IN THE HIGH COURT OF SOUTH AFRICA,

FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	**YES/NO**
Of Interest to other Judges:	**YES/NO**
Circulate to Magistrates:	**YES/NO**

Case No: 2484/2023

In the matter between:

NANDIPHA MAGUDUMANA Applicant

and

THE DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE 1st Respondent

THE MINISTER OF THE SOUTH AFRICAN POLICE SERVICES N.O. 2nd Respondent

CAPTAIN FLYMAN 3rd Respondent

THE PRESIDING MAGISTRATE N.O.
CASE NUMBER 20A/113/23
MAGISTRATES COURT BLOEMFONTEIN 4th Respondent

THE HEAD OF THE BIZZAH MAKHATE CORRECTIONAL CENTRE, KROONSTAD 5th Respondent

THE MINISTER OF HOME AFFAIRS N.O. 6th Respondent

JUDGMENT BY:	**LOUBSER, J**
HEARD ON:	**14 JULY 2023**
JUDGMENT BY:	**LOUBSER, J**
DELIVERED ON:	**18 JULY 2023**

[1] This is an application for leave to appeal to the Supreme Court of Appeal against the judgement of this court dated 5 June 2023. In the judgement, this court found that the applicant had consented to her removal from Tanzania to South Africa, or at the very least, that she had willingly acquiesced to her transportation to South Africa.

[2] Section 17(1) of the Superior Courts Act[1] provides, *inter alia*, that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why the appeal should be heard, including conflicting judgements on the matter under consideration. In this application, the applicant relies on both these grounds to obtain leave to appeal.

[3] The judgement against which the applicant seeks leave to appeal, was premised on the firmly established rule that a final order will only be granted on notice of motion if the facts as stated by the respondent, together with the facts alleged by the applicant that are admitted by the respondent, justify such an order. It means that applications having a material dispute of fact, will be adjudicated on the version put up by the respondent. In this regard the applicant certainly has no prospects of success on appeal.

[1] **Act no 10 of 2013**

[4] The version of the respondents is to the effect that the applicant was not arrested in Tanzania by the South African Police and forcefully abducted from that country, as alleged by her. Neither was she blindfolded and taken to the airport, where she was ordered to get into an aircraft. The respondents pointed out that the applicant was arrested by the Tanzanian authorities because they were not legally in Tanzania. After her arrest, the Tanzanian government decided to deport her as she had been declared a prohibited immigrant in accordance with Tanzanian laws. Thereafter the applicant was handed over to the South African High Commission at the airport, which in turn handed her over to an immigration official of the South African Department of Home Affairs. She was then transported back to South Africa in the aircraft of Home Affairs. During this process, she did not offer any resistance or protest. She in fact informed all and sundry that she wanted to return to South Africa to her children.

[5] These are then the facts on which the matter was decided. In my view, there is no prospect that a court of appeal would find differently. This court however, went on to find that the handing over of the applicant was in fact an extradition without any due process, and not a deportation. At the same time, this court found to the effect that the voluntary nature of the applicant's return to South Africa consequently did not result in an infraction of South Africa or public international law, despite the extradition without due process.

[6] In the present application, it was contended on behalf of the applicant that consent may not be given to unconstitutional conduct because it would undermine the doctrine of objective constitutional invalidity. In this respect it was eloquently argued by mr. Perumalsamy that no person can waive a fundamental or constitutional right. This court erred in that it did not declare the conduct of the respondents unconstitutional, and this omission by the court also has implications for the costs order made by the court in constitutional matters, he submitted. In this respect, he argued, there is a reasonable prospect of success on appeal.

[7] Curiously enough, there was no mention in the notice of motion of relief sought on a constitutional basis. The relief sought was to declare the arrest and transportation to South Africa to be wrongful and unlawful. Only in her replying affidavit did the applicant aver that an extradition disguised as a deportation is inconsistent with the Constitution. Despite this, the notice of motion was never amended. The relief sought in the notice of motion, was directed at the alleged conduct of the South African police in Tanzania. This was the issue this court had to decide, and not the constitutionality of the 6th respondent's conduct. In **Minister of Cooperative Governance and Traditional Affairs v De Beer and Another**[2] the Supreme Court of Appeal found that the respondents were granted relief that had never been sought and that the High Court had ranged beyond what had been sought by the respondents. Moreover, the Constitutional Court held in **South African Transport and Allied Workers Union v Garvas**[3] that if a party wishes a declaration of invalidity, it must properly and specifically place such an issue before the court. It is only when that is done that the obligation on the court in terms of section 172(1)(a) of the Constitution is activated.

[8] I therefore find that there is also no reasonable prospect of success on the court's failure to declare the 6th respondent's conduct unconstitutional. The facts of the matter simply did not pave the way for such a declarator. The question whether a person can wave a fundamental or constitutional right, therefore falls away.

[9] The next question is whether the consent of the applicant was a proper consent and whether it could ever override the irregular disguised extradition. In this respect I was referred to the stance of the Supreme Court of Appeal and the High Court of Transvaal on waiver and consent, as expressed in

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[2] **(2021) 3 All SA 723 (SCA) at para 85**
[3] **2013 (1) SA 83 (CC) at para 108 - 114**

Spagni v Acting DPP and Others[4] and **S v Shaba and Another**[5] respectively. It was submitted on behalf of the applicant that the Spagni-case point to the fact that the consent must be in writing and that it must be unequivocal. In the Shaba-case it was held that rights enshrined in the interim Constitution are inalienable rights. It is further submitted on behalf of the applicant that these decisions are in conflict with the judgement presently under scrutiny, and that this fact represents a compelling reason why the appeal should be heard.

[10] Once again one has to revert back to the version of the respondents. It is not their version that the applicant had consented to the disguised extradition process. Nor is it their version that she had actually consented to anything that was taking place at the time. It is simply their version that she wanted to return to South Africa to her children. This was the true nature of her consent, and in my view, the other cases referred to are therefore distinguishable from the present case. Insofar as the applicant contends that the Supreme Court of Appeal should be allowed to consider whether a person may or may not consent to an unlawful and unconstitutional act, I therefore respectfully disagree. In the Mohamed-case referred to in my judgement, the Constitutional Court left open that question, but in the Mahala and December-cases, also quoted in my judgement, the then Appellate Division held that where a person voluntarily returned to South Africa, there was no infraction of South African or public international law. There is then also no violation of such person's fundamental human rights, it was held in the Mahala-case. These cases have not been overruled, and they still stand.

[11] Having regard to all the submissions made on behalf of the applicant in the present application for leave, I am of the view that those submissions cannot be successful in light of the findings of fact made by this court in the application launched by the applicant. I am therefore not persuaded that another court would come to a different conclusion, or that there are other

[4] **(2023) ZASCA 24, case no 455/2022**
[5] **1998 (2) BCLR 220 (T)**

compelling reasons why the matter should proceed on appeal. The following order is made:

1. The application for leave to appeal is dismissed with costs.

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P.J. LOUBSER, J

Counsel for Applicant:	Adv. K. Perumalsamy and Adv. F Dlamini
Instructed by:	Machini Motloung Inc Attorneys Bloemfontein
For 1st to 3rd respondents:	Adv. N. Snellenburg SC and Adv. M.S. Mazibuko
Instructed by:	State Attorney Bloemfontein
For 6th respondent:	Adv. L. Le R. Pohl SC
Instructed by:	Matsepes Bloemfontein

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