IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C.of A (CRI) N0.11/2011

In the matter between:

ROCKY MASINGA	1ST APPELLANT
FRANCISCO MANDLATE	2ND APPELLANT
MANGANI MALENGE	3RD APPELLANT
ANGELO MONDLANI	4RD APPELLANT
GEORGE THOMAS	5TH APPELLANT
ABEL NHANTSANE	6TH APPELLANT

AND

DIRECTOR OF PUBLIC PROSECUTIONS **RESPONDENT**

CORAM: SCOTT, JA
HOWIE, JA
FARLAM, JA

HEARD: 12 APRIL 2012
DELIVERED: 27 APRIL 2012

SUMMARY

Appellants extradited from South Africa in terms of Extradition Treaty – appellants alleging that by reason of certain irregularities in South Africa the Lesotho High Court has no jurisdiction to try them – no violation of international law or abuse of the process – alleged irregularities, in any event, not established.

JUDGMENT

SCOTT, J A

[1] The appellants face thirty-one charges in the High Court. These include murder, attempted murder, robbery and kidnapping. The offences were allegedly committed in the Kingdom of Lesotho. At the commencement of the trial the appellants raised a special plea that the court lacked jurisdiction. The plea was founded on the assertion that they had been arrested in the Republic of South Africa where they had not been afforded a fair hearing before the decision was taken to return them to Lesotho to stand trial.

The court a quo heard viva voce evidence and thereafter dismissed the special plea.

[2] The Director of Public Prosecutions, who appears in these proceedings, referred to the undesirability of appeals being heard piecemeal and contended that there was no reason why the issue before us should be resolved prior to the finalization of the criminal trial. He submitted that the appeal should accordingly be struck from the roll. The absence of a court's jurisdiction to hear a matter will vitiate the proceedings. A dismissal of a plea that the court has no jurisdiction is therefore appealable. See Moch v Nedtravel (Pty) Ltd t/a American Express Travel Services 1996 (3)1 (A) at 10 B – J. In the present case the appellants face the prospects of a lengthy trial. If their plea against the jurisdiction of the court were to be upheld, there would be a considerable saving of both time and

expense. In these circumstances it seems to me that it would be fair to both parties to have the issue resolved at this stage.

[3] The facts are shortly as follows. There is an Extradition Treaty between the governments of the Republic of South Africa and the Kingdom of Lesotho. It was concluded on 19 April 2001. At some stage shortly after 22 April 2009, an application was made to the South African authorities for the provisional arrest of the appellants who were believed to have fled to South Africa. Following their arrest a substantive extradition application was made in terms of the treaty for them to be surrendered to Lesotho. The appellants appeared in the Magistrates' Court, Bloemfontein, for remand on a number of occasions. The hearing eventually commenced in the Bloemfontein Regional Court on 22 July 2010. The proceedings were

concluded on 30 July 2010 when the appellants were found liable to be surrendered to Lesotho. They were afforded legal aid and were represented at the hearing by Advocate Nel. They noted an appeal which was heard in the High Court, Bloemfontein, on 31 January 2011. On 11 February 2011 the Court handed down judgment dismissing the appeal. On 15 February 2011, when the appellants appeared in the Magistrates' Court they were told of the decision of the High Court and that the matter was being remanded to 6 May 2011 pending the final decision of the South African Minister of Justice and Constitutional Development. According to the first appellant, who was the only appellant who gave evidence in the court a quo, he thereupon telephoned Adv. Nel who had also argued their case in the High Court. He said that they did not instruct Nel to note an appeal to the Supreme Court of Appeal but merely requested that he furnish them

with a copy of the judgment, which Nel duly did. He said they made no attempt to seek legal aid to prosecute a further appeal. Instead, they made contact with their families and requested them to obtain the services of a lawyer. He testified that on 13 March they consulted with Mr Paul Shapiro who was a lawyer. They instructed Shapiro to note an appeal. The latter indicated that he would consult with them further on 6 May 2011 at their next appearance in court. However, an appeal was not noted and on 19 April the appellants were removed from prison and taken to the border at the Maseru Bridge where they were handed over to the Lesotho authorities. The first appellant said that he subsequently learned that on 6 April 2011 the Minister had signed an executive order directing that they be surrendered to the persons authorized by the Kingdom of Lesotho to receive them.

[4] In this court Mr. Phoofolo, who appeared for the appellants, submitted that by reason of what he contended was a disregard of the rights of the appellants by the South African authorities, the court a quo had erred in finding that it had jurisdiction to try them. The rights of the appellants which he contended were denied them were (a) the right to appeal the decision of the High Court, Bloemfontein, and (b) the right to make representations to the Minister before he signed the executive order directing that they be returned to Lesotho.

[5] In S v Ebrahim 1991 (2) SA 553 (A) the appellant, a member of a banned organisation, who had fled South Africa while under a restriction order, had been abducted from his home in Mbabane, Swaziland, by persons acting as agents for the South African State and handed over to the police in South Africa where he was prosecuted for

treason. He applied for an order declaring that the court lacked jurisdiction to try the case inasmuch as his abduction was in breach of international law and therefore illegal. The application was dismissed but the appeal upheld on the ground inter alia that there had been an abuse of the process, that the dignity and integrity of the judicial system had to be protected and that the State had to come to court with clean hands.

[6] The facts in Bennett v Horseferry Road Magistrates' Court and Another [1993] 3 All ER 138 (HL) were similar. In that case Bennett, a New Zealand citizen, was wanted for a criminal offence allegedly committed in England. He was traced by the English police to South Africa. The English police decided not to employ the extradition process and instead to collude with the South African police to have Bennett arrested in South Africa and forcibly

returned to England against his will. He was arrested by two South African detectives and placed on an aeroplane in Johannesburg, ostensibly to be deported to New Zealand via Taipei. When he attempted to disembark he was restrained by two men who identified themselves as South African policemen and who returned him to South Africa where he was held in custody until he was placed, handcuffed to a seat, on a flight bound for England. On arrival at Heathrow airport he was arrested by English police officers, and subsequently tried and convicted. The Divisional Court held that it had no jurisdiction to inquire into the circumstances by which Bennett came to be in the jurisdiction and accordingly dismissed his application for judicial review. On appeal to the House of Lords, it was held, Lord Oliver dissenting, that it was an abuse of the process for a person to be forcibly brought within the jurisdiction in disregard of available extradition procedures

and that such conduct amounted to a violation of international law and the laws of the state from which the person had been abducted. The appeal was accordingly allowed.

[7] The present case is totally distinguishable from the two described above. The appellants were returned to Lesotho in accordance with an extradition procedure regulated by treaty. There was no violation of international law, nor was there an abuse of the process. The Lesotho State comes to court, to use Steyn JA's phrase in the Ebrahim case "with clean hands". In these circumstances, I can see no justification for a challenge to the jurisdiction of the Lesotho Court on the grounds of an alleged irregularity in the requested State's decision to surrender the appellants to Lesotho. In the Scottish case of

Sinclair v HM Advocate (1890) 17 R (J) 38 Lord M'Laren stated the position as follows (43-44):

> *'The extradition of a fugitive is an act of sovereignty on the part of the state who surrenders him. Each country has its own ideas and own rules in such matters. Generally it is done under treaty arrangements, but if a state refuses to bind itself by treaty, and prefers to deal with each case on its merits, we must be content to receive the fugitive on these conditions and we have neither title nor interest to inquire into the regularity of the proceedings under which he is apprehended and given over to the official sent out to receive him into custody ....."*

This statement has since been quoted with approval on numerous occasions (See for example S v Beahan 1992(1) SACR 307 (ZS) at 318j-319c. See also O'Higgins "Unlawful Seizure and Irregular Extraditions" 1960 British Yearbook of International Law at 317). In some instances the judgments in question have been overruled, but I know of no case where the correctness of Lord M'Laren's statement has been challenged. Indeed, it would seem clear that international law, as opposed to the municipal law of the requested state, does not require the

requested state to grant extradition only after regular judicial or administrative proceedings. See Felice Morgenstern 1952 Yearbook of International Law 265 at 271.

[8] On the facts of the present case the criticisms levelled at proceedings in South Africa are, in my view, in any event without substance. The decision of the High Court was made known to the appellants within four days of its being handed down. They did not instruct Adv. Nel to note an appeal, nor did they seek legal aid for this purpose. According to the first Appellant they consulted with their own lawyer on 13 March 2011 when he was instructed to note an appeal, but he apparently failed to do so. If they are aggrieved by his failure to carry out his instructions, their remedy must lie against him. They can have no complaint against the legal process. It is necessary to

mention that when it was pointed out to the appellant in the course of being cross-examined that his lawyer had had ample time to note an appeal, he suggested for the first time that he "could have made mistake" by saying 13 March instead of 13 April. But the latter date was contrary to the whole tenor of his evidence and can be ignored.

[9] As far as the failure to make representations to the Minister is concerned, it is clear that as early as 15 February 2011 the appellants were told that the final decision lay with the Minister. There was nothing to prevent them from making written representations to him, nor was there evidence that it was their intention to make such representations.

Their failure to do so was their own doing.

[10] The appeal is accordingly dismissed.

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D.G. SCOTT
Justice of Appeal

I agree: ______________________________

C. T. HOWIE
Justice of Appeal

I agree:

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I.G. FARLAM
Justice of Appeal

For the Appellants: Mr. E.H. Phoofolo

For the Respondent: Adv. L.L. Thetsane KC assisted by
Adv. L. Mofilikoane and
M.E. Ts'oeunyane