'Reportable'

SUMMARY

CASE NO.: A 82/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FADI AYOUB *v* THE MINISTRY OF JUSTICE AND 4 OTHERS

PARKER J

2012 June 11

Practice - Applications and motions – Application proceedings – Interim interdict – Applicant applying to be released from further detention pending finalisation of review application simultaneously filed with application for rule nisi – Court applying requirements for interim interdict in *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 SA 256 (C) – Court finding that applicant has shown a prima facie right though open to doubt – Court finding that on the facts applicant has failed to satisfy any of the requirements necessary for the grant of interim interdict – Consequently, Court dismissing application with costs.

Statute - Extradiction Act (Act No. 11 of 1996 – Interpretation of s 5(1)(e) and 5(2)(a) of the Act – Court finding that the clause 'if it appears to the Minister' is critical to the interpretation and application of ss 5(1)(e) and 5(2)(a) of Act No 11 of 1996 – Court finding further that interpretation and application of the clause 'if it appears to the Minister' critical to the consideration of the application for interim interdict in the present proceedings.

Statute - Criminal Procedure Act (Act 51 of 1977) – s 18, interpretation of – Court concluding that interpretation of s 18 of Act 51 of 1977 and ss 5(1)(e) and 5(2)(a) of Act No 11 of 1996 must be considered together in the instant proceeding.

Extradition - What it represents – Court concluding that extradition represents a systematic international effort to cooperate in the suppression of crime – Court finding that in instant case applicant posed real flight risk and on the facts it would be injurious to Namibia and a violation of Namibia's moral obligation which exists between Namibia and the world, particularly France (the requesting State) to release the applicant pending finalization of his interim interdict application.

Held, that where all the requirements for a temporary interdict appear to be present, it remains a discretionary remedy and the exercise of the discretion ordinarily turns on balance of convenience.

Held, further that in the interpretation and application of ss 5(1)(e) and 5(2)(a) of the Extradition Act (Act No 11 of 1996) the clause 'if it appears to the Minister' in those provisions is critical particularly in the interim interdict application because the clause forms the basis of the discretionary power vested in the Minister by those provisions and if the clause were left out any interpretation of the rest of the provisions will not be in tune with the intention of the Legislature.

Held, further that rendition of a fugitive offender to the requesting State is a matter strictly of comity and an international duty and refusal to surrender is so clearly injurious to the country which refuses and to the world because it is a serious violation of the moral obligation which exists between civilized communities.

CASE NO.: A 82/2012

IN THE HIGH COURT OF NAMIBIA

In the matter between:

FADI AYOUB	**Applicant**

and

THE MINISTER OF JUSTICE	**1st Respondent**
THE MAGISTRATE OF WINDHOEK: ELINA NANDAGO	**2nd Respondent**
THE PROSECUTOR GENERAL	**3rd Respondent**
THE MINISTER OF FOREIGN AFFAIRS	**4th Respondent**
THE HEAD OF THE WINDHOEK PRISON	**5th Respondent**

***CORAM*:** **PARKER J**

Heard on: 2012 May 8

Delivered on: 2012 June 11

JUDGMENT

PARKER J: [1] In this proceeding the applicant has brought an application for an order in terms appearing in Part A of the Notice of Motion. In para 3 of Part A of the Notice of Motion the applicant prays that the relief sought in paras 2.1 and 2.2 operate as interim orders pending the finalization of the review application filed simultaneously under Part B of the Notice of Motion.

[2] The urgent application for a rule nisi was set down for hearing on 24 April 2012. However, by agreement between the parties and with the concurrence of the Court the hearing of the application was postponed to 8 May 2012 to enable

the respondent to file answering papers on or before 30 April 2012, and the applicant to file replying papers, if so advised, on or before 3 May 2012. That being the case, the issue of urgency fell away; and for completeness, the order below will be made that the matter was heard on urgent basis. I shall now consider the interim relief sought under Part A of the Notice of Motion in these proceedings, which is an interim interdict. Mr Tjombe, counsel for the applicant, and Mr Van Wyk SC, counsel for the respondents, have filed heads of argument which I found to be useful and of assistance to the Court; and I have consulted the authorities mentioned therein.

[3] I accept Mr Tjombe's submission that the requirements which the applicant must establish in order to succeed in the relief for a temporary interdict are those articulated by Corbertt J (as he then was) in *L F Boshoff Investments (Pty) Ltd v Cape Town Municipality* 1969 SA 256 (C) at 267A-F ('*The Boshoff Investments requirements*'). Corbertt J (as he then was) stated:

> 'Briefly these requisites are that the applicant for such temporary relief must show –
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> (a) that the right which is the subject matter of the main action and which he seeks to protect by means of interim relief is clear or, if not clear, is *prima facie* established, though open to some doubt;
> (b) that, if the right is only prima facie established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he ultimately succeeds in establishing his right;
> (c) that the balance of convenience favours the granting of interim relief; and
> (d) that the applicant has no other satisfactory remedy.'

[4] As to item (a) in the *Boshoff Investments* requirements; Mr Tjombe submits that on the papers the applicant has shown a clear right 'which is violated and will continue to be violated if he is detained'. It would seem counsel argues further that, in any case, even if the applicant has not shown a clear right, he has shown a prima facie right. And why does the counsel so submit? As I understand counsel, the basis for so submitting is grounded in the interpretation and application of the Extradition Act, 1996 (Act No. 11 of 1996) and counsel refers to s 5(1)(e) and 5(2)(a) of that Act in particular. For the sake of clarity I shall append, hereunder, those provisions:

> '5(1) Notwithstanding section 2 or the terms of any extradition agreement which may be applicable, no person shall be returned to a requesting country, or be committed or kept in custody for the purposes of such return, *if it appears to the Minister* acting under section 6(3), 10 or 16 or the magistrate concerned acting under section 11 or 12, as the case may be –
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> …
>
> (e) that the offence for which such return was requested has, according to the law of Namibia or the requesting country, prescribed through lapse of time.
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> 5(2) Notwithstanding section 2 or any extradition agreement which may be applicable, no person who is alleged to be unlawfully at large after conviction of an extraditable offence shall be returned to a requesting country, or be committed or kept in custody for the purposes of such return, *if it appears to the Minister* acting under section 6(3), 10 or 16 or the magistrate concerned acting under section 11 or 12, as the case may be –
>
> (a) that the conviction was obtained in such person's absence.'
>
> [Italicized for emphasis]

[5] As respects s 5(1)(e), it is Mr Tjombe's further submission that this provision in the Extradition Act ought to be interpreted and applied together with s 18(1) of the Criminal Procedure Act, 1977 (Act No. 51 of 1977) ('the CPA'). I accept Mr Tjombe's submission. Section 18(1) of the CPA provides:

> 'The right to institute a prosecution for any offence, other than an offence in respect of which the sentence of death may be imposed, shall, unless some other period is expressly provided by law, lapse after the expiration of a period of twenty years from the time when the offence was committed.'

[6] From the papers I accept that according to the letter of request submitted to the authorities of Namibia (the requested State) from France (the requesting State) requesting the surrender of the applicant (the claimed person) the applicant is alleged to have committed the offence of rape in France on 9-10 January 1992. Mr Tjombe argues that Namibia is an absolute abolitionist of the death penalty in terms of the Namibian Constitution and has been so since Namibia's attainment of statehood on 21 March 1990. That been the case, counsel submitted, the twenty-year prescription period in terms of s 18 of the CPA applies to rape for which during the period before 21 March 1990 the death penalty was a competent sentence. From this premise, Mr Tjombe reiterates what the applicant states in his founding affidavit, namely, that no person, shall be extradited or detained pending such extradition, if the offence for which such return is requested, has according to the laws of Namibia prescribed through lapse of time. In her opposing affidavit, the third respondent denies that 'the matter has prescribed', and states that prosecution for the offence of rape in respect of the applicant had already 'been instituted in the Rouen County Court on 12 January 1992. 'Thus', according to the third respondent, 'when applicant absconded (from France) in

March 1992 the proceedings were in process'. It is not necessary for me for the purposes of the present proceeding to decide on the third respondent's averment which is in response to the applicant's averment on the point, as well as submissions by Mr Tjombe and Mr Van Wyk thereanent.

[7] Relying on South African and Canadian authorities, Mr Van Wyk argued in respect of s 5(1)(e) that although the death penalty is no longer a competent sentence for rape, for good reason which are set out in the cases referred to the Court, the twenty-year statutory prescription against the institution of prosecution for rape should not apply. In view of the interpretation and application of s 5(1)(e) of the Extradition Act that I have undertaken below it is not necessary in the present proceeding to concern myself with whether to accept Mr Van Wyk's submission on the interpretation of s 18 of the CPA in respect of the crime of rape. That is all that I say now about s 18 in the present proceeding.

[8] Mr Tjombe relies on the canon of construction, which I accept, that 'there is a presumption that no statute contains invalid or purposeless provisions'. What this means, as I understand the presumption, is that no word, phrase or clause in a provision of a statute should be left out in the interpretation and application of such provision. If a word, phrase or clause is left out the true meaning of the provision is bound to be lost and the interpretation put on such provision will not be in tune with the true intention of the Legislature. If this canon of construction and my explanation thereanent are applied to s 5(1)(e) it seems to me clear that at this stage the argument put forward by Mr Tjombe respecting the interpretation and application of s 5(1)(e) cannot, with respect, be correct. Counsel overlooks the key and critical (grammatical) clause in s 5(1)(e), namely, '*if it appears to the Minister'*. Doubtless, this clause is the basis of the discretionary power vested in

the Minister by s 5(1)(e) of the Extradition Act and the clause is indubitably critical to the correct and proper interpretation and application of s 5(1)(e) of that Act.

[9] As matters stand now, it is not placed before the Court any evidence tending to show how the Minister exercised her discretion under s 5(1)(e). Section s 5(1)(e) does not just say simpliciter that 'no person shall be returned to a requesting country or be committed or kept in custody for the purposes of such return' where 'the offence for which such return was requested has, according to the laws of Namibia or the requesting country, prescribed through lapse of time', as Mr Tjombe appears to submit. Section 5(1)(e) rather says no person shall be returned to a requesting country, or be committed or kept in custody for the purposes of such return, *if it appears to the Minister* – not to a Judge, counsel or any other person (and this is significant) – that the offence for which such return was requested has, according to the laws of Namibia or the requesting country, prescribed through lapse of time. The Minister must perforce exercise her discretion before the Court can intervene when the Court is called upon to intervene, and that is not the burden of this Court in the present proceeding. As far as these proceedings are concerned there is no basis upon which the Minister's exercise of discretion can be impugned.

[10] The aforegoing reasoning and conclusions apply with equal force to s 5(2)(a) of the Extradition Act which the applicant relies on, too. Here, too, Mr Tjombe has decided, without a jot or tittle of justification, to excise the key and critical clause '*if it appears to the Minister*' and put forward an interpretation which serves the applicant well. Section 5 (2) (a), too, does not say simpliciter that 'no person who is alleged to be unlawfully at large after conviction of an extraditable offence shall be returned to a requesting country, or be committed or kept in

custody for the purposes of such return' where 'that conviction was obtained in such person's absence'.

[11] Thus, with the greatest deference to Mr. Tjombe, by misreading s 5(1)(e) and 5(2)(a) of the Extradition Act, Mr Tjombe has proferred an interpretation which I cannot accept for the purposes of the present proceeding. As I understand Mr Van Wyk on this point, it is for this reason that counsel submitted persistently that at this stage the Court is not in a position to determine as to how the Minister exercised her discretion when she decided to authorize extradition proceedings respecting the applicant despite s 5(1)(e) and 5(2)(a) which, Mr Tjombe argues, stand in the applicant's favour and stand in the Minister's way.

[12] For the aforegoing reasoning and conclusions respecting the interpretation and application of s 5(1)(e) and 5(2)(a) of the Extradition Act in the present proceeding, I find that on the papers the applicant has not shown a clear right; but I accept that a prima facie right is established and it is open to doubt. That being the case, I proceed to consider whether the applicant has satisfied items (b), (c) and (d) of the *Boshoff Investments* requirements set out previously. In this regard it has been said authoritatively that a 'consideration of the balance of convenience (i.e. item (c) of the *Boshoff Investments* requirements) is often the decisive factor in an application for an interim interdict.' (Prest, *The Law & Practice of Interdicts* (1996): p.73, and the cases there cited) I respectfully accept the *Prest* proposition as a correct statement of law, and so I adopt it. I pass to consider the requirements against the facts of the case.

[13] As to item (b); Mr Tjombe submits that the applicant has satisfied the requirement because, according to Mr Tjombe, the applicant has detailed the

irreparable harm he is suffering and will continue to suffer should he be further detained, e.g. his income and income-generating activities are 'coming to a halt' with 'attendant consequences'. I must say that that is not enough to satisfy the requirement. The harm referred to is seen in terms of damage suffered by the applicant and it ought to be irreparable harm and I do not think the harm the applicant describes are such that they are irreparable; for, the applicant can be compensated for any harm in damages in due course. And as to item (d) which, in a way, is related to item (b); I am of the firm view that the applicant has a satisfactory remedy in due course that is guaranteed by the Namibian Constitution in terms of Article 25(4) thereof in the form of, for instance, an order for 'monetary compensation'; and that, in any case, is the order which an applicant who stands in a similar position as the present applicant may obtain if he or she is successful in an application to the Court.

[14] I now proceed to consider item (c) which is balance of convenience, and I have said previously that, according to the authorities, it is a consideration of this item which 'is often the decisive factor in an application for an interim interdict'. The applicant admits that 'the only inconvenience that may be suffered by the Respondents is the risk that he will flee'; and Mr Tjombe submits that that fear 'can only be unreasonable fear'. And on what basis does counsel make such bold assertion? Counsel submits:

> 'He (the applicant) clearly states that he will not flee as his family and business attachment is to Namibia. He is married to a Namibian citizen and they have two minor children. His younger brothers are all residents of Namibia (one is a citizen). He is a successful farmer by any standard, with the joint estate of his and his wife totalling an estimated value or N$20 million.'

[15] I am not at all persuaded by this litany of empty self-serving and self-praising statements. The applicant says he is a national of Lebanon and he holds a South African citizenship. If the applicant has been able to leave his country of birth and has been able to be in France which he ran away from as a fugitive offender and made it to Namibia, what is so permanent to him in Namibia that can compare with that which he was able to leave behind in his country of birth of Lebanon where he has family and probably ancestral ties? What would prevent him from fleeing to Lebanon or South Africa, two States of which he is a citizen? And what is more; it cannot be said that the applicant has no experience in fleeing from justice.

[16] In all this one must not lose sight of the fact that extradition represents a systematic international effort to cooperate in the suppression of crime (Alan Jones QC, *Jones on Extradition and Mutual Assistance* (2001): p 5). For Voet rendition of a fugitive offender to the requesting State is a matter strictly of comity. And for Grotius and Vattel it is an international duty, a duty of public morality (referred to in Sir Edward Clarke, *Clarke upon Extradition*, 4th edn: pp 2-6). And it has been said also that refusal to surrender is so clearly injurious to the country which refuses and to the whole world because it is a serious violation of the moral obligation which exists between civilized communities. (Alum Jones, QC, ibid: p.14)

[17] From the aforegoing I conclude that the risk of flight posed by the applicant is superlatively real, and if he did flee Namibia the applicant's action will not only be injurious to Namibia in the sense that Namibia will be seen as a safe haven for the international club of fugitive offenders, but also injurious to the world for it would be a serious violation of the moral obligation which exists between Namibia

and the world, particularly France, the requesting State. Furthermore, it would be an abrogation of Namibia's international duty. That the flight risk of the applicant is not just an unreasonable fear by the respondents is underlined by the decision of this Court (*per* Siboleka J) to confirm the lower court's decision to refuse to admit the applicant to bail when the applicant appealed from that decision to the Court. And so, as matters stand, there is in existence a valid judgment and an order in favour of denying the applicant his liberty and, therefore, in favour of the respondents and against the applicant respecting the same issue of the applicant's liberty which the applicant now seeks in the present proceeding, too, also before the selfsame Court. For all the aforegoing, I find that the balance of convenience clearly favours the respondents. Accordingly, I hold that the applicant has failed to satisfy the critical requirement of balance of convenience, too. And it must be remembered that according to the high authority of Prest, and the cases there cited, referred to previously, where all of the requirements for a temporary interdict appear to be present, it remains a discretionary remedy and the exercise of the discretion ordinarily turns on a balance of convenience.' (Prest, ibid: p.73, and the cases there cited)

[18] In virtue of the aforegoing ratiocination and conclusions I find that the applicant has failed to satisfy the requirements for the grant of interim interdict, including the critical item of balance of convenience and, therefore, in the exercise of my discretion I refuse to grant the rule nisi sought. It follows that the application fails. Whereupon; I make the following order:

1. The applicant's non-compliance with the Rules of Court and the time limits prescribed therein insofar as these have not been complied with are condoned, and the matter is heard on urgent basis.

2. The application for the relief of a rule nisi is dismissed with costs, and such costs shall include costs occasioned by the employment of one instructing counsel and two instructed counsel.

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PARKER J

COUNSEL ON BEHALF OF THE APPLICANT:

Mr N Tjombe
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COUNSEL ON BEHALF OF THE RESPONDENTS:

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