IN THE COURT OF APPEAL OF LESOTHO

HELD AT MASERU

C OF A (CIV) /54/14

In the matter between:

THE DIRECTOR OF PUBLIC PROSECUTIONS **1ST APPELLANT**

THE ATTORNEY – GENERAL **2ND APPELLANT**

THE MINISTER OF JUSTICE **3RD APPELLANT**

THE MINISTER OF LAW AND CONSTITUTIONAL AFFAIRS **4TH APPELLANT**

And

JESSIE RAMAKATANE **RESPONDENT**

CORAM: K.E. MOSITO P
Y.J. MOKGORO AJA
P.T. DAMASEB AJA

HEARD: 23 JULY 2015

DELIVERED: 7 AUGUST 2015

SUMMURY

Appeal from Judgment of the High Court – Two extradition applications having been consolidated in South Africa for purposes of remand – Whether such consolidation means that an adjudication on the application relating to events of 2007 means that the application on events of 2009 are res judicata.

Held:The application relating to events of 2009 not res judicata. Consolidation of the two application did not mean both were adjudicated together.

Held:Order of High Court relating to res judicata set aside and remitted to High Court for hearing by another judge.

Costs to be costs in the cause.

JUDGMENT

DAMASEB AJA

[1] Mr Jessie Ramakatane (the respondent), initiated two interrelated originating motion proceedings (CIV/APN/205/13 and CIV/APN/101/14) in the High Court of Lesotho, including an application for contempt of court for an alleged failure to give effect to a court order made in CIV/APN/205/13. CIV/APN/205/13 (the first application) was launched on19th June, 2013.[1] The contempt

[1] Record pp 1 – 39.

application was filed of record on 6th February, 2014[2]. CIV/APN/101/14 (the second application) was lodged on 27 March 2014[3]. The latter process consolidated the contempt application with it.

[2] The first application was moved on 26th November, 2013, and an order was made by the High Court on 12th December, 2013 granting 'the prayers as contained in the notice of motion under prayers 1, 2 and 3'. Prayer 3 was a costs order. Prayers 1 and 2 read:

> 1. *Directing the Respondents to cause to be cancelled a warrant leading to the extradition of Applicant from South Africa into Lesotho.*
>
> *2. Applicant be granted amnesty for any offence which led to his seeking asylum in South Africa and which led to the warrant referred to in 1 above."*

[3] The respondent had, by his own admission, fled from the Kingdom to South Africa in 2007 to place himself beyond what he refers to as the political 'upheavals' engulfing his homeland, Lesotho. The Crown suspected him of having committed serious crimes and sought his extradition from South Africa (SA) against which he put up a spirited defence in the courts of SA and Lesotho. He made several appearances in magistrate courts in SA and resisted attempts by the Crown to have him extradited to Lesotho to face criminal charges. Those extradition applications were

[2] Record pp 40 – 66.
[3] Record pp 79 - 176

then consolidated by agreement in the Randburg magistrate's court. As I will presently show, a dispute has arisen as to the effect of that consolidation. According to the Crown, the purpose was for convenience only, while the respondent maintains that the two became one and the withdrawal of one included the other.

[4] Whilst resisting attempts for his extradition to the Kingdom, the respondent launched first application in the High Court of Lesotho in order to put an end to the prosecution the Crown pursued against him. In the first application, the respondent complained that he was being unfairly pursued, in that persons similarly situated as he were pardoned of the very same offences he was being pursued. The High Court agreed with him and ordered that the Crown discontinue the extradition proceedings in SA against him. It is important to quote the High Court in so concluding. It said:

> *"First Respondent has attached Annexure "I" to his answering affidavit, being a charge sheet containing some 19 counts of offences alleged to have been committed during 2007 by the following:*
>
> - *Jessie Ramakatane, present Applicant*
> - *Lefa Davis maker Ramantsoe who was pardoned in 2012.*
> - *Thabiso Mahase also pardoned 2012*
>
> *Respondents have however shown that Applicant was again involved in some criminal activities of offences that took*

place in 2009 affecting the security of the former head of government.

Applicant's counsel challenged that submission in that there has not been even an iorta of evidence for the 2009 allegation as was the case with 2007 allegations. Such evidence if any must have been within reach of the Director of Public Prosecutions but chose not to provide such evidence possibly as an Annexure "2" to his answering affidavit. Counsel invited the Court not to accept such allegations for 2009 and the criminal case number referred to as CRI/T/50/2012 with no names of accused or copy of such.

Respondents' counsel conceded that the pardon that was afforded others was not in terms of the Act but a political decision. He also conceded that "Annexure I" to the answering papers related to 2007 events but that also reference has been made to 2009 events at paragraph 5 therefor he submitted that Applicant's position has been as a result different from all those who have been pardoned.

It has therefore not been disputed that acts for charges for 2009 have been placed before Court. It was within the first respondent's power to have supplied such documents like he did with Annexure "I". He has just made a bare allegation which is without proof.

The position of the law has already been stated above on discrimination. On close look of things, the Applicant on what has been placed before this Court is not to be treated differently from others who have been pardoned through a political decision on similar acts. As for the acts of 2009 there has only been a bare allegation which has not been substantiated by proof of any documentation as has been the case with the events of 2007. Under the circumstances of this case the Court feels bound not to accept the allegations for events of 2009.

Even assuming that such allegations were to be considered, Respondents as shown in the heads called the forgiveness of all others who were pardoned in 2012 a general forgiveness which was all inclusive and covered also the Applicant. Respondent's counsel in his heads at 2.5 showed that, "it

> *therefore goes without saying that in all politically related incidences, then the Applicant is forgiven.*
>
> *For the reasons shown above the law allows no room for discrimination safe under exceptional circumstances which are wanting in this case. The 2009 events which have not been substantiated before this Court are not going to be considered. This being Application proceedings every allegation needed proof and without such proof in the papers filed of record the allegations stand to be disregarded."* (My underlining for emphasis).

[5] To understand the High Court's conclusions, it is crucial to set out what case the respondent brought and how the Crown had met it. These are motion proceedings in which the respondent sought final relief and, therefore, are intended for the resolution of issues on common cause facts. In motion proceedings, the version of the respondent prevails unless it is so far – fetched that it can be rejected merely on the papers.

[6] In the first application, the respondent deposed to an affidavit in which he set out the following salient facts in support of the relief which the High Court granted. He alleged that:

> *"On or about the year 2007, I fled into South Africa seeking political asylum as a result of political upheavals in Lesotho. I fled into South Africa seeking political asylum amongst others with Thabiso Mahase and Ford Sekamane who are residents of Lesotho.*
>
> *Since then I have always been in South-Africa and the Lesotho government has applied to the South-African government for my extradition into Lesotho claiming that I was wanted for murder and robbery charges when these*

latter charges are disguised to have me extradited for an alleged political offence.

As a result of the application for my extradition, a warrant for my extradition was issued but it has not been pursued. As a result I initially had to attend remands in Bethlehem Orange Free State very four months. Thereafter my remands were transferred to Midrand, Gauteng. This activity already costs me in excess of two million Maloti for counsel's fees.

In May 2012 Thabiso Mahase and Ford Sekamane were granted amnesty by the government of Lesotho for this alleged political offence for which we all fled into South-Africa and I was singularly left out for no apparent reason.

I continue to suffer irreparable harm and prejudice as I am not able to run my business in Lesotho. It is also in the interest of justice and fairness that I be given the same privilege with my-would-be co-accused."

[7] The Crown's opposing affidavit was deposed to by the learned Director of Public Prosecutions (DPP) who made the following salient allegations:

"Save to admit that the applicant fled to South-Africa with Thabiso Mahase and Ford Sekamane the rest of the contents are denied and applicant is put to proof thereof. I aver that the applicant fled to South Africa because he was involved in 2007 incidents that threatened the national security by forcefully taking away the guns belonging to armed forces. As a result, an application for extradition of applicant was made. However, it was not necessary to seek political asylum because the applicant and others had committed purely criminal offences of robbery, unlawful possession of firearms and murder. I attach a copy of a charge sheet for extradition and mark it annexure 1.

Save to admit that the applicant has always been in South Africa and the respondents have applied for the applicant's extradition into Lesotho the rest of the contents are denied and applicant is put to proof thereof. I aver that the applicant's extradition involves 2007 events and 2009

events. The 2009 events among others involved murder, attempted murder, kidnapping, armed robbery and unlawful possessions, and these events are not politically motivated.

Contents there in are denied and the applicant is put to proof thereof. I aver that amnesty in Lesotho is a matter governed by law being Pardons Act No.7 of 1996 which would have to be amended in order to accommodate any deserving person and that has not been done, in respect of all the suspects for the 2007 and 2009 events. It deals with pre-prosecution pardon and on the other hand, there is the Constitution which deals with pardon only post-conviction and sentencing. Therefore, the people the applicant has referred to in his founding affidavit have not been granted any amnesty whatsoever. Again, the co-accused with applicant for 2009 events have been convicted by this Honourable Court in CRI/T/50/2010 and they are happily serving their sentences."

[8] I have quoted comprehensively what the protagonists said in the first application about the 2007 and 2009 events. I have also shown that the High Court in its judgment made clear that in the first application it was not seized with charges allegedly arising from the 2009 events.

[9] The 2009 events came into sharper focus when the respondent launched another application under CIV/APN/101/14 9the second application), in which he sought to have the responsible officers of the Crown committed for contempt for what he alleged was the failure to give effect to the High Court's order in the first application.

[10] In the answering affidavit in opposition to the contempt application, the learned DPP deposed to an affidavit stating that the first application was concerned with the 2007 events and that the court's judgment of 12 December 2013 was confined thereto. The DPP also stated that the Crown was satisfied with the court's judgment of 12 December 2013 in the first application.

[11] That catapulted the respondent into launching the second application in which he dealt squarely with the 2009 events. The gravamen of his case in the second application is that, (a) the 2009 events were treated the same as the 2007 events in the courts of SA, and (b) the 2009 events were treated as such in the High Court of Lesotho and were subsumed in the order of the High Court directing the Crown to discontinue his extradition from SA and prosecution in the Kingdom. The High Court agreed with him and, in particular, his premise that the 2009 events were hit by *res judicata*. The basis for that finding, as I understand it, is that the 2007 events and the 2009 events were *res judicata* on account of being 'consolidated' in SA and ought, in any event to have been pursued by the Crown together with the 2007 events because they were known to the Crown at the time and were concealed by it in the first application. That elicited the following comments from the judge *a quo* in her judgment of 12 August 2014:

> *"But the respondents in the answering affidavit, unlike what the applicant has alleged to have referred to the*

offences as political, refer to them just as criminal offences which would not qualify for seeking any political asylum. It would seem that all the same the Government of Lesotho considered them as political offences hence the amnesty.

It this Application the respondents still in their answering affidavit have shown at para 5.9 thereof that the two Extradition Applications for both 2007 and 2009 were consolidated and heard together in Gauteng. The two Applications were to be heard before Randburg Magistrate Court, and applicant was made to attend remands there.

Respondents at par 8 of the answering affidavit in explaining what they understand consolidation to mean said:

> *'The two matters were simply consolidated for purposes of hearing, but they remained separate matters.*
>
> *The dictionary meaning of consolidate from Concise Oxford Dictionary is "combine into one whole.'*

As applicant pointed out in his heads the respondents in CIV/APN/205/13 referred to the events of 2009 without informing the Court that in fact the 2007 events had been consolidated with the alleged 2009 events. The Court was denied the opportunity of making a comprehensive finding of the two consolidated Extradition Applications, hence why the Court came to the decision that such events were not substantiated.

This case is thus centered on whether or not the decision in CIV/APN/205/13 should be taken to have related to both events of 2007 and 2009. Respondents have shown that the two Extradition Applications were consolidated and considering the meaning of consolidation both Applications became one. So that the decision that was made in CIV/APN/205/13 automatically affected the present Application.

Following on the decision in CIV/APN/205/13, that decision mutatis mutandis applies to this case as the Extradition Application had been consolidated."

[12] It is apparent therefore that the learned judge a quo held that the 'consolidation' of the two extradition requests in SA had the result that the decision in the first application (CIV/APN/205/13) covered both the 2007 and 2009 events. The court added:

> *"I still recall when the Court kept on asking about any documentary proof for 2009 Application from the respondents as they had done with 2007 Application but they were never made available."*

[13] In this appeal, the Crown faults the High Courts' conclusion and order, principally, on the basis that it erred in finding : (a) that 'consolidation' of the two applications (2007 events and 2009 events) in a SA Court had the consequence that the judgment of 12 December 2013 extinguished the extradition requests in relation to both, (b) that the extradition request in respect of the 2009 events was *res judicata;* (c) that the judge a quo misdirected herself by not expressly deciding the matter in relation to the events of 2009 , and that no decision was made on the 2009 events in the court's judgement of 12 December 2013.

[14] In the view I take of the matter I do not find it necessary to fully set out the facts as traversed by the parties in the second application.

[15] During argument of the appeal the parties' counsel agreed that the learned judge did not in her judgment of 12 August 2014 deal with the merits of the second application. However, counsel for the respondent suggested during oral argument that the High Court did not need to deal with the merits of that application. I disagree, and to the extent that the court failed to do so, it fell into error. The court, regrettably, got side-tracked by the notion of 'consolidation' and failed to apply its mind to the appellants' stance that consolidation did not have the effect of extinguishing the extradition request in relation to the 2009 events. Finding, as it did, that the judgment of 12 December 2013 covered the 2009 events, the court failed to deal squarely with the parties' allegations in the second application. As is apparent from the court's own reasoning and conclusions in that judgment, it was not seized with the 2009 events in the first application.

[16] In the first application, the parties' pleadings were confined to the extradition request relating to the 2007 events and the court's judgment in express terms excluded the 2009 events. It was, therefore, a misdirection for the High Court to hold in the second judgment that its decision and order in the 12 December 2012 judgment also had a binding effect in the second application. In my view, a monumental factual dispute exists between the parties on what was intended with the consolidation that took place in the SA

court. That could well necessitate oral evidence being led to resolve the matter[4].

[17] I regret that I do not share **Mr Ntlhoki KC's** (counsel for the respondents) enthusiasm that the matter is best resolved simply by reliance on the dictionary meaning of the word 'consolidation'. The consolidation did not occur in Lesotho but in a foreign court. It is trite that foreign law is a question of fact which must be proved by way of expert evidence.[5] A court is therefore not at liberty to take judicial notice of foreign law. Lesotho does not have the equivalent of SA's Law of Evidence Amendment Act, 1988 which, in section 1 (1) states that any court may take judicial notice of the law of a foreign state in so far as such law can be ascertained readily and with sufficient certainty. Absent an equivalent provision under Lesotho Law, what prevails, by default, is the common law position.

[18] Although it may appear pedantic and odd, given the Roman-Dutch common law heritage we share with SA and given our recourse to decisions of SA courts as persuasive authority

[4] In terms of rule 8 (1) of the Rules of the Lesotho high court.
[5] S v Masilela 1968 (2) SA 558 (Q); Standard Bank of SA Ltd v Ocean Commodities Inc, 1983 (1) SA 276 (A)

for the interpretation of similar legal principles under Lesotho law, the matter must be approached on principle when it comes to matters of proof. It is trite that admissibility of evidence is a question of law and not of discretion.

[19] **Mr Ntlhoki KC** also suggested during argument that consolidation must be understood in the criminal law sense and that extradition proceedings in South Africa are criminal rather than civil proceedings. But that is only possible by taking judicial notice of South African Law – the very thing which at common law we can't do.

[20] Bearing in mind that it remains open to the parties to seek to have resolved by oral evidence the dispute of fact that exists as regards what they had in mind when the 2007 and 2009 extradition requests were 'consolidated' in SA, it is undesirable for this court, as the apex court, to finally determine that dispute of fact on the papers. In addition, the judge a quo quite clearly adjudicated the relief sought in the second application based, principally, on the affidavits and submissions made in the first application. That was a misdirection and the result the court a quo reached cannot be sustained. Very scant regard was had to the affidavits in the second application in which, at some length and in detail, the respondents set out facts which, according to them, support the conclusion that there is a pending

extradition request in SA in relation to the 2009 events. That failure on the part of the court a quo denied the appellants the right to a fair trial as contemplated by article 12 of the Lesotho Constitution of 1993.

[21] I am satisfied that the disputes ventilated by the parties in the second application remain substantially unresolved and that the present is an appropriate case for referral back to the

High Court for the matter be considered afresh according to law.

[22] Although both counsel had no difficulty for the matter to be heard by the same judge upon referral back, I think that is not a path that leads to justice, or at least the appearance of it. As the adage goes, 'justice must not only be done, it must be seen to be done.' The learned judge a quo expressed strong views about the manner in which the Crown's case was run. The learned judge made the following acerbic comment:

> "*It was very unprofessional to have withheld the issue of consolidation from the court when CIV/APN/205/13 was argued.*"

[23] In addition, the court expressed firm conclusions on the effect of consolidation in the SA court – the very issue that may will become crucial and decisive upon a re-hearing of

the matter. It is undesirable in such circumstances for the same judge to hear the matter upon referral back. (Compare **DPP and Another v Lesupi and Another** C of A (CRI) 7/2008, delivered on 17 October 2008, at para 22.)

[24] As far as costs go, the proper approach in the circumstances is to make it to be in the cause given that this court is not finally determining the issues between the parties.

THE ORDER

[25] The appeal succeeds in part, and it is the ordered as follows:

1. The judgment and order of the High Court in CIV/APN/101/14 is set aside;

2. CIV/APN/101/14 is remitted to the High Court for adjudication afresh before a judge of that court other than the judge who set in the court *a quo*;

3. Costs in this court and in the court below are to be in the cause.

P.T. DAMASEB
Acting Justice of Appeal

I agree

DR K. E. MOSITO
President of the Court of Appeal

I agree

Y MOKGORO
Acting Justice of Appeal

For Applicant : Adv. Ntlhoki KC

For Respondent : Mr L. Letsie