REPORTABLE

IN THE NORTH WEST HIGH COURT, MAFIKENG

CASE NO: CA 41/2010

In the matter between:-

SEFELANE SHONIWA	First Appellant
FERESE GARAYI	Second Appellant
ELISA MPOFU	Third Appellant
JOSEPH MACHALA	Fourth Appellant

and

THE STATE	Respondent

CRIMINAL APPEAL

HENDRICKS J; GUTTA J

DATE OF HEARING : 06 MAY 2011
DATE OF JUDGMENT : 27 MAY 2011

COUNSEL FOR THE APPELLANT : ADV KUAPANE
COUNSEL FOR THE RESPONDENT: ADV VAN NIEKERK

JUDGMENT

HENDRICKS J

Introduction:-

[1] The State applied for the extradition of the Appellants and one Jokwoeya Chaka ("Chaka") to the Republic of Botswana ("Botswana") to stand trial on three counts of theft of motor vehicles. This application was heard at Zeerust, in the district of Marico, North West Province. On 16 April 2010 the Magistrate ordered that the Appellants together with Chaka, (who did not file an appeal), are liable to be surrendered to Botswana. They are committed to custody pending their extradition. The Appellants appeal this extradition order.

Grounds of appeal:-

[2] In their notice of appeal, the Appellants raised the following grounds of appeal:-

> *"1. The Magistrate erred in finding that the Republic of Botswana is not an "associated state" as contemplated by The Extradition Act 67 of 1962 ("the Act"). [Ground 1]*
>
> *2. The Magistrate erred in finding that the appropriate procedure for the extradition enquiry herein is in terms of section 10 of the Act and consequently coming to the finding that it is not in her power to refuse the surrender [on] the basis that the surrender is not in the "interest of justice" within the contemplation of section 12 (2)(c)(i) of*

the Act.

2.1 More particularly, the Magistrate erred in finding that constitutional issues raised by the Appellants were not relevant to the enquiry." [Ground 2]

[sic]

[3] As can be seen, this appeal is purely on a question of law. The facts and circumstances of the application for extradition are not in dispute.

The Facts:-

[4] The facts can be succinctly summarized as follows:- Three cases of theft of motor vehicles were laid with the police in Botswana. On the 06th October 2008 police officers of Botswana were on their way to Swartruggens investigating a different case. They received information about a stolen Toyota Dyna truck, which was marked. When they stopped at a shopping complex in Zeerust in order to have breakfast, they saw the Dyna truck that was reported stolen, in the parking area at the shopping complex. Also in the parking area, they observed two other motor vehicles being a beige Toyota Corolla and a silver Toyota Hi-ace minibus bearing number plates of Botswana. These motor vehicles were also suspected to be stolen in Botswana.

[5] The Botswana police officers then elicited the help of the South African police and kept the aforementioned three motor vehicles

under surveillance. Chaka and the Second Appellant approached the said cars. They were then arrested. Shortly thereafter the First Appellant approached the truck and was also arrested. Investigations revealed that these motor vehicles were fitted with false number plates and discs.

[6] Two other men also approached the Toyota Corolla motor vehicle. Upon realizing that the other suspects were already arrested, they disappeared. The motor vehicles were impounded and taken to the Zeerust Police station. A search was conducted and in the Toyota Corolla motor vehicle the passports of the Third and Fourth Appellants were discovered. They were arrested in Mafikeng the following day, on the 07th October 2008.

Was the extradition enquiry correctly held?

[7] An application for the extradition of the four Appellants and Chaka were made by the Republic of Botswana, communicating the request through the Diplomatic channels to the Minister of Justice as required by section 4 of the Extradition Act 67 of 1962 (herein-after referred to as "the Act").

[8] In proving that the request was correctly received in terms of the Act, the Respondent submitted exhibits A, B, C, D1 and D2. These documents clearly indicate that the request for extradition was received in the required manner. These documents were not contested by the Appellants.

[9] It is apparent that, safe for the aforementioned questions of law, the Appellants do not raise any other point on which they wish to appeal the order by the court ***a quo***. The points raised by the Appellants are dealt with ***in seriatem*** hereinafter:-

Ground 1:-

[10] It is contended on behalf of the Appellants, that the order of the court ***a quo*** finding the Appellants extraditable was wrong, because the extradition enquiry should have been held in terms of section 12 of the Extradition Act and not section 10 because Botswana is an associated state as contemplated by the Act. It need to be determined whether the enquiry which was held in terms of section 10 was correct.

[11] Section 10 of the Act provides:-

> *"[10]* ***Enquiry where offence committed in foreign state*** *–*
>
> *[1] If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(a) and (b)(i) the Magistrate finds that the person brought before him or her is liable to be surrendered to the foreign state concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign state concerned, the Magistrate shall issue an order committing such person to prison to wait the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.*
>
> *[2] For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign state the*

Magistrate shall accept as conclusive proof a certificate which appears too him or her to be issued by an appropriate authority in charge of the prosecution in the foreign state concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.

[3] If the Magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him.

[4] The Magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary."

[12] Section 12 of the Act provides:-

"[12] ***Enquiry where offence committed in associated state*** *–*

[1] If upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(b)(ii) the Magistrate finds that the person brought before him or her is liable to be surrendered to the associated state concerned, the Magistrate shall, subject to the provisions of subsection (2), issue an order for his or her surrender to any person authorized by such associated state to receive him or her at the same time informing him or her that he or she may within 15 days appeal against such order to the Supreme Court.

[2] The Magistrate may order that the person brought before him or her shall not be surrendered-

[a] where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and

where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;

[b] where such person is serving, or is about to serve a sentence to a term of imprisonment, until such sentence has been completed; or

[c] at all, or before the expiration of a period fixed by him or her, or make such order as to him or her seems just if he or she is of the opinion that-

[i] by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interest of justice, or that for any other reason it would, having regard for the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or

[ii] the person concerned will be prosecuted or punished or prejudiced at his or her trial in the associated state by reason of his or her gender, race, religion, nationality or political opinion.

[3] If the Magistrate finds that the evidence does not warrant the issue of an order under subsection (1) or that the required evidence is not forthcoming within a reasonable time and the delay is not caused by the person brought before him or her, he or she shall discharge that person."

Is Botswana a foreign state or an associated state?

[13] The Appellants submitted that Botswana is an associated state. In principle the distinction would be that the Magistrate's powers are

wider where the enquiry is held in terms of section 12, and that it is the Magistrate and not the Minister who issues the certificate for the surrender of the subject in an extradition matter. An enquiry can only be held in terms of section 12 if the requesting state is an associated state. The submission by the Appellants that Botswana is an associated state is premised on what is stated in **S v Williams** 1988 (4) SA 49 (W). Despite the fact that the status of Botswana as a foreign or associated state was not pertinently before that court, it treated Botswana as an associated state.

[14] The Act defines an associated state as any foreign state in respect of which section 6 of the Act applies. Section 6 deals with warrants of arrest issued in certain foreign states in Africa, and the crux thereof lies in the reciprocal endorsements of warrants for arrest that was issued in a foreign state. The Treaty on extraditions between the Republics of South Africa and Botswana does not provide for the endorsement of warrants issued in either states on a reciprocal basis as provided for in section 6 of the Act.

[15] Accordingly Botswana is a foreign state.

[16] Section 9 (4) provides:-

"[4] At any enquiry relating to a person alleged to have committed an offence:-

[a] in a foreign state other than an associated state, the provisions of section 10 shall apply;

[b] in an associated state -

[i] the provisions of section 10 shall apply in the case of a request for extradition as contemplated in section 4(1) of the Act.

[ii] the provisions of section 12 shall apply in any other case."

[17] For purposes of completeness I will refer to section 4 of the Act.

[18] Section 4 of the Act reads as follows:-

*"[4] **Request for extradition from Republic**-*

[1] Subject to the terms of any extradition agreement any request for the surrender of any person to a foreign state shall be made to the Minister by a person recognised by the Minister as a diplomatic or consular representative of that state or by any Minister of that state communicating with the Minister through the diplomatic channels existing between the Republic and such state.

[2] Any such request received in terms of an extradition agreement by any person other than the Minister shall be handed to the Minister.

[3] The provisions of subsections (1) and (2) do not apply in respect of a request for the endorsement for execution of a warrant of arrest under section six."

The Respondent submitted that in this matter the request for extradition was received in terms of section 4(1) of the Act, and therefore the enquiry was rightly held in terms of section 10 of the Act.

Is section 10 or section 12 of the Act applicable?

[19] The Appellants contended that the request was received in terms of section 4 (2) and therefore that section 9 (4)(b)(ii) is applicable and that the enquiry should have been held in terms of section 12 of the Act. In my view, section 4(2) is complementary to section 4(1) and is merely an extension of section 4(1). It complements section 4(1) where it says the following:-

> *"communicating with the Minister through the diplomatic channels existing between the Republic and such state."*

The Minister on his own does not form the diplomatic channel, and therefore section 4(2) merely dictates that ultimately the request should be handed to the Minister by any other person in the diplomatic channel who is not the Minister.

[20] If section 4(2) is not complementary to section 4(1), then section 4(1) would have ended where it states the following regarding the way in which the request should be received:- *"shall be made to the Minister by a person recognized by the Minister as a diplomatic or consular representative"* but instead it goes on to give an alternative and it is to complement the alternative that section 4(2) was written into the Act, and not to indicate an alternative way of receiving the request. Furthermore, if section 4(2) was indicative of an alternative way of receiving a request for extradition then section 9(4)(b)(ii) would have read that *"the provisions of section 12 shall apply in the case of a request for extradition contemplated*

in section 4(2)".

[21] The difference between section 10 and section 12 of the Act is that in a section 12 enquiry the Minister does not have the final say on whether or not the subject of extradition is to be surrendered to the requesting state or not, but the Magistrate conducting the enquiry. The Magistrate conducting the enquiry will in both a section 10 and 12 enquiry have to make the following findings:-

> *"That the subject is liable for extradition and if the subject is accused of having committed an offence in a foreign state, whether;*
>
> *There is sufficient evidence to warrant a prosecution."*

[22] Section 10 is applicable as Botswana is a foreign state.

Ground 2

[23] In essence the Appellants' contention is that if the Magistrate held the enquiry in terms of section 12, the Magistrate could have made a finding in terms of section 12(2) that the Appellants may not be surrendered on one of the grounds set out in section 12(2) (a) to (c). More specifically that the Appellants will not have a fair trial in Botswana should they be extradited because in Botswana there is no government funded organisation who can assist the Appellants in their trial, and that this will not be in the interest of justice.

[24] In **Geuking v President of the Republic of South Africa and**

Others 2003 (1) SACR 404 (CC) it was held:-

"[36] The starting point of this inquiry is to consider the nature of the inquiry which the magistrate is obliged to hold under the Act. As appears from para [15] above, in terms of s 10(1) of the Act the magistrate must consider the evidence adduced and, in order to issue a committal warrant, he or she must be satisfied that:

a) the person brought before him or her is liable to be surrendered to the foreign State concerned and,

b) in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State.

[37] In a case such as the present, in considering whether the person brought before him or her is liable to be surrendered, the magistrate must be satisfied that:-

a) the person who has been brought before him or her is the person sought by the requesting State;

b) the President has consented to the surrender of that person under s 3(2);

c) the offence in respect of which the person is sought by the foreign State is an extraditable offence. An 'extraditable offence' is defined in s 1 of the Act to mean

'any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military

law which is not also an offence under the ordinary law of the Republic and of such foreign State';

d) there is sufficient evidence to warrant a prosecution of the offence in the foreign State;

e) if a s 10(2) certificate is relied on, that it was issued by an appropriate authority in charge of the prosecution in the foreign State concerned.

[42] In considering the constitutionality of s 10(2) it must be borne in mind that:-

a) the proceedings before the magistrate do not constitute a trial. In the event of the surrender of the person, his or her trial will be held in the foreign State. That, after all, is the purpose for which the extradition is sought;

b) if the magistrate finds that the person is liable to be surrendered to the foreign State, the person has a right of appeal to the High Court;

c) if there is no appeal or if the decision of the magistrate is confirmed on appeal, the record of the proceedings together with such report as the magistrate may deem necessary must be forwarded to the Minister;

d) the Minister is then required to exercise a discretion under s 11 of the Act and notwithstanding the finding of the magistrate, may refuse the surrender on any one or more of the grounds specified in that section of the Act;

e) the person concerned is entitled to give and adduce evidence at the enquiry which would have a bearing not only on the magistrate's

decision under s 10, but could have a bearing on the exercise by the Minister of the discretion under s 11.

[44] Extradition proceedings do not determine the innocence or guilt of the person concerned. They are aimed at determining whether or not there is reason to remove a person to a foreign State in order to be put on trial there. The hearing before the magistrate is but a step in those proceedings and is focused on determining whether the person concerned is or is not extraditable. Thereafter it is for the Minister to decide whether there is indeed to be extradition. What is fair in the hearing before the magistrate must be determined by these considerations."

[25] In **Director of Public Prosecutions, Cape of Good Hope v Robinson** 2005 (4) SA 1 (CC) it was held:-

"[6] The Minister of Justice makes the decision whether or not to surrender the person concerned to the foreign State in an extradition commenced in terms of s 4(1), and after a s 10 enquiry. The Minister is empowered to do this by the provisions of s 11 of the Act. Section 11 provides:

*'**Minister may order or refuse surrender to foreign State***
The Minister may-

a) order any person committed to prison under s 10 to be surrendered to any person authorised by the foreign State to receive him or her; or
b) order that a person shall not be surrendered-
    i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a

sentence of a term of imprisonment, until such sentence has been served;

ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;

iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interest of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or

iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion.

[7] In summary therefore, a person whose extradition is requested by a foreign State in terms of s 4(1) must be brought before an extradition magistrate who determines whether the person is liable to be surrendered in terms of s 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 s 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 s 10 enquiry.

[49] In summary, the respondent will be liable to be surrendered and an order of committal by the magistrate will be justified if:

(a) He has been convicted of an extraditable offence that is

mentioned in the extradition agreement; and

(b) there is nothing in the Act or in the extradition agreement read subject to the Act that warrants a finding that the respondent is not liable for extradition.

The magistrate is therefore required to determine these two matters only. Issue (a) does not entail a consideration of whether the respondent will be subject to an unfair trail if extradited. It remains necessary to consider whether issue (b) requires the magistrate to consider this aspect. In other words, is there anything in the Act or the extradition agreement which requires the magistrate to ensure that the respondent will not be subject to an unfair trial before concluding that the respondent is liable to be surrendered?

[50] The High Court sought to derive this power from the phrase 'liable to be surrendered' in s 10(1). It construed the section so as to oblige the magistrate not to grant an order for committal if a person sought to be extradited would be subjected to imprisonment imposed during her absence upon extradition. I cannot find the power there. The High Court erred in several respects in the process of the reasoning that led to this conclusion. Before traversing this reasoning, however, we must remind ourselves that a decision by an extradition magistrate in terms of s 10(1) of the Act that the person sought is liable to be surrendered does not result in the extradition of that person. We must not forget that the decision to extradite is made by the Minister in terms of s 11 of the Act.

[51] First, the High Court incorrectly interpreted the phrase to mean 'bound or obliged in law or equity to be surrendered'. A dictionary definition may be a convenient starting point by they are often not very helpful in determining the meaning of a phrase in the setting in which we find it. The context is all

important. It is self-evident that the magistrate conducting a s 10 enquiry, as distinct from the magistrate conducting an enquiry mandated by s 12 of the Act, makes no order to surrender. Section 11 of the act does not oblige the Minister to order extradition. She may order extradition if she chooses and is expressly permitted not to order extradition in certain defined circumstances. A finding that the person is liable to be surrendered in terms of s 10(1) obliges nobody to do anything; the decision places no obligation whatsoever, whether directly or indirectly, upon the Minister or any other organ of State for that matter."

[26] From the aforementioned passages of the cases quoted, the following is apparent:-

- An extradition enquiry is not a criminal trial and the subjects of an enquiry are not accused persons. An order that the Appellants are extraditable is not a sentence and therefore the fair trial rights as contemplated in section 35(3) of the constitution are not relevant to an extradition enquiry. Procedural fairness is what should prevail.
- Extradition agreements should be accommodated as far as possible.
- The Magistrate conducting an enquiry in terms of section 10 of the Act has no power to consider whether the constitutional rights of the person sought may be infringed upon extradition, because that aspect should be considered by the Minister in terms of section 11 of the Act.
- The decision of the Minister is subject to judicial control.
- When the application of a national law would infringe the

sovereignty of another state that would ordinarily be inconsistent with and not sanctioned by international law.

[27] On this last point specifically, it is speculative to argue that if no legal representation at state cost is afforded, the trial that follow will necessary be unfair. It is without merit to assume that unrepresented accuseds do not receive fair trials. Save for the undisputed evidence that for this type of offence there is no legal representation at government cost in Botswana, there wasn't any evidence to indicate that the trial that will follow will necessarily be unfair. Sight should not be lost of the fact that the Minister under section 11 of the Act will also have the opportunity to look at the Appellants concerns regarding the fair trial issue and may refuse their surrender on that basis. However, this is not the issue that this Court has to decide at this juncture.

See:- **Kaunda and Others v President of the Republic of South Africa** 2005 (4) SA 235 (CC).

[28] The extradition application documents were handed in at court and forms part of the record before us. A study of the said application documents prove that all the requirements for the extradition in terms of the Act and Treaty have been complied with. It is clear that the Appellants were brought before court in terms of section 9(1) of the Act in order for an enquiry to be held. If the contents of the request for extradition is scrutinized it becomes clear that it is a document that conforms to the requirements of section 9(3) of the Act and that it may be received in evidence. The documents contained in the requesting document are authenticated in the

manner provided for in section 9(3)(a)(i) to (iii) of the Act.

[29] The requesting documents further deals with the following:-

[a] It deals with the law relating to vehicle theft in Botswana, thereby indicates court that this is indeed an extraditable offence. The requesting document further clearly indicates that the penalty for the offences is indeed more than 12 months (article 2 of the Treaty).

[b] It is clear it is not a political offence (article 3 of the Treaty).

[c] It is clear that it is not a military offence (article 4 of the Treaty).

[d] It is clear that it is not a fiscal offence (article 5 of the Treaty).

[e] It is clear that capital punishment is not applicable (article 6 of the Treaty).

[f] It is clear that the offences for which the Appellants are wanted have not been barred by lapse of time (article 9 of the Treaty).

[30] In terms of section 10 of the Act a Magistrate holding an enquiry will have to decide whether:-

[a] the subject is liable for extradition and if the subject is accused of having committed an offence in a foreign state,

whether

[b] there is sufficient evidence to warrant a prosecution in the requesting state.

[31] Section 10(2) of the Act makes it clear that the Magistrate holding the enquiry shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of prosecutions in the requesting state concerned, stating that it has sufficient evidence at its disposal to warrant prosecution of the person or persons concerned. Such a certificate is attached to the requesting document and is sufficient proof for a Magistrate to issue an order that the Respondents are liable for extradition. However, the Respondents went even further and adduced evidence ***viva voce*** which linked all of the Respondents to the alleged stolen vehicles.

Conclusion:-

[32] The court ***a quo*** correctly found that the extradition enquiry should be held in terms of section 10 and not section 12 of the Act. That all the requirements of the Act and Treaty were satisfied. That the Appellants are liable for extradition and that there is sufficient evidence to warrant their prosecution in the requesting state. The constitutional issue raised by the Appellants should be considered by the Minister in terms of section 11 of the Act before issuing the required certificate for the surrender of the Appellants.

[33] Yacoob J, writing the unanimous decision of the Constitutional

Court in the **Robinson** matter ***supra***, summarized the findings of that Court in conclusion. I can do no better than to once again quote from that leading case on page 30 G-J which I find quite apposite:-

> *"Summary*
>
> *[71] This judgment holds that an extradition magistrate conducting an enquiry in terms of s 10(1) of the act has no power to consider whether the constitutional rights of the person sought may be infringed upon extradition. That aspect must be considered by the Minister in terms of s 11 of the Act. The correctness or otherwise of the decision of the Minister to extradite the respondent is subject to judicial control. This judgment also holds that the documents before the extradition magistrate were all properly authenticated as required by the extradition agreement. The consequences of this judgment are that the extradition magistrate's order for the committal of the respondent to prison stands and that it is for the Minister to decide whether the respondent should be extradited in all the relevant circumstances, including the fact that he will, if extradited, have to serve a term of imprisonment that was imposed upon him in his absence."*

The appeal must consequently fail.

Order:-

Therefore, the following order is made:-

The appeal is dismissed.

R D HENDRICKS
JUDGE OF THE HIGH COURT

I agree.

N GUTTA
JUDGE OF THE HIGH COURT