REPUBLIC OF SOUTH AFRICA

**IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

CASE NO: A404/2013

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED. ✓

12.3.14
DATE

SIGNATURE

In the matter between:

VAN ROOYEN, STEPHEN M **APPELLANT**

and

THE STATE **RESPONDENT**

JUDGMENT

WRIGHT J

1. On 23 November 2012 the learned Magistrate at Kempton Park held that the appellant, Mr Van Rooyen is a person liable to be surrendered to the United

States in terms of Section 3(1) of the Extradition Act, 67 of 1962. This appeal is against that order and is brought as of right under Section 13(1) of the Act.

BACKGROUND

2. On 24 August 2006 the then Minister for Justice and Constitutional Development, Mrs B S Mabandla gave notice under Section 5(1)(a) of the Act that she had received a request for the surrender of Mr Van Rooyen to the United States to stand trial on charges of fraud.

3. On 12 January 2010 Mr J T Radebe, the Minister for Justice and Constitutional Development informed Mr Van Rooyen's attorney that he had no reason to reverse a decision of his predecessor. He had been requested under Section 11(b)(iii) to order that Mr Van Rooyen not be surrendered on the ground that the offence in question was of a trivial nature and that Mr Van Rooyen's surrender was not sought in good faith. The record in this appeal does not include a document showing that Mrs Mabandla had made a decision under Section 11.

THE FORMALITIES

4. It appears to me that Mr R Chartash certified on 12 July 2006 that he is the Assistant United States Attorney in charge of the prosecution against Mr Van Rooyen in the Northern District of Georgia and that the evidence summarized or contained in documents attached to his certificate is available for trial and is sufficient under the laws of the United States to justify the prosecution of Mr Van Rooyen. There are five attachments to Mr Chartash's certificate. These are an affidavit deposed to by him setting out the law and facts relating to the charges against Mr Van Rooyen. Attached to the affidavit are the indictment, the arrest warrant, the documents setting out the relevant statutes allegedly contravened and an affidavit by a special agent of the United States Food and Drug Administration's Office of Criminal Investigations, Mr R Kuykendall, an investigator in the case.

5. The affidavits of Mr Chartash and Mr Kuykendall were signed and sworn before a United States Magistrate Judge on 7 July 2006, that is five days before Mr Chartash made his certification.

6. On 14 July 2006, Mr David P Warner, Associate Director, Office of International Affairs, United States Department of Justice, certified that attached to his certification is the original affidavit, with attachments, of Mr Chartash and that Mr Chartash's affidavit was sworn to before a United States Magistrate Judge of the United States District Court for the Northern District of Georgia on 7 July 2006. Mr Warner did not purport to authenticate Mr Chartash's certificate dated 12 July 2006.

7. On 17 July 2006, Mr Alberto R Gonzales, the Attorney General of the United States, certified that Mr David P Warner, whose name is signed to the accompanying paper, is Associate Director, Office of International Affairs, Criminal Division of the Department of Justice, duly commissioned and qualified. Mr Gonzales states that he caused the seal of the Department of Justice to be affixed to the document he was signing and that he caused his name to be attested by the Director / Deputy Director, Office of International Affairs, Criminal Division of the Department of Justice. The document is signed by Mr Gonzales and by the Director / Deputy Director of the relevant office. The paper accompanying Mr Gonzales' document is the authentication by Mr Warner of Mr Chartash's affidavit.

8. On 17 July 2006, Condoleezza Rice, Secretary of State certified that the document annexed to her certification is under the Seal of the Department of Justice of the United States and that such Seal is entitled to full faith and credit. In testimony thereof she caused the seal of the Department of State to be affixed to her certification and she caused her name to be subscribed by the Assistant Authentication Officer of the State Department. The certification is signed by Ms Rice and the Assistant Authentication Officer. The document annexed to Ms Rice's certification is the certification by Mr Gonzales.

9. Mr Van Rooyen challenges the formalities and the admission into evidence of the documents referred to above. It was submitted on his behalf in written heads of argument that in contravention of Section 9(3)(a)(i) the evidence is

not accompanied by a certificate according to the example set out in Schedule B to the Act. Schedule B is a pro-forma document with certain limited formal requirements. This point was abandoned by Mr Elliott, for Mr Van Rooyen during oral argument and in my view wisely so. Firstly, the form and content of the documents relied on by the United States are more than that required in Schedule B. Accordingly there has been compliance with Section 9(3)(a)(i). The certificates of Mr Gonzales and Ms Rice, separately and collectively provide compliance with Section 9(3)(a)(i).

10. Secondly, compliance with Section 9(3)(a)(i) is not compulsory. It is sufficient if there is compliance with either Section 9(3)(a)(i) or (ii) or (iii). The word "or" appears after (ii). It is accordingly beyond doubt that (iii) is an alternative to (ii). To read (i) as a selfstanding requirement in addition to (ii) or (iii) would mean that the Legislature intended more than one authentication of the same document. This would be unnecessary. In my view the legislature in Section 9(3)(a) simply had in mind three alternative ways of authenticating the relevant documentation. Although the word "certificate" is used in (i) the meaning of this word is one of authentication. This appears from a reading of Schedule B.

11. Authentication means verification and is specifically provided for in Section 9(3) of the Act and in Article 10 of the relevant treaty to which I refer below.

12. The decision in **Bell v S 1997(2) All SA 692 ECD** at 697 a-i is authority for the proposition that Section 9(3)(a)(i), (ii) and (iii) postulates requirements in the alternative.

13. In **Geuking v President of the Republic of South Africa 2003(3) SA 34 CC** at paragraph 39 Goldstone J said the following "*Under s9(3) of the Act, the evidence may take the form of a deposition, statement on oath or affirmation, whether taken in the presence of the person concerned or not, and* ***must be*** *duly authenticated in the manner provided in s9(3)(a)(iii) of the Act.*" My emphasis. The learned Justice was not dealing with the question of whether or not the requirements under Section 9(3)(a)(i), (ii) and (iii) are disjunctive or conjunctive. He was dealing with the constitutionality of Section 10(2) and was merely giving an overview of the Act. In my view the learned Justice's quoted words were said in passing.

14. In any event for the reason given below I am of the view that there has been compliance with Section 9(3)(a)(iii)(bb) and therefore compliance with Section 9(3)(a)(iii). Section 9(3)(a)(iii) contains four different ways of authenticating documents. These different ways are disjunctive. The word "or" appears between (cc) and (dd). To read the different ways of authentication as conjunctive would be to read the Legislature as insisting on more than one authentication of the same document. There would be no purpose in such insistence.

15. In the **Law of South Africa, 2nd ed, Vol 10, Part 1** page 201, footnote 5 the learned author suggests that the certificate referred to in Section 9(3)(a)(i) is a necessary document and that authentication of it under Section 9(3)(a)(ii) is an additional requirement. No authority is cited in support of the proposition. The decision in **Bell** is not cited. I disagree with the learned author.

16. In my view the documents referred to above were also properly received by the learned Magistrate under Section 9(3)(a)(ii) and under Section 9(3)(a)(iii)(bb). Under Section 9(3)(a)(ii) documents may be received if they have been authenticated in the manner provided for in an extradition agreement. On 16 September 1999 the United States and South Africa concluded an extradition treaty. Article 9 covers procedure and required documents. Article 10 covers the admissibility of documents in evidence in extradition proceedings. The validity and enforceability of this treaty was confirmed in **President of the Republic of South Africa and Others v Quagliani, and Two Similar Cases 2009 (2) SA 466 CC,** particularly at paragraph 54. Mr Van Rooyen was party to that litigation. I am further of the view that there has been compliance with the authentication requirements in Article 10(1)(b)(ii) of the treaty in that, but for Mr Chartash's certificate, the documents were authenticated by the signature and seal of office of a US government authority charged with the authentication of documents in terms of US domestic law.

17. Under 9(3)(a)(iii)(bb), any deposition, statement on oath or affirmation taken, or any copy thereof may be received in evidence at an enquiry if such document is authenticated by the signature and seal of office of such foreign State charged with authentication of documents in terms of the law of that

foreign State. The document signed by Ms Rice and the Assistant Authentication Officer contains express reference to the laws of the United States pursuant to which the certification is issued.

18. In my view, but for Mr Chartash's certificate, the chain of evidence starting with Mr Kuykendall's affidavit and ending with the authentication of Ms Rice's signature and certification is unbroken.

19. During argument before us, Mr Elliott, and Mr Barnard for the State agreed that pages 154 to 201, both pages included, of the record before us had been bound and sealed by the gold seal of the Department of State. These pages go from the subscribing of Ms Rice's name by the Assistant Authentication Officer on 17 July 2006 back to the commissioning of Mr Kuykendall's affidavit on 7 July 2006 by the United States Magistrate Judge.

20. The failure of Mr Warner to authenticate Mr Chartash's certificate does not assist Mr Van Rooyen. The authentication requirements in Section 9(3) relate to depositions, statements on oath and affirmations rather than to certificates. In Section 10(2), the Legislature, obviously intending to lower the hurdle for the requesting state, provides that "*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.*" My emphasis. The authentication requirement in Section 9(3) is absent in Section 10(2).

21. A certificate placed before the Magistrate in circumstances such as the present must necessarily cause the certificate to appear to the Magistrate to have been issued by an appropriate authority as described in Section 10(2).

22. It is most improbable that the document dated 12 July 2006 and purporting to be a certificate signed by Mr Chartash is a forgery. In the context of the presentation of the evidence against Mr Van Rooyen as a whole the probabilities are overwhelming that Mr Chartash signed the document which purports to be his certificate of 12 July 2006. At a glance, and to my untrained eye, the signature on this document is not obviously not that of the person

whose signature is authenticated by Mr Warner as that of Mr Chartash on Mr Chartash's affidavit.

23. Under Article 10 of the treaty "*Any document referred to in Article 9 shall be received in evidence in any proceedings for extradition if...*" certain requirements are met. There is no express reference in Article 9 to a certificate of any description. Accordingly the treaty is silent on the existence of a conclusive proof certificate and it follows that the treaty does not place its own limitation on the admissibility of the certificate. Articles 9(2) and 9(3) are limited to a description of required supporting information. As the conclusive proof certificate is not a document referred to in Article 9 of the treaty it does not need to be authenticated under Article 10.

24. Provided, as I find, that Mr Chartash's certificate is admissible, it is in my view unnecessary for any of the documents attached to Mr Chartash's certificate to be in affidavit form or to be authenticated at all. I say so because the five attachments to Mr Chartash's certificate form part of the certificate. Mr Chartash specifically states in his certificate that "*the evidence summarized or contained in the attached extradition documents*" is available for trial and is sufficient to justify prosecution.

25. Strictly speaking and as a matter of principle, Mr Van Rooyen's evidence should not be admissible in the face of a conclusive proof certificate as such a certificate is just that, namely conclusive proof of what it purports to prove. However, in **Geuking** at para 42(e) Goldstone J, as part of his reasoning in upholding the constitutionality of Section 10(2) held that the person sought to be extradited was entitled to give and adduce evidence at the enquiry which would have a bearing not only on the Magistrate's decision under Section 10, but which could have a bearing on the exercise by the Minister of the discretion under Section 11.

THE MERITS

26. Under Section 10(2), the learned Magistrate was bound to accept the certificate signed by Mr Chartash as conclusive proof that there is sufficient evidence to warrant a prosecution in the United States.

27. Mr Van Rooyen testified at the enquiry and handed in an affidavit deposed to by him. He affirms his innocence and says that his extradition is sought in bad faith. He gives detailed testimony on both questions.

28. Whether or not the extradition of a person is sought in good faith is not a question required to be answered by the Magistrate conducting the enquiry. It is relevant to a decision taken by the Minister under Section 11(b)(iii).

29. The affidavit of Mr Chartash, considered apart from his certificate, shows clearly, even in the face of Mr Van Rooyen's evidence, that the United States has sufficient evidence to warrant a prosecution.

DUAL CRIMINALITY

30. It was argued for Mr Van Rooyen that the requirement of dual criminality has not been met. Under Section 1, an extraditable offence means any offence which in terms of the law of South Africa and of the foreign State is punishable by a sentence of imprisonment for a period of 6 months or more. Mr Chartash seeks to prosecute Mr Van Rooyen on 51 counts. Broadly speaking, counts 1 - 25 allege wire fraud in violation of a particular statute. Counts 26 – 51 allege fraudulent misbranding of drugs and their introduction to interstate commerce in contravention of a particular statute. These crimes are punishable by imprisonment for longer than one year or more. Under Article 2(1) of the treaty an offence is extraditable if it is punishable under the laws in both States by deprivation of liberty for a period of at least one year or by a more severe penalty.

31. Fraud in South African criminal law is defined as the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another. See **Snyman, Criminal Law, 5th edition** at page 531. This definition encompasses the allegations as framed against Mr Van Rooyen on both sets of counts namely 1-25 and 26-51. It is trite that in South African law the offences alleged against Mr Van Rooyen are punishable by imprisonment for more than one year.

32. The charges alleged by Mr Chartash are fraud under both US and SA law. The additional requirements under US law relating to the wire and interstate

aspects do not change the extraditable nature of the offences. It avails Mr Van Rooyen nought that the particular statutes relied on by Mr Chartash do not form part of South African law and do not find direct counterpart in this country.

33. The name of the offence is not determinative. Under Article 2(3)(a) of the treaty an offence shall be extraditable whether or not the laws in the Requesting and Requested States place the offence within the same category of offences or describe the offence by the same terminology. Under Article 2(3)(b) it matters not that the offence is one for which United States federal law requires the showing of such matters as interstate transportation or the use of mails or of other facilities affecting interstate or foreign commerce.

34. It was agreed by counsel for both parties that in the event of the present appeal being dismissed, bail in an amount of R2 000 would be extended for Mr Van Rooyen on condition that he remained confined to the province of the Western Cape, that he report twice a week to the SAPS at Sea Point at the times he has been required to do so pending this appeal and that he prosecute his further appeal within the prescribed time limits. To this agreement I would add two bail conditions namely that Mr Van Rooyen immediately inform the investigating officer, the station commander at Sea Point and the clerk of the criminal court at Kempton Park of any change of address and further that the appellant immediately hand himself over to the clerk of the criminal court at Kempton Park when either he does not prosecute a further appeal within the prescribed time limits or when such appeal is dismissed.

35. I would dismiss the appeal and extend bail as set out in the previous paragraph.

MODIBA AJ

I agree

Order

1. The appeal is dismissed.

2. Bail in the amount of R2 000 is extended to Mr Van Rooyen on the following conditions:

   2.1. He remains confined to the province of the Western Cape.

   2.2. He is to report to the SAPS at Sea Point at the same times he has been required to do so pending this appeal.

   2.3. He is to prosecute his intended further appeal within the prescribed time limits.

   2.4. He is to inform the investigating officer, the station commander of the SAPS at Sea Point and the clerk of the criminal court at Kempton Park of any change of address as soon as this occurs.

   2.5. He shall hand himself over to the clerk of the criminal court at Kempton Park as soon as either, he does not prosecute a further appeal within the prescribed time limits or such appeal is dismissed.

JUDGE OF THE HIGH COURT

On behalf of the Applicant:	Adv G. Elliott
Instructed by:	David H Botha, Du Plessis and Kruger Inc
On behalf of the Respondent:	Adv D. Barnard
Date of Hearing:	10 March 2014
Date of Judgment:	13 March 2014