

SIMBARASHE CHARUMA
and
PRINCE CHINDAWANDE
versus
THE REPUBLIC OF SOUTH AFRICA
and
THE MINISTER OF HOME AFFAIRS N.O.

HIGH COURT OF ZIMBABWE
MAFUSIRE J
MASVINGO: 1 & 13 February 2018; 9 March 2018

Application for discharge from extradition

Mr *O. Mafa*, for the applicant

Mr *T. Chikwati*, for the respondent

MAFUSIRE J:

- [1] This was an application for discharge from extradition in terms of the Extradition Act, [*Cap 9:08*]. The background was quite colourful.
- [2] In the month of November 2017 Zimbabwe experienced seismic political developments. For weeks on end they dominated news headlines around the globe. In simple terms, there was a change of political leadership in central government. Sages and analysts have wondered, and still do, whether since the army was involved, and since the change did not come about through the ballot box, was it a coup *d'état* or not?
- [3] Events unfolded this way. In November the then sitting President of the Republic – Robert Gabriel Mugabe – resigned. He had been head of government for an uninterrupted thirty seven years since Zimbabwe's independence from Britain in 1980, first as Prime Minister, and later on as Executive President.

- [4] For much of those thirty seven years, the economy was on a tailspin. Concomitantly, everything else was in free fall. Among other things, democracy and good governance disappeared. Corruption became endemic. Law and order was scarce. Rule *by* law replaced the rule *of* law.
- [5] From 13 November 2017 the army stepped in. The Zimbabwe Defence Forces launched an exercise that they termed ‘Operation Restore Legacy’. Among other things, military tanks roared out of the barracks. They were stationed at strategic positions. These included the then President’s private residence; his official presidential offices; the armoury division of the Zimbabwe Republic Police; central government offices that are situate very close to the Constitutional Court; and so on.
- [6] Following intense negotiations over a number of days, and some momentous events elsewhere; such as multitudes pouring into the streets and gathering in open spaces in solidarity with the army; preparations by the Zimbabwean Parliament to impeach the President allegedly for abrogating the Constitution; expulsion from the ruling Zimbabwe African National Union - Patriotic Front [ZANU – PF] party of the President’s wife, Grace, and several of her followers or supporters; the former President of Zambia, Kenneth Kaunda, jetting into the country; the President finally agreed to step down. His former Vice-President, Emmerson Dambudzo Munangagwa, whom he had dramatically dismissed a few days earlier and had fled the country to seek refuge in South Africa, was flown back to be sworn in by the Chief Justice of Zimbabwe, Luke Malaba, as the next President.
- [7] As all that was happening, the applicants were languishing in remand prison at Chiredzi, pending their extradition to South Africa for trial on charges of murder and robbery in aggravating circumstances. The extradition order had been issued on 6 June 2017 by the magistrate’s court at Chiredzi. This followed a formal application by the prosecution authorities of the Republic of South Africa. Evidence placed before the magistrate’s court in support of the extradition established that the applicants, who were employed as security guards at certain business premises in the Limpopo Province in that country, had brutally assaulted and killed their employer. They had stolen some cash and two cell phones. The evidence was said to include footages downloaded from CCTV cameras.

- [8] The application for discharge from extradition was based on the fact that it was more than two months after the extradition order had been granted and that none of the authorities from the two countries had done anything towards the actual hand-over-take-over of the applicants in furtherance of the extradition order.
- [9] In terms of s 17 of the Extradition Act, where the magistrate's court is satisfied that the requirements for extradition have been satisfied, it can order that the suspect be extradited to the designated country concerned, and that pending such extradition, he be committed to custody, or admitted to bail, as the court thinks fit. *In casu*, the applicants had not been admitted to bail. They were in custody. In terms of the Extradition [Designated Countries] Order, 1980, SI 133 of 1990, South Africa is one of the designated countries with which Zimbabwe has an extradition agreement.
- [10] In terms of s 20 of the Extradition Act, as soon as the suspect may be extradited, the Minister [of Home Affairs] shall notify the appropriate authority of the designated country concerned of the date on, and the place at, which the suspect will be handed over.
- [11] Section 33 of the Act empowers any person who is still in custody awaiting extradition, two months after the expiry of the date on which he could have been extradited, to apply for his discharge from custody. When considering such an application, the court has to satisfy itself that reasonable notice was given to the Minister. If so satisfied the court *shall* order that the applicant be discharged *forthwith*, unless good cause to the contrary is shown.
- [12] The actual wording of s 33 aforesaid is as follows:

“33 Discharge from extradition

- [1] If any person in custody awaiting his extradition in terms of this Act is still in custody after the expiry of a period of two months beginning with the first day on which he could in terms of this Act have been extradited, he may apply to the High Court for his discharge from custody.
- [2] If upon application made in terms of subsection (1) the High Court is satisfied that reasonable notice of the proposed application has been given to the

Minister it shall, unless good cause to the contrary is shown, order that the applicant be forthwith discharged.”

[13] Thus, for a suspect to be discharged from extradition, it must be shown:

- that there is an extradition order;
- that the suspect is in custody awaiting extradition;
- that two or more months must have expired since the extradition order could have been actioned;
- that an application for discharge has been lodged with the court;
- that reasonable notice of the application was given to the Minister [of Home Affairs];
- that there is no good cause militating against the discharge.

[14] If the above conditions exist, the court has no discretion but to grant the discharge order.

[15] *In casu*, the application for discharge was filed on 19 January 2018. That was more than seven months after the extradition order. The Extradition Act does not specify how soon after such an order has been granted the actual extradition should take place. Section 20 simply says as soon as the person may be extradited.

[16] The applicants’ notice to the Minister was by way of a letter dated 23 November 2017 from their legal practitioners. That was more than five months after the extradition order had been granted. The letter read as follows:

“RE NOTICE OF INTENDED APPLICATION FOR DISCHARGE FROM EXTRADITION ON [sic] PRINCE CHANDAWANDE AND SIMBA CHARUMA MUTIZA IN TERMS OF SECTION 33 (2) OF THE EXTRADITION ACT

We refer your attention to the above matter. We represent Mr. Chindawande and Mr. Charuma. Kindly note our interest herein.

The above duo appeared at Chiredzi Magistrates Court for their extradition upon request by the South African Government. On the 6th of June 2017, the presiding Magistrate granted the application for the extradition of the duo. The two have been in custody from the 6th of June 2017 to date awaiting their extradition. No efforts have been made by the South African government or by the State to facilitate the duo’s extradition.

As a result of the above delay, the duo is entitled in terms of the provisions of Section 33 (1) of the Extradition Act to approach the High Court for their discharge.

This letter therefore serves as notice to your good office of the intended application by the duo.”

[17] That a reasonable notice of the intended application was given to the Minister was not in issue. The State conceded it. What was in issue was whether the court could take judicial notice of the upheaval in central government, as narrated above, and accept it as the reason for the Ministry’s inaction, and therefore take it as the ‘good cause’ contemplated by s 33 of the Extradition Act.

[18] The State argued that the upheaval rendered the government dysfunctional for the period that the army was in control. It was argued that before the military operation, the Zimbabwe Republic Police had become so corrupt that it had practically abdicated its constitutional mandate. The police were said to have been only concentrating on chasing after members of the public, particularly motorists at road blocks and other check points, to extort money from them. A part of the State’s response to the application read as follows:

“In recent days, our local newspapers carried a headline wherein the Minister of Home Affairs apologised that the police force had been captured to look for money from the public rather than concentrate on their duties. Consequently, some of the important duties of the force were neglected. This is evident from the delay that was occasioned in the extradition of the applicants.”

[19] The State further wrote:

“At the time the applicants filed their notice of intention to make this application, the court can take judicial notice of the fact that the country was undergoing operation restore legacy. There was no Cabinet and no Minister responsible for running the country. The Ministers were only appointed sometime in December 2017. This has had adverse effects on the operations of the police and contributing to further delays in the accused persons’ extradition.”

[20] Filed together with the State’s submissions were two letters dated 24 January 2017 [evidently a typing mistake] and 8 February 2018. The first was from the Permanent Secretary in the Ministry of Home Affairs to the Acting Commissioner General of Police. It advised of the extradition order and gave authority for the police to communicate with the South African authorities, through Interpol, for the hand-over-take-over of the

applicants. The second letter, whose signature page was not attached, seemed to be from some police department, but was also addressed to the Acting Commissioner General at Police General Headquarters, for the attention of the Finance Director. It also advised of the extradition order and of the names of the police details who had been assigned to arrange for the collection of the applicants from remand prison at Chiredzi on 5 March 2018. On 7 March 2018 they would take the applicants to the Beit bridge Border post.

[21] Mr *Mafa*, for the applicants, argued that the court can deny discharge only if satisfied that the Ministry of Home Affairs had not been given sufficient notice, or where the State has shown good cause why the applicants should not be released. He relied on the case of *Ncube & Anor v Minister of Home Affairs*¹ where, despite the urgency of the matter being impressed upon them by their Zimbabwean counterparts, the South African authorities practically did nothing for six months after the extradition order had been granted. CHEDA J, granting the application for discharge, said²:

“These courts hold individuals’ rights to liberty in very high regard. It has been said on numerous occasions that the general principle in this regard is that the courts should always lean in favour of the liberation of an individual unless it is shown that such liberation will frustrate the proper administration of justice.”

[22] Mr *Chikwati*, for the State, argued that the combination of the political turmoil referred to above, and the renewed efforts by the Zimbabwean authorities to handover the applicants to South Africa, amounted to such ‘good cause’ as to disqualify the applicants from discharge.

[23] The *Ncube* case above is not quite in point. Therein, it was the South African authorities that were lethargic. The Zimbabwean authorities had been quite vigilant. But in extradition matters, it takes two to tango. Both the requesting country and the host nation have to play ball if extradition is to succeed. In that case, the applicants applied for discharge six months later after no hand-over-take-over had been done. It was granted.

¹ 2003 [1] ZLR 445 [H]

² At p 450C - D

[24] *In casu*, the position was worse. When the applicants gave notice of their intention to apply for discharge five months after the extradition order [the actual application being launched seven months later], neither the Zimbabwean authorities, nor their South African counterparts, had done anything towards implementing the order.

[25] To compound the situation further, in court, there were only submissions from the lawyer on what *might* have caused the delay. Nothing factual was placed before me. No affidavits, or even unsworn statements from any of the two authorities, were filed to explain the delay. Instead, as reasons for the delay, I was being urged to take judicial notice of some internal factional turmoil within the ruling ZANU [PF] party, even though it did affect the entire country. But I disagree that such turmoil was to the extent painted by the State. Among other things, there was always a Minister of Home Affairs even during the turbulent days.

[26] In s 33 of the Extradition Act, the Legislature deliberately and wisely left open the question what constitutes ‘good cause’. It is up to the court to use its judicial discretion to decide on a case by case basis. It is not practical, or even desirable, to prescribe what should constitute ‘good cause’. The question can only be answered by a consideration of the broad and general principles applicable to the exercise of judicial discretion.

[27] The court should strive to strike a balance between giving efficacy to extradition treaties or agreements, and an accused person’s fundamental right to freedom if he has not yet been convicted of an offence. Recently, in *Moyo v S*³, in relation to an application for bail pending extradition, I said:

“Undoubtedly, there are obligations thrust on state parties to extradition agreements or treaties to make such instruments effectual by handing over cross-border criminals to thwart their designs to escape justice for crimes committed by them in one country and taking refuge in another. John van der Berg: *Bail – A Practitioner’s Guide*, 3rd ed., Juta, at pp 287 – 288, says a [judicial officer] must exercise his power to grant bail with extreme caution in a manner that would not conflict with treaty obligations between the foreign state and the custodian one.”

³ HMA 20-18

[28] In the instant case, I granted the application for discharge at the close of submissions. I did not regard the alleged endemic corruption within the Zimbabwe Republic Police or the military's 'Operation Restore Legacy' as such good cause as contemplated by s 33 of the Extradition Act. The Ministry of Home Affairs' inaction for five to seven months cannot be sufficient excuse where the liberty of an individual is concerned. The Minister might himself have been under some discomposure by reason of the factional combat within his own political party, but the Permanent Secretary, and the entire bureaucracy under him, had been in office. Only after the applicants had actually launched the application did the Permanent Secretary purport to swing into action.

[29] Furthermore, not only were the applicants not facing any criminal charges locally, but also the South African authorities themselves had remained mum ever since their application for extradition had been granted. The crime was allegedly committed in June 2016. The extradition order was granted exactly a year later. More than seven months later, the requesting country had made no follow-up. It is because of such lackadaisical, easy-going, indifferent and laidback approach to government business that such laws as s 33 of the Extradition Act are promulgated.

[30] The order that I granted read:

- “1 The first and second applicants be and are hereby discharged from custody pending extradition to South Africa.
- 2 The Officer in Charge, Masvingo Remand Prison, be and is hereby directed to release the first and second applicants from custody forthwith upon being served with a copy of this Order.”

9 March 2018

