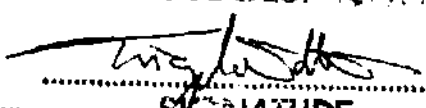


VIC &amp; DUP/JHB/LKS

IN THE HIGH COURT OF SOUTH AFRICA(WITWATERSRAND LOCAL DIVISION)JOHANNESBURGCASE NO: 99/22973DATE: 29 SEPTEMBER 1999

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: <input checked="" type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
(2) OF INTEREST TO OTHER JUDGES: <input checked="" type="checkbox"/> YES <input checked="" type="checkbox"/> NO	
(3) REVISED <input checked="" type="checkbox"/>	
DATE: 8/10/99	SIGNATURE: 

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In the matter between:

NZIMA, TCHAKA

Applicant

and

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MINISTER OF SAFETY AND SECURITY

First Respondent

MINISTER OF JUSTICE

Second Respondent

MINISTER OF CORRECTIONAL SERVICES

Third Respondent

DIRECTOR OF PUBLIC PROSECUTIONS

Fourth Respondent

J U D G M E N T

WILLIS, J: The applicant has come to court by way of urgency seeking the following substantive relief:

1. That this court order that the applicant is not amenable to the criminal jurisdiction of the Regional Court/... 30

Court for Johannesburg, held at Johannesburg, or any criminal court in the Republic of South Africa in respect of the charges brought against him under Case No. 041/01102/974.

2. Declaring that the applicant's apprehension and abduction in Botswana on 26 September 1997 and his subsequent transportation to the Republic of South Africa and purported arrest and detention pursuant thereto is in breach of international law and therefore wrongful and unlawful.

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3. Declaring that the applicant has not been properly and lawfully arrested and has not been properly and lawfully arraigned for a court of competent jurisdiction for the purposes of trying him on the indictments proffered by the prosecution against the applicant and other persons under Case No. 041/01102/974.
4. Declaring that the applicant is entitled to be discharged from his imprisonment and detention at present pending his trial on said indictments.

Further alternative relief which is not relevant was also sought. 20

I would have preferred to have had more time to prepare my judgment in the matter but as this is urgent I shall proceed to give judgment straightaway.

It is common cause that the applicant has been charged with an offence which relates to the selling and delivery of a Mercedes truck which had been taken in a robbery on or about 24 October 1996. It is also common cause that he has been charged with an offence relating to the dealing in 99,2 grams of cocaine.

30

The/..

The following further facts are also common cause:

- (1) The applicant is a Zambian citizen.
- (2) The applicant is a wanted person in the Republic of South Africa and that he found himself in Botswana.
- (3) That the South African Police by way of Captain Rothman being the project manager of the project to bring to justice members of a criminal syndicate, of which the applicant was allegedly a member, requested the Botswana police to apprehend 10 the applicant if he was found to be in Botswana.
- (4) That the Botswana police had traced and arrested the applicant and that they intended to deport the applicant to South Africa which they indeed did do on 26 September 1997.

It would appear that the applicant, having been arrested by the Botswana police was transported by them to the Kopfontein border post whereupon the applicant was handed over to the South African Police and arrested by them.

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There have been no allegations in the applicant's papers of any unlawful conduct on the part of the Botswana authorities.

I have been referred during the course of argument to the well-known case of S v Ebrahim 1991 (2) SA 553 (A). In my view the facts of this case are very different from those in S v Ebrahim. The South African Police did not in any way act unlawfully either by entering Botswana unlawfully or unlawfully abducting the applicant.

I have also been referred by counsel for the applicant 30

to/..

to the case of S v Wellem 1993 (2) SACR 19 (ECD). It would appear that the principles upon which he relies, as developed in that case, have been expressly overruled in the case of S v December 1995 (1) SACR 438 (A). In addition to the case of S v December, *supra*, I was also referred to the case of S v Mahala and Another 1994 (1) SACR 510 (A). In my view the principles developed in these cases assist the respondent rather than the applicant. Certainly on the facts that have been placed before me there is nothing in either of those two cases to suggest that the arrest of the 10 applicant and his subsequent trial is unlawful.

It may be that there was in the arrest and subsequent extradition of the applicant to Botswana a contravention of article 10 of the Treaty between Botswana and South Africa relating to extradition. Be this as it may, it would seem that article 10 does not create rights for the person who has or who is to be extradited but rather creates rights for the state receiving the request for extradition. In my view any possible breach of article 10 of this Treaty does not create rights for the applicant. It does not seem to me 20 that there has been any invasion of the applicant's rights in terms of the Constitution.

Counsel for the applicant relied on section 35 of the Constitution, in particular subsection (1) -

"anyone who is arrested for allegedly committing an offence has the right

(b) to be informed promptly -

(i) of the right to remain silent;

(ii) of the consequences of not remaining silent."

I do not see that in the facts before me there has been any 30 denial/..

denial of the applicant of these rights and, in any event, if they were it would not affect, in my view, the lawfulness of the applicant's arrest in Botswana and his transferral to South Africa.

The applicant has also relied on subsection (2), in particular (d), which provides that -

"anyone who is detained, including every sentenced prisoner, has the right to challenge the lawfulness of the detention in person before a court and if the detention is unlawful to be released."

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That the applicant has a right to challenge the lawfulness of his detention is recognised by my having agreed to hear this application today.

It would seem to me, having regard to the cases of Mahala and December, supra, and the Constitution of South Africa, that no considerations of policy arise in these particular circumstances to render the arrest of the applicant unlawful. Indeed, I wish to record that I can see nothing offensive to either principle or policy in a person being arrested in another state and to be tried in a country 20 of different jurisdiction where there has been co-operation between the authorities; where neither authority has acted unlawfully in the sense of infringing any basic rights of the person so arrested; where relations between the states are friendly and where the offence in respect of which a person is to be tried would constitute an offence in the country where the original arrest took place.

For these reasons I am of the view that the application stands to be dismissed on both the ground that it is not

urgent/.. 30

urgent and also that an insufficient case has been made out on the merits.

The first respondent has not sought any order for costs and in the circumstances it seems to me that the appropriate order to make is that the application is dismissed. It is so ordered.

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ON BEHALF OF APPLICANT : ADV D DEN HARTOG  
Instructed by : Danie Koen Attorneys

ON BEHALF OF RESPONDENTS : ADV N B TUCHTEN SC  
ADV P MOKOENA  
Instructed by : The State Attorney

DATE OF JUDGMENT : 29 SEPTEMBER 1999

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