

Judgment No. HB 50/2003
Case No. HC 612/2003
X-Ref HC 75/2003

KHULEKANI NCUBE

And

NGONENI MAFU

Versus

MINISTER OF HOME AFFAIRS

And

THE ATTORNEY-GENERAL OF ZIMBABWE

IN THE HIGH COURT OF ZIMBABWE
CHEDA J
BULAWAYO 1 AND 3 APRIL 2003

J James for the applicants
H Ushewokunze III for the respondents

Bail Application

CHEDA J: This is an application for the immediate release of the applicants from custody. The brief facts are that an armed robbery was committed at the Johannesburg International Airport in South Africa on 27 December 2001 which resulted in the two applicants and various other suspects being arrested. Applicants are therefore wanted to appear in court in South Africa to answer allegations of robbery.

Applicants were arrested in Zimbabwe by members of the Zimbabwe Republic Police on 23 September 2002 after they had presented themselves at a police station for a totally different matter altogether. The South African authorities have indicated that they would like to have applicants extradited to South Africa and to face the charges of armed robbery and attempted murder. Applicants were arrested and

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detained pending the outcome of extradition proceedings that had been commenced by the South African authorities. Warrants of arrest were issued against applicants but were defective and therefore were of no force or effect.

Applicants' arguments are that the South African authorities have not shown any keen interest in processing the extradition proceedings against them and that the allegations of armed robbery which occurred in South Africa should not be used as reason for their denial of their liberty as armed robbery is not a continuing offence. This infact is correct and hence our courts have no jurisdiction to try them for the alleged offence. In fact this point was observed by my brother NDOU J in *Khulekani Ncube and another* HB 126/02 at page 2 of the cyclostyled judgment. See also *S v Makhuta* 1969 (2) SA 490 (O) at 493A-B.

They further argue that a period of 2 months has since elapsed since their detention pending their extradition. This argument is based on section 33 of the Extradition Act Chapter 9:08 which reads:

“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.

Mr Ushewokunze for both respondents has opposed this application on the grounds that extradition proceedings are in progress as they are in constant touch with the South African authorities about the pending extradition proceedings. To enhance their argument they filed a letter from the Office of the Director of Public Prosecutions in South Africa which reads:

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“30 January 2002 (03)

The Attorney General: Mr Chigovera
Republic of Zimbabwe
4th Floor Corner House
Samora Machell Avenue
Harare

Private Bag 7714
Courseway
Harare

Dear Sir

EXTRADITION: ZIMBABWE
ROBBERY – JOHANNESBURG INTERNATIONAL AIRPORT CASE
338/12/2001
STATE VS KHULEKANI NCUBE
 NGOBENI MAFU
 STANDFORD SIBANDA
 VUSI NDLOVU
 THEMBA MAHLANGU

Following the meeting held at my office on 30 January 2003, I wish to advise you as follows:

KHULEKANI NCUBE, NGOBENI MAFU and STANDFORD SIBANDA are currently being held in custody in Zimbabwe. VUSI NDLOVU and THEMBA MAHLANGU, who are known to be in Zimbabwe, are also being sought for the abovementioned robbery and a request for their provisional arrest will be conveyed to Zimbabwe through the Interpol channel.

Zimbabwe is a designated country in terms of section 2 (1) (b) of the South African Extradition Act of 1962.

I hereby wish to inform you that the Government of the Republic of South Africa will seek the assistance of the Government of the Republic of Zimbabwe for the extradition of the abovementioned person back to South Africa to be prosecuted on the following charges:

- . Robbery with aggravating circumstances as defined in section 1 of Act 51 of 1977
- . Attempted murder
- . The unlawful possession of arms and ammunition in contravention of the Arms and Ammunition Act, No 75 of 1969.

Each of the said offences is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more.

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The formal extradition request is in the process of being drafted and will be forwarded, via diplomatic channel, to your office as a matter of urgency.

Yours faithfully

(Signed)

A P DE VRIES SC

DIRECTOR OF PUBLIC PROSECUTIONS

WITWATERSRAND LOCAL DIVISION OF THE HIGH COURT OF SOUTH AFRICA”

In response to this letter Mrs M Cheda of the Attorney-General’s office Bulawayo, Zimbabwe in her letter to them of 31 January 2003 emphasised the need for them to attend to the extradition process in view of the limited two months period. The Director of Public Prosecutions again wrote to the Zimbabwean authorities on 12 March 2003 their letter reads:

‘The Attorney General: Mr Chigovera
Republic of Zimbabwe
Private bag 7714
Courseway
Harare

Fax: 09 263 4781769

Dear Sir

EXTRADITION: ZIMBABWE
ROBBERY – JOHANNESBURG INTERNATIONAL AIRPORT CAS
338/12/2001
STATE VS KHULEKANI NCUBE
 NGOBENI MAFU
 STANDFORD SIBANDA
 VUSI NDLOVU
 THEMBA MAHLANGU

Kindly find attached a copy of the indictment in above matter, the formal extradition request is currently being finalized and will be forwarded, via diplomatic channel to your office within two (2) weeks.

Yours faithfully

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(Signed)
H J BROODRYK
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS
WITWATERSRAND LOCAL DIVISION”

It seems nothing was done by the South African authorities despite the fact that they were expected to respond by 4 February 2003. The law in relation to extradition matters is quite clear in that if nothing is done after two months from the time of applicants detention pending extradition, applicant may apply to the High Court for his discharge. The court can only dismiss that application if it is satisfied that no reasonable notice to the Minister of Home Affairs has been given or where a good cause is shown by the Minister why the applicant should not be discharged from custody.

The question here is whether or not the Minister has been given reasonable notice to act in this matter or whether there has been a good cause shown to the contrary by the respondents. As far back as September 2002 the South African Police have been aware that applicants had been apprehended and a meeting to discuss the extradition process was held in South Africa between the Zimbabwe Attorney-General Mr Chigovera and his South African counter-part. This is evidenced by a letter to them of 31 January 2003 from the Attorney-General's office. It however, seems to me that the South African authorities have not pursued this matter with any zeal or vigour. In their latest letter to the Attorney-General's office in Zimbabwe of 12 March 2003 they undertook to forward the formal extradition documents within two (2) weeks. However, to date nothing has been sent to the Zimbabwean authorities. This matter is by any standards a very serious one so much that it should merit a lot of attention by those adversely affected, namely the South African authorities. It is in

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my view not fair for them to drag their feet, as it were, while the liberty of the suspects is being compromised. Both South African and Zimbabwean authorities have been given more than enough notice to act in this matter but have failed to do so.

It is *Mr Ushewokunze's* argument that this matter is complex, while I accept that it might be so, but the question of efficiency still surfaces. The length of time respondents have taken to finalise the extradition process leaves a lot to be desired, in fact it falls far short of the expected standard of police international co-operation through Interpol. The South African authorities' response can only be described as curt which does not shed light as to their problem if any in finalising this matter.

With the greatest respect, I do not see any good reason why the South African Police should have taken such a long time to finalise this matter. I am left with the only irresistible conclusion that there is some unexplained reluctance on their part. They, therefore having been given sufficient notice to act in this matter, it will be unreasonable in my opinion to ask for more time to do what they are legally required to do within 2 months which they have failed to do.

On 27 February 2003 applicants made an application for bail before me under case number HB-27-03 which I dismissed. My main reasons for dismissal amongst others was that the case was quite complex and as such the police should be given reasonable opportunity to delve into that case thus "untying the tentacles of this octopus in our midst." A month after that the police have not untied those tentacles and in fact the South African Police have not taken any reasonable steps at all to extradite the applicants. It is my view that they have been given more than enough opportunity to regularise their previous defective warrants.

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These courts hold individuals' rights to liberty very high. 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.

These courts in my view should not be seen to assist the state by continuing to hold suspects in custody when there is no good and sufficient reason to do so. However, the courts as administrators of justice should, where possible, assist the state machinery in bringing the suspects to book, but such assistance should be carried out within the precincts of acceptable legal principles. As of now applicants are not even facing any criminal charges in Zimbabwe and as such I find no good and sufficient cause to continue to hold them indefinitely for and on behalf of a seemingly uninterested jurisdiction..

In the light of the above I find that it will be unjust to continue to hold the applicants in custody pending the mooted extradition when there is nothing on the papers which indicate that the South African authorities have taken or are taking any reasonable steps towards the extradition process.

This application is accordingly granted with costs.

Messrs James, Moyo-Majwabu & Nyoni applicant's legal practitioners
Office of the Attorney-General respondents' legal practitioners