

SOUTH AFRICA / JUDGMENT

Benjamin v Additional Magistrate Cape Town and Others (14216/2013) [2014] ZAWCHC 115 (1 August 2014) [2014] ZAWCHC 115

COURT

Western Cape High Court, Cape Town

BEFORE

LL Burger, Gamble

CASE / FILE NUMBER

14216/2013

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Republic of South Africa

In the High Court of South Africa

Western Cape Division, Cape Town

CASE NO: 14216/2013

DATE: 01 AUGUST 2014

BRIAN BENJAMIN.....Applicant

And

THE ADDITIONAL MAGISTRATE, CAPE TOWN.....First Respondent

THE DIRECTOR OF PUBLIC PROSECUTIONS

WESTERN CAPE.....Second Respondent

THE MINISTER OF INTERNATIONAL RELATIONS

AND COOPERATION.....Third Respondent

THE MINISTER OF JUSTICE AND

CONSTITUTIONAL DEVELOPMENT Fourth Respondent

JUDGMENT: 1 AUGUST 2014

LL BURGER, AJ

1 The Government of the United States of America (the “USA”) seeks the extradition of the Applicant to stand trial on various criminal charges. The charges relate to the illegal importation and marketing of various drugs, including anabolic steroids, in the United States. The USA sent a request to the Government of the Republic of South Africa (the “RSA”) to extradite the Applicant.

2 The Applicant was born Brian Wainstein and changed his name in 2011. The extradition documents also allege that he uses other names. He was arrested and brought before the first respondent, the Additional Magistrate for Cape Town (the “Magistrate”), to determine whether he should be extradited.

3 Mr. Anton Katz SC and Mr. David Simonz appear for the Applicant, Mr. Andrew Breitenbach SC and Ms. Ncumisa Mayosi appear for the Second Respondent. The First Respondent abides the decision of this court.

4 The extradition process is governed by the Extradition Act 67 of 1962 (as amended) (the “Act”) and the Extradition Treaty between RSA and USA which came into effect on 25 June 2001 (the “Treaty”).

5 This application for review relates to the second stage (the judicial phase) of the process, an enquiry before the Magistrate in terms of section 9(1) of the Act.

6 The relevant provisions of the Act are the following:

Section 9 Persons detained under warrant to be brought before magistrate for holding of an enquiry

- (1) Any person detained under a warrant of arrest or a warrant for his further detention, shall, as soon as possible be brought before a magistrate in whose area of jurisdiction he has been arrested, whereupon such magistrate shall hold an enquiry with a view to the surrender of such person to the foreign State concerned.
- (2) Subject to the provisions of this Act the magistrate holding the enquiry shall proceed in the manner in which a preparatory

examination is to be held in the case of a person charged with having committed an offence in the Republic and shall, for the purposes of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he has at a preparatory examination so held.

- (3) Any deposition, statement on oath or affirmation taken, whether or not taken in the presence of the accused person, or any record of any conviction or any warrant issued in a foreign State, or any copy or sworn translation thereof, may be received in evidence at any such enquiry if such document is-

(a)

- (i) accompanied by a certificate according to the example set out in Schedule B;

- (ii) authenticated in the manner provided for in the extradition agreement concerned; or
- (iii) authenticated by the signature and seal of office-
 - (aa) of the head of a South African diplomatic or consular mission or a person in the administrative or professional division of the public service serving at a South African diplomatic, consular or trade office in a foreign State or a South African foreign service officer grade VII or an honorary South African consul-general, vice-consul or trade commissioner;
 - (bb) of any government authority of such foreign State charged with the authentication of documents in terms of the law of that foreign State;
 - (cc) of any notary public or other person in such foreign State who shall be shown by a certificate of any person referred to in item (aa) or (bb) or of any diplomatic or consular officer of such foreign State in the Republic to be duly authorized to authenticate such document in terms of the law of that foreign State; or
- ...
- (4) At any enquiry relating to a person alleged to have committed an offence-
 - (a) in a foreign State other than an associated State, the provisions of section 10 shall apply;
- ...

10 Enquiry where offence committed in foreign State

- (1) If upon consideration of the evidence adduced at the enquiry referred to in section 9 (4) (a) and (b) (i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.
- (2) For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.

7 The Applicant seeks the following relief in these proceedings:

"1.1 Reviewing and setting aside the decision of the First Respondent ("the impugned decision"), made on 1 August 2013, to admit into evidence, in terms of section 9(3)(a) read with section 10 of the Extradition Act 67 of 1962 ("the Act"), the following documents:

1.1.1 A certification issued for the purposes of section 10(2) of the Act, signed by Mr Brent A. Hannafan, Assistant United States Attorney, and dated 31 January 2013 (“the section 10(2) certificate”);

1.1.2 A document purporting to be an affidavit in support on the extradition request signed by Mr Brent A. Hannafan, dated 29 January 2013 (“the Hannafan document”);

1.1.2.1 Exhibit A to the Hannafan document, being a superseding indictment from the United States District Court for the Middle District of Tennessee (“the Tennessee court”), dated 7 June 2012 (“the indictment”);

1.1.2.2 Exhibit B to the Hannafan document, being an arrest warrant from the Tennessee court, dated 7 June 2012 (“the warrant”);

1.1.2.3 Exhibit C to the Hannafan document, being copies of relevant statutes (“the statutes”); and

1.1.2.4 Exhibit D to the Hannafan document, being an affidavit deposed to by Mr Alex Davis, dated 28 January 2023 (“the Davis affidavit”).

In the alternative to prayer 1.1:

1.2.1 Reviewing and setting aside the decision of the First Respondent, made on 1 August 2013, to admit into evidence, in terms of section 9(3)(a) read with section 10 of Act, the section 10(2) certificate; and/or

1.2.2 Reviewing and setting aside the decision of the First Respondent, made on 1 August 2013, to admit into evidence, in terms of section 9(3)(a) read with section 10 of Act, the Hannafan document together with the indictment, the warrant, the statutes and the Davis affidavit;

2.1 Declaring as inconsistent with the Constitution of the Republic of South Africa, 1996 (“the Constitution”) the conduct of the First Respondent, on 1 August 2013, in admitting into evidence in terms of sections 9(3)(a) read with section 10 of the Act the following document:

2.1.1. The section 10(2) certificate;

2.1.2. The Hannafan document;

2.1.3. The indictment;

2.1.4. The warrant;

2.1.5. The statutes; and

2.1.6. The Davis affidavit;

In the alternative to prayer 2.1:

2.2.1 Declaring as inconsistent with the Constitution and invalid the decision of the First Respondent, made on 1 August 2013, to admit into evidence, in terms of section 10(2) certificate; and

2.2.2 Declaring as inconsistent with the Constitution and invalid the decision of the first Respondent, made on 1 August 2013, to admit into evidence, in terms of section 9(3)(a) read with section 10 of Act, the Hannafan document together with the indictment, the warrant, the statutes and the Davis affidavit;

3. Declaring that the document numbered 13016664-2, dated 4 February 2013, signed by Mr John F, Kerry is invalid."

8 In short, the Applicant seeks to review the decision of the Magistrate to admit documents into evidence at the enquiry.

9 The Applicant relies on section 22(1) of the Superior Courts Act 10 of 2013 to review the decision of the Magistrate, which reads as follows in its relevant parts:

"The grounds upon which the proceedings of any Magistrates' Court may be brought under review before a court of a Division are -

- (c) gross irregularity in the proceedings; and
- (d) the admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence."

10 I leave aside the question whether an enquiry in terms of section 9(1) constitutes "proceedings of any Magistrates' Court". Even if it was not, the decision of such a tribunal would be reviewable in any event. I will assume that the decision could be reviewed on the grounds as set out in section 22(1).

11 It follows that the question before us is whether there has been a gross irregularity of the proceedings, or whether inadmissible evidence was admitted. Gross irregularities are only alleged to have been committed in relation to the admission of the evidence. It is therefore convenient to consider the admissibility of the evidence first before considering whether a gross irregularity occurred.

Documents sought to be admitted

12 At issue is the admissibility of a bundle of original bound documents (the "original bundle") submitted by the USA to the RSA through the respective departments of foreign affairs. For the sake of convenience the Magistrate and the parties worked from a paginated photocopy thereof on size A4 paper. This was the only practical course of action. The Applicant's attorney was present when the original was copied and did not object to photocopies thereof being used at the enquiry. Any such objection would in any event have been spurious if the original was available.

13 We called for, and received, the original bundle. It consists of a bound bundle of documents on paper size 8½” x 11” (the paper size used almost invariably in the USA) which comprise (in chronological order as bound and sealed by various persons):

13.1 The bundle from the United States Department of Justice bound with a red ribbon and a red seal sticker which has been embossed, and signed by Mr Randy Toledo on behalf of the Attorney General of the USA, on the first page thereof (the “red ribbon bundle” or the “Justice bundle”, according to the context).

13.2

The bundle from the Department of State^[1] of the USA bound with a gold ribbon and a gold seal sticker which has been embossed, and signed by Ms. Sonya Johnson, Assistant

Authentication Officer, on behalf of the Secretary of State of the USA on the first page thereof, bound together with the red ribbon

bundle (the “gold ribbon bundle” or the “Department of State bundle”, according to the context.)

13.3 The total original bundle consisting of the first page titled “Certificate of Authentication” binding together the gold ribbon bundle and red ribbon bundle with a green ribbon and red sticker seal which has been embossed and signed by Mr. Moroeng of the South African Embssy in the USA (the “green ribbon bundle” or the “original bundle”).

14 The green ribbon bundle and the gold ribbon bundle each added one page to the previous red ribbon bundle.

15 The Justice Department bundle consists of the following documents:

15.1 A certification by Mr. Jeffrey W. Cole referring to the following documents enclosed therewith;

15.2 A certification by Mr.. Brent A. Hannafan referring to the following documents enclosed therewith;

15.3 An affidavit by Mr. Hannafan sworn before US District Judge Todd J. Campbell referring to the following documents, being exhibits A, B, C and D to his affidavit;

15.3.1 Exhibit A, being the so-called Superseding Indictment;

15.3.2 Exhibit B, being the Arrest Warrant;

15.3.3 Exhibit C, being copies of the relevant US Statutes;

15.3.4 Exhibit D, being the affidavit of Special Agent Alex Davis with Annexures thereto.

16 An “X” appears on the top right corner of the first page of the gold ribbon bundle. The numbering of the pages referred to in the founding affidavit does not appear on the original bundle.

17 The Applicant raises the following contentions regarding the admissibility of the original bundle before the the Magistrate in its founding papers:

17.1 The documents were not properly authenticated.

17.2 The Hannafan Certificate put before the Magistrate in terms of Section 10(2) has not been proven by evidence (the so-called "Affidavit Issue").

17.3 The involvement of US District Judge Todd J Campbell in commissioning an affidavit (the so-called "Campbell Issue").

17.4 There were multiple versions of the gold ribbon bundle (the so-called the "X" issue).

Should the decision be reviewed at this stage?

18

We raised with counsel whether the Magistrate's decision should be reviewed at this stage, or whether the Applicant should wait until the Magistrate makes a final decision and then review the matter, if the final decision is adverse to him. We referred counsel in this regard to the dictum in *Wahlhaus v Additional Magistrate, Johannesburg*,

[2] that the court should only in special circumstances interfere by way of review before the conclusion of the proceedings. I also note that the court in *Wahlhaus* also stated that the consent of the Attorney-General (now the Director of Public Prosecutions) is a material element, but does not relieve the court of deciding whether it should intervene before the conclusion of proceedings. Counsel for the both parties informed us that they have were of the view that the decision should be reviewed at this stage.

19 The Applicant was arrested on 19 January 2013. This matter is nowhere close to a conclusion. If we decide that the matter should not be reviewed at this stage the matter will be further delayed. This will not be in the interests of justice.

20 We will therefore consider the merits of the application.

Authentication

21 Applicant contends that authentication as contemplated in section 9(3) of the Act is the verification of a signature on the document. He further contends that because no-one refers in any of the documents to the signatures of Mr. Hannafan and Mr. Davis they have not been authenticated and are therefore not admissible in evidence. He further submits that the seal of office required by section 9(3)(a)(iii) of the Act does not appear anywhere in the request.

22 The issue before us is the interpretation of the word "authenticated" in section 9(3).

23 The Supreme Court of Appeal recently restated the law regarding the interpretation of documents, including statutes, as follows:

"[18] ... Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.

[19] All this is consistent with the 'emerging trend in statutory construction'. " [3]

24

This is the approach that I will adopt in the interpretation of the word "authenticate". I consider the purpose of section 9(3) is to ensure the authenticity of the documents introduced into evidence to establish the facts to be proven: the identity of the person, that the person is liable to be extradited and whether there is sufficient evidence to warrant a prosecution. [4] I also note that the provisions of section 9(3) should be given a sensible interpretation which gives effect to the underlying purpose of the legislation.

25

To understand the meaning of the word "authenticated" in section 9(3)(a) one must start with a reading of the Act. The term is not defined in the Act. Generally it means to verify as genuine. The Magistrate stated (quoting from various sources):[5]

Authentication has been defined as follows:

"to establish as genuine or valid or to give authority or legal validity"; [6]

"to prove to be genuine or as represented"; [7]

"to prove or serve to prove that (something) is genuine especially to prove that (an item of evidence) is genuine for the purpose of establishing admissibility; to make (a written instrument) valid and effective by marking esp. with one's signature";

It is clear from these definitions that the authentication instrument signifies that the document is what it purports to be." [8]

To this I add the following definition of "authenticate" from Webster's New World Law Dictionary:

- "1. To prove that something, such as a document, is what it purports to be, especially so that the item can be admitted into evidence at a trial or hearing. For example, a party wishing to admit a letter into evidence may ask the witness whether it is, indeed, the letter he received, does he recognize the handwriting, and similar questions.
2. To place a mark, such as a signature or a stamp, on a document to signify that it is authentic, effective, or valid.
3. To approve or adopt a writing as one's own."

In the legal context it normally means to verify a document to be genuine, which is often done by verifying or "authenticating"

the signature on a document. Section 9(3) specifically refers to the document itself ("such document") being authenticated,

rather than the signature on the document being authenticated.

26 While the definition of "authentication" in Rule 63(1) of the Uniform Rules of Court is consistent with the Applicant's argument that authenticate means the verification of signature, in terms of the provisions of Rule 63(1) this definition only applies to the use of the word in that rule.

Authentication under the common law

27 It is useful to first discuss authentication under the common law as it would provide for a better understanding of discussion of the statutory law that follows below.

28 The meaning of the word "authenticate" means a process by which a document is considered to be genuine or what it purports to be, as will be discussed in more detail below. In practice this is usually done by a statement (authenticating document) by a person other than the author of the authenticated document that a signature on the authenticated document is a genuine signature. There are various ways of authenticating a document: For example, oral evidence might be lead that a document is a valid document. Another example where authentication is not done with reference to the signature is in the case of a document such as an email, which does not have a signature. Someone testifying that he or she sent an email is in effect saying that the email is genuine or authentic. Furthermore, not every document with a correct signature is, however, a genuine document: a valid signature might be obtained by fraud, or a signature stamp might be used by someone for fraudulent purposes.

29 I agree with the following statement made in relation to Uniform Rule 63, which is also applicable to authentication generally:

The conclusion is inescapable that the exiting Rules relating to the authentication of documents, including the discretion conferred upon the Court, are designed to ensure that documents executed in foreign countries are genuine before they can be used in the Republic. The provisions laying down formalities are not mandatory in the sense that only strict and exact compliance will suffice. [9]

30

From this dictum it is clear that it is the genuineness of the document that is at stake and not just the signature on the document. The court in Chopra also stated, referring to McLeod v Gesade Holdings (Pty) Ltd [10]:

"... Ramsbottom J. observed that the Rules then in force relating to the authentication of documents were not exhaustive, that what the Court had to be satisfied of was that the document before it was a genuine one, and that the signature of the person who was said to be the signatory thereof was indeed the signature. " [11]

I agree with the statement that it is the document that is important and which must be genuine. The reference to a signature does not mean that the signature also has to be verified in some way in every case.

31 Although in the majority of cases authentication is done by way of verifying a signature, the real issue is whether the document as a whole is authentic, not only whether the signature is authentic. This authentication can be done either by saying "the signature is the signature of X" or "this is an authentic document" or other words to that effect.

32

An example of a case where the authentication was not done by way of verifying the signature is Mountain View Hotel (Pty) Ltd v Rossouw.

[12] In that matter the statement made was that "the person swearing to the affidavit is personally known to him as ...", not that he verified the signature. The court accepted the affidavit as being sufficiently authenticated under Uniform Rule 63(4) read with Uniform Rule 27(3).

33 What is important is that the document is genuine, not whether the signature is genuine. It is theoretically possible that a genuine signature might be obtained by fraudulent means, which would not make the document valid, even though the signature might be valid.

34 The Applicant's counsel referred the Court to a large number of cases where reference is made to a signature being verified as the act of authentication. However, none of these cases discusses the issue of whether authentication under the Act (and not involving Uniform Rule 63) requires verification of the document or just the signature on the document. It merely mentions the verification of the signature, as this is normally the way in which documents are verified.

35 I am therefore not persuaded by the argument that authentication must be restricted to a signature and cannot extend to the entire document. Authentication refers to authentication of documents, which might be by verification of a signature, but not necessarily so.

36 All the recent cases relating to authentication that I have been able find deal with the question under Uniform Rule 63(4). It does appear to me, however, that Uniform Rule 63(4) reflects the common law (except in its use of the definition of "authenticate"), which allows the court a discretion to admit documents executed outside South Africa if the court is satisfied that the document is genuine. I do not find, however, that the definition of "authentication" in Uniform Rule 63(1) reflects the common law.

What is meant by authentication under the Act?

37

Section 9(3) deals with the admissibility of documents. Documents can be either "authenticated" or "certified" (in the case of an associated State) [13] to be admissible. In the context the Legislature appeared to use "certified" (in the case of an associated State) as being similar to "authentication" (in the case of other States). "Certified" means to certify a document as an original document or true copy by a magistrate or judge, i.e. that they are genuine documents. The certificate does not say anything about the signature on them. This supports the conclusion that "authenticate" in section 9(3) means and act to verify the genuineness of the document, as opposed to verifying the signature.

38 In light of the view I have taken of the common law and a reading of the Act I therefore conclude that "authentication" means verifying a document to be genuine, or what it purports to be, whether it be by verifying a signature on a document or by other means.

39 This interpretation of the word "authenticate" is consistent with the purpose of section 9(3) as set out above, and is also the sensible approach which will give effect to the primary purpose of the proceedings before the Magistrate. The approach of the Applicant to contend that authentication can only mean the verification of a signature ignores, firstly, the plain words of the statute, which refers to documents being authenticated, and secondly, the purpose of section 9(3) and thirdly that such an interpretation is not sensible.

Were the documents properly authenticated?

40 The question before us is whether the documents in the Justice bundle have been authenticated. These documents purport to prove the requirements that the magistrate must find, i.e. whether the Applicant is liable to be surrendered and whether there is sufficient evidence to warrant a prosecution.

41 The face page of the gold ribbon bundle states:

"I [c]ertify [t]hat the document hereunto annexed is under the Seal of the Department of Justice of the United States of America, and that such Seal is entitled to full faith and credit."

42 The statement is made by Sonya Johnson on behalf of the Secretary of State, in her capacity as "Assistant Authentication Officer" and bears her signature and the Seal of Office of the Department of State.

43 The effect of this rather formal language is, although it does not expressly say so, that the document under seal is genuine: The statement is that the seal is entitled to "full faith and credit", the clear import being that the document is genuine. This is would be tantamount to confirming the genuineness of the signature thereby implying that the document is genuine, and can be be relied upon.

44 The Johnston certificate refers to the "document hereunto annexed" under seal, which must mean all the documents bound together by the red ribbon under the seal of the Department of Justice, and annexed to the Johnson certificate, not just the face page of the annexed documents. This would include the red ribbon bundle as well.

45 Ms. Johnson does not state on what evidentiary basis she makes the certification but it is not necessary to state so. The fact is that she, as an Assistant Authentication Officer, authenticates all the documents in the red ribbon bundle. She might do so because she relies on the seal and signature on the red ribbon bundle, but that does not matter since here is nothing in the Extradition Act that requires an authentication to be based on any particular information.

46 Ms. Johnson signed the authenticating certification quoted above and affixed the seal of office of the Department of State thereon. It follows that the documents annexed thereto, being the red ribbon bundle, have been authenticated by a "government authority ... charged with the authentication of documents in terms of the law of" the United States of America. In my view this complies with the requirements of section 9(3)(a)(bb) of the Extradition Act.

47 As such the documents were duly authenticated and therefore properly admitted. This finding only applies to a document that is a "deposition, statement on oath or affirmation" as referred to section 9(3). It would not apply to the certificate in terms of section 10(2), nor to the copies of the relevant statutes. Because of the provisions of Article 10.1(b)(ii) of the Treaty the same reasoning would apply to these additional documents, as the whole of the request is a document "referred to in Article 9" of the Treaty.

48 The Magistrate was therefore correct when she stated that the verifications complied with the requirements of section 9(3)(a)(iii)(bb).

49

It is therefore not necessary to go into an analysis of the further authenticating acts, being the authentication by Mr. Moroeng and by Mr. Toledo. [14] I add, though, that the certificate of the Department of Justice (the face page of the red ribbon bundle) constitutes a verification of the signature of Mr. Jeffrey W. Cole, in saying that his "name is signed". Mr. Cole himself on behalf of the Department of Justice certifies that all the documents attached to his "Certification" constitute the original extradition

request.

Rule 63(4)

50 Authentication of the relevant documents can take place either under section 9(3)(a)(ii) (“as provided for in the extradition agreement”) or section 9(3)(a)(iii). The Applicant's argument deals with section 9(3)(a)(iii), but does not consider section 9(3)(a)(ii). The Treaty (being the extradition agreement referred to in the Extradition Act) provides as follows in Article 10:

“Any document referred to in Article 9 [which would cover the documents in question] shall be received in evidence in any proceedings for extradition if:

3. Such document is certified or authenticated in any other manner acceptable by the laws in the Requested State.”

51 Uniform Rule 63(4), if applicable, might provide a complete answer to the question whether the documents were properly authenticated.

52

In S.

- v. Eliasov, 1967 (2) SA 423 (TPD) [15] the court did confirm that documents were admissible before a magistrate in extradition proceedings under Uniform Rule 63(4). It does not appear to me that the question whether the Uniform Rules could be applied to courts of law other than the High Court or public officials was considered or argued there, nor whether the Uniform Rules could or did change the substantive common law.

53 I therefore conclude that, if applicable, Rule 63(4) would have provided a complete answer to the admissibility of the documents. I am however hesitant to rule on this basis as the issue was not fully argued before us.

54 The finding above makes it unnecessary to discuss the further argument by the Second Respondent, that strict compliance with the statutory provisions is not required.

55 It follows, that the contention that the decision of the Magistrate must be reviewed and set aside because she admitted inadmissible evidence must fail, as the evidence was admissible.

Gross irregularities

56 This brings us to the further contention by the Applicant that there were other gross irregularities which require us to review and set aside the decision to admit the original bundle. The Applicant contends that the admission of the original bundle should be set aside because of the cumulative effect of these alleged irregularities.

57 The first alleged gross irregularity that the Applicant refers to is that the Magistrate, in her decision to admit the original bundle, stated (at page 6 of the decision): "Section 9(3) provides that any deposition, statement on oath or affirmation may be received at the enquiry in evidence if such document is accompanied by a prescribed certificate which is authenticated [Emphasis added]" Similar words are repeated at page 7 of the decision.

58 The Magistrate's statement is incorrect: It is the document itself that must be authenticated, not the "prescribed certificate". There is also no "prescribed" certificate in the sense that a certificate is prescribed by regulation in terms of section 18 of the Extradition Act. There is, of course, a certificate prescribed (in the wide sense) by section 9(3)(a)(i), which is Schedule B to the Act (which follows the form provided for in the Hague Convention Abolishing the Requirement of Legalisation for Foreign Public Documents). Such certificate would not require any further authentication, as the certificate itself is the authenticating document.

59 The Magistrate's statement would have been more accurate had it read: "Section 9(3) provides that any deposition, statement on oath or affirmation may be received at the enquiry in evidence if such document is accompanied by a certificate prescribed in section 9(3)(a)(i), or either authenticated by" or words to that effect. The Magistrate's statement seems to contemplate a more onerous requirement, (being both the certificate referred to in section 9(3)(a)(i) and further authentication), than is required by the law, being one or the other.

60 Nothing flows from this mistake, however, which is essentially background discussion and not part of the reasons for her decision. The Magistrate did not require both the certificate prescribed (in a wide sense) by section 9(3)(a)(i) as well as further authentication.

Her reasoning is set out in page 8 of her decision and does not mention the "prescribed certificate" again. There is therefore no "gross irregularity" relating to the "prescribed certificate".

61 The Applicant further submits, on this issue, that the Magistrate had a "total misunderstanding of the workings of section 9(3)(a)" and submits that Magistrate had asked herself the wrong question. He further submits that the Magistrate had remained silent on the alleged defects in her decision (by not filing an opposing affidavit in these proceedings) and as such the Applicant's submission must be accepted.

62 This is not correct. The reasoning of the Magistrate shows that she did apply her mind to the right question and came to the right decision to admit the original bundle. This therefore does not amount to a gross irregularity. Furthermore, the fact that the Magistrate did not file an opposing affidavit does not mean that the inferences sought to be drawn by the Applicant should be drawn. These inferences are that:

62.1 The Magistrate has a total misunderstanding of the workings of the Act and/or

62.2 The Magistrate asked herself the wrong question, that is, a question other than that which the Act directed her to ask, and or

62.3 The Magistrate fundamentally misdirected herself on the facts and the law.

63 A further argument put forward in relation to the cumulative effect of the Magistrate's misdirections relates to the fact that she cited a short passage from *S v Davoy*, 1971 (3) SA 899 (A) 901 in support of her reasoning. Counsel for the Applicant complained that the passage relied upon was not part of the judgment itself but was part of the argument of one of the parties recorded in the report of the case. Counsel did not submit however that the quoted part is an incorrect statement of the law. His criticism was simply with the fact that the Magistrate

stated that the court held when it did not do so. This quote appears in a background discussion by the Magistrate and did not affect her decision or reasoning. It is a simple misstatement with no effect at all. It is not a gross irregularity.

64

The Applicant further contends that the Magistrate should not have referred to the case in any event given that the legal representatives did not deal with it in argument. Reliance was placed on the judgment of *Kauesa v Minister of Home Affairs*

[16] The statement in *Kauesa* at 973J that presiding officers should not rely on matters not put before them by litigants and that if they come across a point not argued they should put it to counsel is correct as a general position. This does not mean however that a judge need put every case to counsel before it may be referred to it in a judgment. It is the issue or the point that must be put to counsel, not necessarily every case or authority on the issue or point. What needs to be put to counsel depends of the circumstances of each case. In this case the reference to *S v Devoy* was simply part of the general discussion and did not form part of the Magistrate's reasoning for admitting the original bundle.

The reference therefore did not amount to a gross irregularity.

65

The same applies to the criticism of the Magistrate's unilateral reference to *Abel v Minister of Justice and others* [17], the author *Van Wijngaert and Garrido v Director of Public Prosecutions, Witwatersrand Local Division and others*. [18]

66

The Applicant contends, relying on *De Vos v. Marquard and Co.*

[19] that all of these individual irregularities cumulatively lead to a gross irregularity. In addition he submits that the erroneous reference to the "prescribed certificate" by itself constitute a gross irregularity. I am not persuaded that these two minor mistakes cumulatively constitute an irregularity. They certainly were not gross irregularities, either singularly or cumulatively.

67 In any event, even if there was a gross irregularity, my view is that the Magistrate came to the correct decision in admitting the original bundle. There is no point setting aside her decision to simply substitute our own decision to admit the documents.

Section 10(2) Certificate or Affidavit issue

68 The Applicant argues that the section 10(2) certificate should not have been admitted into evidence since to be admissible as evidence it must be introduced either by way of an affidavit or oral evidence and inclusion in one or more of the bundles was not procedurally acceptable.

69 The answer is that all that is required in terms of section 10(2) for the certificate to be admitted into evidence is for the Magistrate to be satisfied that it "appears to him or her to be issued by an appropriate authority". For good reasons, forming part of the authenticated bundle, it appeared to her to be so and was duly admitted. As I have found, the Magistrate was correct in finding that the certificate was properly issued and, therefore, as part of the duly authenticated bundle it was admissible before her.

Judge commissioning affidavit

70 The Applicant claims in his founding affidavit that a further ground for review is that United States District Judge Todd J Campbell presided over the superseding indictment, issued the arrest warrant, will preside over the trial and commissioned the affidavit of Mr. Hannafan admitted into evidence.

71 How these conclusions, even if correct, relate to the relief sought in the Notice of Motion, being the setting aside the admission of documents in evidence, is not explained.

72 In any event the conclusions by the Applicant are not supported by facts. The Applicant does not explain how he has personal knowledge of these conclusions stated as facts.

73

The conclusion that Judge Campbell presided over the superseding indictment is simply based thereon that his name appears under the case number of the superseding indictment returned by the Grand Jury. There is no evidence that a judge presides over a Grand Jury.[20] There is in any event no evidence that the judge dealt with any issues in this case, whether procedural or on the merits. The same applies to the warrant of arrest. There is no evidence that the judge issued the warrant or applied his mind to the matter. As explained in the "statement under penalty of perjury" of Ms. Patricia L Petty, a document forming part of the answering papers filed herein in which the procedural steps followed in the US Court are explained, the allocation to Judge Campbell is provisional and the Applicant can apply for his recusal.

74 The fact that the judge commissioned an affidavit does not matter either. In South Africa the administration of the oath is a completely neutral function not involving consideration of the merits of a case. There is no evidence that the position is different in the United States of America.

75 This contention therefore fails.

Changing the Certificate: the "X" issue and the pagination of the bundle

76 Finally the Applicant complains that when Mr. Moroeng verified the gold ribbon bundle he placed a handwritten "X" on the top right of the first page of the that bundle for the purpose of identification. A copy of the original bundle provided to the Applicant was also paginated for reference, but the original was not.

77 This document states after the operative words of the certificate: "This certificate is not valid if it is removed or altered in any way whatsoever." The Applicant contends in his founding affidavit that the placing of the "X" and the pagination of a copy of the request is a "mala fide and/or unlawful alteration".

78 In my view what was done with copies of the original bundle is irrelevant. The placing of a mark on a document for the purpose of identification is not an alteration of the certificate contained in the document in any way. If it was, this is clearly a case in which the maxim *de minimis lex non curat* applies.

79 The relief sought in prayer 3, to declare the document "invalid" must therefore also fail.

Prayer 2

80 Prayer 2 of the Notice of Motion asks for a declaration that the admission of the documents by the Magistrate is inconsistent with the Constitution. I have already found that the documents were properly admitted. As such the relief sought in prayer 2 must fail.

Conclusion

81 The application is dismissed with costs, including the costs of two counsel.

LL Burger AJ

I agree. It is so ordered.

Gamble J

[1] This is the equivalent of the South African Department of International Relations and Cooperation.

[2] 1959

(3) SA 113 (AD)

[3] Natal Joint Municipal Pension Fund v Endumeni Municipality 2012

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- (4) SA 593 (SCA) at 603F - 604D
- [4] Section 10(1)
- [5] Footnotes are as they appear in the Magistrate's decision.
- [6] Collins English Dictionary
- [7] <http://www.yourdictionary.com/authenticate>. Access 26 July 2013
- [8] <http://research.lawyers.com/glossary/authenticate.html>. Access 26 July 2013
- [9] *Chopra v Sparks Cinemas (Pty) Ltd and another*, 1973(2) SA 352 (D&CLD) at 358D
- [10] 1958
- (3) SA 672 (W)
- [11] At page 357D-E
- [12] 1985(2) SA 73 (NCD)
- [13] The USA is not an associated State. Associated States are certain foreign States in Africa. See definition of "associated State" in section 1 and section 6.
- [14] Mr. Moroeng is the Third Secretary in the South African Embassy, Washington DC, who signed the green ribbon bundle authenticating the signature of Ms. Johonson. Mr. Toledo verified the signature of Mr. Cole of the US Department of Justice on the face page of the red ribbon bundle.
- [15] Appeal reported as *S v Eliasov* 1967(4) SA 583 (A)
- [16] 1996(4) SA 965 (NmS) at 973J-974A
- [17] 2000(2) SA SACR 333 (C)
- [18] 2007
- (1) SACR 1 (SCA)
- [19] 1916 CPD 551 at 554
- [20] See *United States, Petitioner v. John H. Williams, Jr.* 504 U.S. 36 (112 S.Ct. 1735, 118 L.Ed.2d 352)

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