



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

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Schultz v Minister of Justice and Correctional Services and Others (76/2023) [2024] ZASCA 77 (23 May 2024)

Today the Supreme Court of Appeal (SCA) upheld with costs, including the costs of two counsel where so employed, an appeal against the decision of the Gauteng Division of the High Court, Pretoria (the high court).

The crisp issue in the appeal was whether the power to request the extradition of a person from the United States of America (the US) to stand trial in the Republic of South Africa (the Republic/ South Africa) vests in the executive authority of the Minister of Justice and Constitutional Development (the Minister), or whether it vests in the National Prosecuting Authority (the NPA). The high court held that the authority to make an extradition request from the US vested in the NPA and not in the Minister. The decision came to the SCA on appeal with leave of the high court.

The appellant, Johnathan Richard Schultz was the applicant in the high court. He is a South African citizen who has resided in the US since 2019. In November of that year, the South African Police Service (the SAPS) made several arrests of persons accused of offences related to the alleged theft and sale of unwrought precious metals. The SAPS also obtained and executed six search warrants. The affidavit supporting the application for the warrants mentioned the appellant as an active member of one of the companies alleged to have been involved in the commission of the offences. In March 2022, when the arrested accused appeared in court, the prosecution sought a postponement on the ground, among other things, that the NPA intended to request the appellant's extradition from the US.

On the premise that extradition proceedings against him were envisaged by the NPA, the appellant approached the high court for urgent relief. His first substantive prayer was for an order declaring that he had a right to submit representations to the Minister, and the DPP in relation to any extradition request that may be sought. The appellant's second substantive prayer was for an order: '[d]eclaring 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'. It was this second declarator, which was refused by the high court, which formed the subject matter of the appeal.

On 16 September 1999, the Government of South Africa entered into the Extradition Treaty with the Government of the US (Treaty). The Treaty was signed by the then Minister of Justice and Constitutional Development, Dr Penuel Maduna on behalf of the Government of South Africa. In terms of Article 1 of the Treaty, parties agreed to extradite to each other, pursuant to the provisions of the Treaty, persons whom the authorities in the requesting State have charged with or convicted of an

extraditable offence. It is the exercise of power in terms of this Treaty which the appellant says vests in the Minister.

The high court held that s 179 of the Constitution, read with ss 20 and 33 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act), vests the NPA with the power to institute and conduct criminal proceedings on behalf of the State. Section 179(2) also empowers the NPA to 'carry out any necessary functions incidental to instituting criminal proceedings'. Under this statutory scheme, prosecutions fall within the exclusive domain of the NPA. This includes the power to decide whether an extradition request to the US should be made. It further stated that, to find in favour of the appellant would be contrary to this scheme; it would permit the Minister to enter the exclusive terrain of the NPA by giving him the power to overrule its prosecutorial decisions. Consequently, the high court refused to grant the declaratory relief sought by the appellant.

The SCA discussed the conferral of powers in the Constitution, the application of international law and the Extradition Act. It found the starting point to be the doctrine of legality, an incident of the rule of law, which entails that no power may be exercised beyond that which is conferred by law. To identify the source of power requires an exploration of what extradition is about. It involves three fundamental elements. These are acts of sovereignty between two States; a request by one State to another State for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial or sentence in the territory of the requesting State.

The procedure governing extradition operates at both international and domestic level. Extradition necessarily involves an international act, invoking executive authority. At international law it will be governing by rules of public international law including, customary international law. Domestically by domestic law. In South Africa, it will be the Extradition Act.

Drawing from Constitutional Court judgments, the SCA held that extradition powers implicate foreign relations. In international law, it is presumed that where a State acts, it does so through its executive officials. This is in line with Article 7(2) of the Vienna Convention on the Law of Treaties. This is so because when an official makes undertakings on behalf of the State or performs such acts, he or she must have authority to do so, as such acts have binding consequences for the State. Section 231(1) of the Constitution provides that 'the negotiating and signing of all international agreements is the responsibility of the national executive'. In terms s 232, customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. In addition, courts are enjoined by s 233, when interpreting legislation, to prefer any reasonable interpretation consistent with international law over any alternative principle that is inconsistent with it.

To hold that it is the NPA and not the executive that has decision-making power in respect of outgoing extradition requests would be contrary to established international law principles: it would accord to a non-executive domestic organ of state, an executive function at a State-to-State level. An intention so to depart from established international law principles would require clear expression in the Extradition Act.

The SCA held that the real nub of the issue is the demarcation of functions between the NPA and the Minister. In other words, the line is drawn between the NPA's power to prosecute and to do things necessarily incidental thereto, on the one hand, and the power of the executive to act in matters involving foreign affairs, on the other. In its role as the prosecuting authority, the NPA has the important function of determining who is to be prosecuted and what the charges are to be. The Minister has no role or power in the exercise of this prosecutorial function. However, if an identified accused is in a foreign State, this triggers the engagement of executive authority, as the NPA must seek assistance from the executive to make the extradition request to the foreign State.

The SCA held that the role of the NPA in the outgoing extradition process does not stretch to dictating to the Minister how to exercise this power, as this would be destructive of the separation of powers. It also held that this demarcation of powers and functions between the NPA and the Minister does not impinge on the NPA's prosecutorial powers. This is because the principle of legality defines the ambit of the Minister's lawful powers. While he has the power to decide whether and when to make an outgoing extradition request, he cannot do so in a manner that undermines prosecutorial independence. Whether he has acted within the realms of his authority will depend on the circumstances of the extradition request in question in any given case.

The SCA concluded that it is clear that the Minister is central to the administration and implementation of the Extradition Act and the decision-making power in respect of all extradition requests vests in him. The reciprocal obligations that arise with extradition are to be dealt with by the Minister on behalf of the Republic. This not only applies to incoming extradition requests, as expressly provided for in the Extradition Act, but also, by implication, to outgoing requests to the US. This was stated by the Constitutional Court in *President of the Republic of South Africa and Others v Quagliani, and Two Similar Cases* [2009] ZACC 1; 2009 (4) BCLR 345 (CC); 2009 (2) SA 466 (CC). This conclusion is reinforced by international law and by the Constitution.

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