

SOUTH AFRICA / JUDGMENT

Schultz v Minister of Justice and Correctional Services and Others (2022/002804) [2022] ZAGPPHC 1001; 2023 (2) SACR 145 (GP) (21 November 2022)

[2022] ZAGPPHC 1001

COURT

North Gauteng High Court, Pretoria

BEFORE

N Janse Van Nieuwenhuizen

CASE / FILE NUMBER

2022/002804

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IN

THE HIGH COURT OF SOUTH AFRICA

(GAUTENG

DIVISION, PRETORIA)

Case

Number: 2022-002804

REPORTABLE:

YES

OF

INTEREST TO OTHER JUDGES: YES

REVISED:

YES

21

NOVEMBER 2022

In

the matter between:

JOHNATHAN
SCHULTZ
Applicant
And
MINISTER
OF JUSTICE AND CORRECTIONAL SERVICES First
Respondent
DIRECTOR
GENERAL: DEPARTMENT OF
JUSTICE
AND CORRECTIONAL SERVICES Second
Respondent
DIRECTOR
OF PUBLIC PROSECUTIONS,
Third
Respondent
GAUTENG
LOCAL DIVISION, JOHANNESBURG
NATIONAL
DIRECTOR OF PUBLIC PROSECUTIONS
Fourth Respondent
REGIONAL
MAGISTRATE, REGIONAL COURT
Fifth
Respondent
FOR
THE REGIONAL DIVISION OF GAUTENG,
HELD
AT KEMPTON PARK
MINISTER
OF INTERNATIONAL RELATIONS AND
Sixth Respondent
COOPERATION
NATIONAL
COMMISSIONER OF THE
Seventh
Respondent
SOUTH
AFRICAN POLICE SERVICE

JUDGMENT

JANSE VAN NIEUWENHUIZEN J:

- [1] This application pertains to a request by the Republic of South Africa to the United States of America for the extradition of the applicant.
- [2] The applicant prays for the following relief:

“2. Declaring that the applicant has the right, in the particular circumstances of this case, to submit representations to the Minister

of Justice and Correctional Services (Minister) and the Director of Public Prosecutions, Gauteng Local Division, Johannesburg in relation to any extradition request South Africa may submit to the United States of America for his extradition before South Africa submits such request.

4. Declaring that only the Minister, in his capacity as a member of the national executive of the Republic of South Africa has the power to submit a request for the extradition of the applicant from the United States of America.”

[3] Only the first, second, third and fourth respondents oppose the relief claimed herein. The opposing respondents will collectively be referred to as “the respondents”, save insofar as it is necessary to refer to a specific respondent.

[4] For ease of reference the relevant respondents will be referred to as follows:

4.1 the first respondent, Minister of Justice and Correctional Services as the Minister;

4.2 the second respondent, Director General: Department of Justice and Correctional Services as the DG;

4.3 the third respondent, Director of Public Prosecutions, Gauteng Local Division, Johannesburg as the Director;

4.4 the fourth respondent, National Director of Public Prosecutions as the NDPP.

Facts

[5] On 3 November 2021 a magistrate in the Kempton Park Magistrates Court issued a warrant of arrest for a number of persons, including the applicant. It is alleged that the suspects, including the applicant, are guilty of serious crimes which, inter alia, include the contravention of certain sections of the Prevention of Organised Crime Act, No 121 of 1998, the contravention of certain sections of the Precious Metals Act, 37 of 2005, theft and fraud.

[6] The applicant left South Africa prior to the warrant for his arrest could be executed and currently lives and works as an artist in Las Vegas, Nevada, the United States of America (“the USA”). The applicant states that he has been residing in Las Vegas since 2019 with his family with includes his three minor children.

[7] The remaining suspects were arrested and are currently facing criminal charges in the Kempton Park Magistrates’ Court. On 31 March 2022 some of the applicant’s co-accused appeared in court and the prosecutor, Ms Roux, applied for a postponement of the matter to inter alia facilitate the extradition of the applicant from the USA.

[8] On 14 April 2022, Mr Strauss, the applicant’s attorney who appeared on behalf of another accused on 31 March 2022, addressed a letter to various respondents in this matter. The letter states that any request for the extradition of the applicant may be unconstitutional,

unlawful and invalid. Mr Strauss, furthermore, requested the identity of the official who is empowered and authorised to submit an extradition and stated that the applicant has a right to make representations to the identified official prior to the request being submitted to the USA. The envisaged representations pertain to the applicant's circumstances in the USA and his intention to co-operate with the investigation team. The representations could, according to the applicant, influence the

decision to submit the extradition request to the USA.

- [9] On 21 April 2022, Mr Phiri, the spokesperson for the Minister responded and advised Mr Strauss that the Minister is not involved in the administrative process regarding extraditions. Mr Strauss was referred to two officials in the Department that are responsible for requests for extraditions, to wit Ms Tandeka Lujiza and Mr Edgar Botes.
- [10] On 22 April 2022 a certain Mr Chauke, provided a rather curt response by email to Mr Strauss, which response reads as follows: "Kindly keep the NDPP and the ministry out of this."
- [11] On 10 May 2022, JG Wasserman, the Deputy Director of Public Prosecutions, responded to the letter and advised that due process will be followed in respect of the extradition proceedings. This would entail that the applicant will be able to exhaust his rights, including the making of representations in the appropriate forum in the USA in due course and it was Wasserman's stance that any engagement with the applicant and his attorney will be premature.

Legislative framework

- [12] The applicant contends that every extradition request, both incoming and outgoing, must be dealt with by the Minister, because he is required to do so in terms of the Constitution, the Extradition Act, and International law. Any request submitted by the prosecuting authority will, therefore, be unlawful,
- [13] In considering the applicant's submissions it is apposite to have regard to the legal framework pertaining an extradition request from the Republic to the USA.
- [14] In this regard, the Extradition Act, 67 of 1962 ("the Act"), is the first port of call.

Although the Act deals mainly with extradition requests from foreign states, it is the only legislative instrument that provides for extradition.

- [15] It is, therefore, of assistance to first of all, have regard to the authority afforded to the Minister insofar as it pertains to extradition requests from foreign states.
- [16] Section 4(1) of the Act provides that a request for the surrender of any person to a foreign state shall be made to the Minister.

- [17] “Minister” is defined in section 1(v) of the Act as the “Minister of Justice”, currently known as the Minister of Justice and Correctional Services.
- [18] Section 5(1)(a) makes provision for the issuing of a warrant for the arrest of a person by a magistrate upon receipt of a notification from the Minister to the effect that a request for the surrender of a person to a foreign state has been made. Section 5(1)(b) authorises a magistrate to issue a warrant for the arrest of a person upon information provided to the magistrate that such person committed an extraditable offence.
- [19] Section 7 provides that a magistrate may issue a warrant for the further detention of a person that was arrested without a warrant, should the magistrate be satisfied that such person has committed an extraditable offence.
- [20] Section 8 (1) stipulates that a magistrate must submit particulars to the Minister in respect of warrants issued in terms of section 5(1)(b) and section 7. The Minister may in terms of section 8(2)(a) direct a magistrate to cancel a warrant that has not been executed and in terms of section 8(2)(b) direct that a person be discharged in circumstances where the warrant has been executed. The Minister’s discretion in this regard is unfettered.
- [21] Section 9 makes provision for the holding of an enquiry by a magistrate in respect of a person who has been arrested in terms of a warrant issued under the Act.
- [22] Section 10(1) authorises a magistrate to commit a person, that has been found to be liable to be surrendered to prison to await the Minister’s decision with regard to his surrender. Section 10(4) directs that a magistrate who has made an order in terms of subsection (1), to forthwith forward a copy of the record of proceedings to the Minister.
- [23] Section 11(a) provides that the Minister may order the surrender of a person committed to prison under section
10. In terms of section 11(b) the Minister, however, has a discretion in certain prescribed circumstances, to order that such person shall not be surrendered. Section 15 similarly provides the Minister with a discretion to cancel a warrant for the arrest of a person or an order for the discharge of the person from custody, should the Minister be satisfied that the offence the person is sought for is of a political character.
- [24] In summary, the aforesaid sections of the Act bestows on the Minister the sole authority to authorise extradition requests from foreign states.
- [25] In so far as the Minister’s personal involvement in a request for extradition to a foreign state is concerned, the Supreme Court of Appeal in considering an extradition request from Botswana held as follows in *Marsland v Additional Magistrate, Kempton Park and Another* 2009 (2) SACR 585 SCA:

“[15] It is necessary to examine in some detail the three documents that were handed to the first respondent in court on 23 August 2019. The note verbale No 164/2019 FS from Botswana reads:

'The High Commission of the Republic of Botswana presents its compliments to the Department of International Relations and Co- operation of the Republic of South Africa and has the honour to submit a request for an extradition of Timothy Gordon Marsland. The esteemed Department is further requested to transmit the enclosed dossier to the relevant South African Authorities. The High Commission of the Republic of Botswana avails itself of this opportunity to renew to the Department of International Relations and Co-operation of the Republic of South Africa the assurances of its highest consideration.'

The document was received by DIRCO on 17 July 2019 in line with the common- cause fact that DIRCO deals mostly with international

relations, as well as diplomatic matters between South Africa and other countries.

[16] As I have pointed out, the second document was a letter from DIRCO to the Director-General of the Department, dated 19 July 2019, which simply enclosed the note verbale and requested that the documents be forwarded to the relevant authorities. The third document was also a letter from the office of the Director-General, enclosing the note verbale and indicating the Department's intention to submit a memorandum to the Minister, requesting him to issue a notification in terms s 5(1)(a) of the Act.

[17] The note verbale constituted a request by Botswana for the extradition of the appellant, as envisaged in the Act and the Protocol. A dossier was attached to it with a request that it be handed over to the relevant department. In accordance with art 6, the request was in writing. The request and the supporting documents were received by DIRCO and forwarded to the Director- General of the Department. Thus, the request was 'transmitted through the diplomatic channel' and received by the Ministry of Justice, as required by art 6.

[18] There is no substance, therefore, in the appellant's argument that the request for his extradition had not been properly received as of 12 August 2019. It was submitted on behalf of the appellant that the request had to be received by the Minister directly. For that interpretation to be accepted, one would have to ignore the words 'diplomatic channel' and 'Ministries' in art 6 of the Protocol, as well as the context in which those words were used. Needless to say, this would not yield a sensible meaning. The Oxford Dictionary describes 'ministry' as (in certain countries) 'a government department headed by a Minister'. This meaning of the word 'ministry' puts to bed the argument that the request had to be received directly by the Minister.” (own emphasis”)

[26] Returning to the provisions of the Act, the Act does not contain similar provisions in respect of a request by the Republic to a foreign state for the extradition of a person. Section 20 is the only section that refers to the Minister and provides that the Minister may, upon a request of a person that has been surrendered to the Republic, return such person to the foreign state from which he/she was extradited.

[27] Although the Act does not contain any specific provisions in respect of extradition requests submitted by the Republic to a foreign state or directly empowers the Minister to authorise/submit such a request, the Constitutional Court stated the following in *President of the Republic of South Africa v Quaglini*, and two similar cases 2009

(2) SA 466 at para [44]:

“[44] The Act, read with other legislation such as the Criminal Procedure Act, thus gives the executive branch all the required statutory

powers to be able to respond to a request for extradition from a foreign state and for the executive branch to be able to request the extradition of individuals who are in foreign states. It should be added that, although the power to request extradition to the Republic from a foreign country is not expressly provided for in the Act, it is necessarily implicit in ss 19 and 20. Both deal with requests for surrender, and indeed, s 19 expressly envisages extradition being requested in terms of an extradition treaty.³⁹”

[28] Mr Brand, counsel for the respondents, agrees that the Minister is the relevant executive authority to submit a request to a foreign state for the surrender of a person to the Republic. Mr Brand, however, disagrees that the Minister has the legislative power to decide whether a request should be made or not.

[29] In support of the aforesaid contention, Mr Brand referred to section 179 of the Constitution that provides for the establishment of a single prosecuting authority in the Republic. In compliance with the aforesaid section, the National Prosecuting Authority Act, 32 of 1998 (“NPA Act”) was promulgated and in terms of section 20 of the Act, the power to institute and conduct criminal proceedings on behalf of the state and to carry out any necessary functions incidental to instituting and conducting such proceedings and also to discontinue criminal proceedings vests in the prosecuting authority and shall, for all purposes, be exercised on behalf of the Republic.

[30] Although, in terms of section 33 of the NPA Act and section 179(6) of the Constitution, the Minister has the final responsibility over the prosecuting authority, such responsibility does not include decision making on behalf of the prosecuting authority.

[31] In this regard, Mr Brand referred to *Minister of Justice and Constitutional Development and Others v Moleko* 2009

(2) SACR 585 SCA at para [18] where the following is stated:

“[18] As far as the first appellant, the Minister for Justice and Constitutional Development, is concerned, the National Prosecuting Authority Act 32 of 1998 provides that the Minister exercises final responsibility over the National Prosecuting Authority established in

terms of s 179 of the Constitution, but only in accordance with the provisions of that Act (s 33(1)). Thus, the National Director of Public Prosecutions (NDPP) must, at the request of the Minister, inter alia furnish her with information in respect of any matter

dealt with by the NDPP or a DPP, and with reasons for any decision taken by a DPP, 'in the exercise of their powers, the carrying out of their duties and the performance of their functions' (ss 33(2)(a) and (b)). Furthermore, the NDPP must furnish the Minister, at her request, with information regarding the prosecution policy and the policy directives determined and issued by the NDPP (ss 33(2)(c) and (d)). However, the prosecuting authority is 'accountable to Parliament in respect of its powers, functions and duties under this Act, including decisions regarding the institution of prosecutions' (s 35(1)). It is therefore clear that the Minister (the first appellant) is not responsible for the decision to prosecute Mr Moleko and the appeal must also succeed as far as the first appellant is concerned."

[32] Although the authority provides a clear guideline in respect of the separation of powers between the prosecuting authority and the Minister insofar as the institution of criminal proceedings are concerned, the question in casu was not before the court and consequently not dealt with.

[33] In view of the finding in *Marsland*, supra, I find it apposite to have regard to the Extradition Treaty between the USA and the Republic, which was published in Government Gazette No 22430 of 29 June 2001 under Government Notice No R 593 ("the treaty"). The following Articles bestows decision making powers on the executive authority:

Article 2: Extraditable offences;

Article 4 : Political and Military offences; Article 6: Non Bis Idem;

Article 12: Additional Information; Article 15: Concurrent Requests; Article 17: Rules of Speciality; Article 20.4: Transit.

[34] Insofar as the extradition procedures and required documents are concerned article 9(1) provides that all requests shall be made in writing and shall be submitted through the diplomatic channel. Article 9(2) lists the documents to be submitted, to wit:

"(a) information describing the facts of the offence(s) and the procedural history of the case;

- (b) a statement or text of the law, if any, creating or relating to the offence(s) for which the extradition is requested;
- (c) a statement or test of the relevant law prescribing maximum punishment for the offence(s);
- (d) a statement or text of the law relating to lapse of time which shall be conclusive;
- (e) as accurate a description as possible of the person sought together with any other information which may help to establish that person's identity or nationality and probable location; and

(f) the documents, statements, or other information specified on sub-article 3 or 4, as the case may be.”

[35] Sub-article 3 provides that the following additional documents must be submitted in respect of a person who is sought for prosecution:

“(a) a copy of a warrant or order of arrest, if any, issued by a judge or other competent authority;

(b) a copy of the indictment, charge sheet, or other charging document; and

(c) such information as would justify committal for extradition under the laws of the Requested state, but neither state is required to establish a prima facie case.”

[36] The aforesaid documents emanate in the Republic from the prosecuting authority. Although the articles referred to supra makes, in certain prescribed circumstances, provision for a decision by the executive authority, article 9 does not contain a similar provision. Article 9, furthermore, refers to the “diplomatic channel” which is the sixth respondent, the Minister of International Foreign Relations and Cooperation. Mr Katz SC, counsel for the applicant, draw my attention to Article 7(2) of the Vienna Convention of the Law of Treaties which provides that “in virtue of their functions, and without having to produce full powers, Heads of State, Heads of Government and Ministers of Foreign Affairs

....shall be representatives of their State, for purposes of performing all acts relating to the conclusion of the treaty.”

[37] It is no doubt the reason why the Department of International Foreign Relations and Cooperation (“DIRCO”) is the entity that submits the extradition requests to the corresponding department in the USA.

[38] Bearing the aforesaid in mind, it is informative to have regard to the procedure followed by the Republic when requesting the extradition of a person from the USA.

[39] On behalf of the Director and the NDPP, Ms Le Roux, a Senior State Advocate and the prosecutor in the pending criminal proceedings deposed to an answering affidavit.

[40] Ms le Roux explains her involvement in the prosecution and states that she is in the process of compiling the documents necessary to comply with the articles contained in the treaty. Once the documents are ready, Ms le Roux will forward the documents to Advocate Wasserman, the Deputy Director overseeing extraditions at the National Prosecuting Authority, Gauteng Local Division.

[41] Mr Wasserman will peruse the application and once he is satisfied of the correctness of the documents, he will forward the documents to the Director, Advocate Chauke, who will sign off on the final document. Thereafter, the application is transmitted to the office of the NDPP.

- [42] Once the NDPP or an authorised colleague has perused the documents and satisfied themselves as to the correctness and veracity of the allegation, the request for extradition is forwarded to the Department.
- [43] Ms le Roux confirmed that the Minister does not personally deal with outgoing requests for extradition, but that he does deal directly with some of the incoming requests for extradition of persons from the Republic.
- [44] Ms le Roux's evidence in this regard is, to a large extent, confirmed by the provisions of the Act and Article 9 of the treaty set out supra.
- [45] Mr Botes, the Acting Director in the Chief Directorate: Extradition and Mutual Legal Assistance of the Department of Justice and Correctional Services ("the Department"), deposed to an answering affidavit on behalf of the Minister and on behalf of the Director General of the Department ("the Department"), the second respondent.
- [46] Mr Botes explained that a distinction should be drawn between a request by the Republic for the extradition of someone to the Republic and an application by a foreign country for the extradition of someone from South Africa.
- [47] In a request by the Republic for the extradition of someone from the USA, the NDPP, or her Deputy, will initiate the process and submit the documentation to the Director-General of the Department. The Department is the South African designated Central Authority to consider the request, to confirm the designations of the NDPP or her deputy, to confirm the designation of the magistrate who has issued the warrant of arrest and to authenticate the signatures on the affidavit and the warrant of arrest.
- [48] If the documents are in order, the Central Authority transmits the request to DIRCO for onward transmission to the requested foreign state through diplomatic channels.
- [49] Mr Botes confirmed that the Minister is not the person who deals with or considers extradition applications. The Department is the designated Central Authority and the Ministry is simply a conduit through which the request is channelled to his fellow Minister in the foreign portfolio for transmission to the Central Authority in the USA.

Decision maker in respect of a request for extradition to the USA

- [50] Mr Brand has already conceded that the Minister is the executive authority for purposes of the Act and the treaty.
- [51] In respect of the authority that takes the decision to request the extradition of someone from the USA and having regard to section 179 of the Constitution, the provisions of the NPA Act read with article 9 of the treaty, I am of the view that the prosecuting authority is the relevant authority to take a decision to make a request for the extradition of a person from the USA.

[52] To find otherwise, would be contrary to the clear provisions of the Constitution and the NPA Act. The Minister, through the Ministry plays an administrative role in the process. Should the Minister be deemed to be the authority to decide whether a request will be submitted, it would entail that the Minister may take a decision not to submit the request. In doing so, the Minister will have to cancel the warrant that was issued by a magistrate. The Minister will, furthermore, have to enter the exclusive terrain of the prosecuting authority and will have the right to overrule the decision taken by the prosecuting authority to request the extradition of a person for purposes of criminal proceedings. This result is in clear violation of the Constitution, the provisions of the NPA Act and is legally untenable.

[53] In the result, I find that the prosecuting authority is the authorised authority to decide whether a request for the applicant's extraction from the USA should be made.

Representations

[54] The question remains whether the applicant has a right to submit representations to the DG.

[55] To answer this question it is apposite to have regard to the provisions of the NPA Act.

[56] Section 24 of the NPA Act provides for the powers, duties and functions of Directors and Deputy Directors. Section 24 does not confer any power on a Director in casu the second respondent, to consider representations by a person prior to a request for the extradition of such person from a foreign state is made.

[57] Absent legislative power to do so, the DG is under no obligation to receive and consider representations by a person prior to taking a decision to request the extradition of such person from a foreign state.

[58] In the result, the relief claimed by the applicant in prayer 2 of the notice of motion must fail

[59] Costs will follow the result.

ORDER

I grant the following order:

1. The application is dismissed.
2. The applicant is ordered to pay the costs of the application, which costs will include the costs of Senior Counsel.

N JANSE VAN NIEUWENHUIZEN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

DATE HEARD:

04 November 2022

DATE DELIVERED:

21 November 2022

APPEARANCES

For the Applicant: Advocate Anton Katz SC

Advocate Kessler Perumalsamy

Instructed by: IAN

Levitt Attorneys

For the Respondent: Advocate CFJ Brand SC

Instructed by: State

attorney

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