to the Minister of Home Affairs in terms of s 16 of the Act. It must be accompanied by:

(a) a warrant of arrest issued by the designated country seeking the extradition,

(b) such evidence as would establish a *prima facie* case in a court of law in Zimbabwe that the person

(c) concerned has committed or has been convicted of the offence concerned in the designated country

Once the requirements set in s 16 have been met, the person to whom the documents relate must be brought before a magistrate for the determination of the request for extradition. The magistrate now has the jurisdiction to determine the request. The magistrate is guided by the guidelines set out in s 17 of the Act in determining the request. Section 17 reads:

> "(1) Where a person has been brought before a magistrates court in terms of subsection of section sixteen the court, if satisfied that-
> (a) the person concerned is the person named in the warrant under which he was arrested; and
> (b) the extradition is not prohibited in terms of this Act; and
> either-
> (i) that a prima facie case is established; or
> (ii) in case in which a record of the case has been submitted in terms of the proviso to paragraph (b) of subsection(1) of section sixteen, that the record of the case indicates, according to the law of the designated country concerned, that the person concerned has committed the offence to which the extradition relates or that he has been convicted of such offence and is required to be sentenced or to undergo any sentence therefor in the designated country concerned, as the case may be;
> shall subject to section nineteen, order that such person be extradited to the designated country concerned……"

The documents in s 16 form the basis of the inquiry on the guidelines in section 17. Section 32 provides that any document referred to in s 16 which is duly authenticated in the designated country be admissible on its mere production before the magistrate as *prima facie* evidence of the facts stated therein upon its production. The rationale for that, appears to be that the magistrate is conducting an inquiry as to whether or not the evidence presented on the papers is such that a reasonable court would conclude that the respondent has a case to answer in South Africa. It is therefore incumbent on the subject of the extradition proceedings to rebut that presumption. This of necessity would require that the person states the basis for the objection such as that he is not the person named in the warrant, the extradition is prohibited in the Act and that the designated country has not established a *prima facie* case. The magistrate would obviously rely on the objections or submissions by the respondent to arrive at his/her decision whether or not a *prima facie* case has been established.

I now turn to the determination of the request. Let me hasten at this stage to note that during the attempted hearing of the second request, the Prosecutor General presented to the court the appellant's request and the basis for the request (which included the authenticated documents referred to earlier), the respondent did not proffer any objections or evidence on the merits as to why the request should not be granted. He raised the technical and preliminary issues alluded to in both the first and the second request. No objection was advanced during the hearing of the appeal either. After the postponement on 2 April 2019, the respondent had adequate opportunity to raise any objections on the merits but decided not to do so. This in our view is a concession that the request is merited. The following were therefore not put into issue:

(1) the appellant State is one of the countries designated in SI 133 of 199;
(2) the requisite documents required under s 16 were produced;
(3) the respondent is the person named in the request documents and in the provisional warrant of arrest;
(4) the extradition is not prohibited under the Act;
(5) the allegations against the respondent are purely criminal and fall squarely under the Criminal Law Code;
(6) the request documents referred to in paragraph 2 establish a *prima facie* case for his extradition;
(7) the respondent is a fugitive from justice as there is no explanation as to how he ended in Zimbabwe after having surrendered his passport to the investigating officer and after his failure to attend court in Johannesburg.

The respondent's counsel conceded to the above. He should be commended as an officer of the court, for the concession which in our view was proper.

It therefore follows that there is nothing to prevent the extradition of the respondent. But before we render our disposition of the appeal, the only issue that is left for us to expound on, out of an abundance of caution, is whether or not a prima facie case was established.

Before codification of our law, fraud and theft were offences under our common law. We have shared the same criminal law with South Africa. Section 89 of the Lancaster Constitution provided that the law to be administered by the courts in Zimbabwe was the law in force in the Cape of Good Hope on 10 June 1891 and as modified by subsequent laws in Zimbabwe. The definition of law (which is now applicable) in s 332 of the new Constitution includes acts of parliament and any unwritten law in force in Zimbabwe. The unwritten law is the common law. Fraud and theft are offences under the Criminal Law Codification and Reform

Act [*Chapter 9:23*] (see sections 136 and 113 respectively). I am satisfied that the conduct alleged by the appellant constitute a criminal offence in Zimbabwe.

In conclusion, the application for extradition was properly before the court a quo. It ought to have been determined on the merits. The court therefore erred in declining to determine the application. The allegations against the respondent are purely criminal and fall squarely under the Criminal Law Code. The evidence set out in the documents placed before the magistrate are in our view sufficient to establish a *prima facie* case considering that we are not determining the guilt or innocence of the respondent. The respondent is a fugitive from justice who has offered no meaningful objection to the request.

Accordingly, it is ordered as follows:

1. The appeal is upheld.
2. The order of the court a quo dated 28 September 2018 dismissing the request for the extradition of and discharging the respondent, Mr Reginald Bernstein, is set aside and substituted with:
   "1. The request for the extradition of Mr Reginald Bernstein from the Republic of Zimbabwe to the Republic of South Africa be and is hereby granted.
   2. The respondent is committed to prison awaiting his extradition."

2. The respondent be and is hereby ordered to pay costs of this appeal.

MUSAKWA J AGREES: ……

Prosecutor General's Office, appellant's legal practitioners
Muvhiringi & Associates, respondent's legal practitioners