IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 4731/2010

In the matter between:

VITO ROBERTO PALAZZOLO	Applicant
and	
THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
THE FORMER MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Second Respondent
THE DIRECTOR-GENERAL: JUSTICE AND CONSTITUTIONAL DEVELOPMENT	Third Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Fifth Respondent
THE WESTERN CAPE PROVINCIAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE	Sixth Respondent

JUDGMENT DELIVERED: 14 APRIL 2011

Fourie et Yekiso JJ:

[1] The troubled relationship between applicant and the South African authorities over a period of more than 20 years, forms the background to this application. This led to six requests by the Italian Government to the South African authorities for the extradition of applicant. All of these requests were unsuccessful, with this court reviewing and setting aside the steps taken in terms of the most recent request, in our judgment of 14 June 2010 ("the judgment"). In the judgment we dealt extensively with the factual background, as well as the legislative scheme and legal principles applicable to the request for the extradition of applicant. We accordingly do not intend repeating same in any great detail, and accept that any person interested in this judgment is fully conversant with the history of the matter, including the content of the affidavits filed in the applications heard by this court.

[2] The sixth request by the Italian Government for the extradition of applicant, was received by the South African Government on 5 February 2007. It was based on applicant's conviction, in absentia, by the Criminal Court of Palermo on 5 July 2006. Applicant was convicted under section 416 *bis* of the Italian Criminal Code, of the offence of complicity of aggravated Mafia-type association. He was sentenced to 9 years' imprisonment. Pursuant to the request, second respondent issued a written notice in terms of section 5 (1) (a) of the Extradition Act No. 67 of 1962, which notification was subsequently confirmed by his successor, the first respondent. The issuing of this notice triggers the extradition process on the domestic level and upon receipt thereof by a magistrate, he or she is entitled to issue a warrant for the arrest of the person sought to be extradited.

[3] The issuing of the section 5 (1) (a) notice in the instant case, prompted applicant to institute review proceedings which culminated in the judgment. In terms of the judgment, the decisions of second and first respondents, respectively, to issue and confirm the section 5 (1) (a) notice, in relation to applicant's extradition to Italy, were reviewed and set aside.

[4] In the context of the present application, the contents of paragraphs 33 and 34 of the judgment are of importance. It appears that the different views of the parties as to the binding force or impact thereof, led to the present application. The application was brought on an urgent basis during December 2010, with interim relief being granted by agreement between the parties and the matter was then set down for hearing by this court. The application is opposed by first and third respondents.

[5] It is apposite to quote paragraphs 33 and 34 of the judgment in full:

"[33] In argument an alternative submission was advanced on behalf of respondents, namely that if it is found that ***Abel's*** *case is correct, then the Minister had only to be satisfied that the request on its face stated or showed the existence of an extraditable offence. It was argued that the Minister was quite correct in accepting that an extraditable offence has been stated or shown, especially if the factual basis for the court of Palermo's finding as set out in its judgment (which judgment served before the Ministers as part of the request), is read with the provisions of the Prevention of Organised Crime Act No. 121 of 1998 and the Prevention and Combating of Corrupt Activities Act No. 12 of 2004.*

[34] The difficulty that I have with this submission, is that it is not the respondents' case that Minister Surty or Minister Radebe, was, in fact, satisfied that the request on its face stated or showed the existence of an extraditable offence. In any event, the request does not state or show that

a conviction of this Mafia-type association under section 416 bis of the Italian Criminal Code, has a counterpart in South African criminal law, resulting in it being an extraditable offence. Respondents' reliance on Acts 121 of 1998 and 12 of 2004 is, in my opinion, misplaced. These Acts do not criminalise the joining of an association with Mafia-type characteristics (as section 416 bis of the Italian Criminal Code does) and had, in any event, not yet been promulgated at the time that applicant was allegedly involved in Mafia-type activities in Italy, which led to his conviction by the court of Palermo. As held by the House of Lords in ***R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (No.3)*** *[1999] 2 ALL ER 97, the principle of double criminality requires that the conduct for which extradition is sought, is an offence in both the requesting and requested countries at the time of the commission of the offence".*

[6] On 29 July 2010, applicant's attorneys addressed a letter to third respondent in which the latter's attention was drawn to paragraphs 33 and 34 of the judgment and applicant's view as to the import thereof was conveyed, as follows:

"We confirm that in the judgment the Court held in respect of the alternative argument on behalf of the Ministers to the effect that the Ministers were quite correct in accepting that an extraditable offence had been stated or shown, that the request did in fact not state or show that a conviction of Mafia-type association under Section 416 bis of the Italian Criminal Code has a counterpart in South African law, resulting in it being an extraditable offence.

Furthermore, the Court held that the Respondents' reliance on the provisions of the Prevention of Organised Crime Act, No. 121 of 1998, and the Prevention and Combating of Corrupt Activities Act, No. 12 of 2004, was misplaced. The Court held that these Acts do not criminalize the joining of an association with Mafia-type characteristics (as Section 416 bis of the Italian Criminal Code does) and had, in any event, not yet been promulgated at the time that our client was allegedly involved in Mafia-type activities in Italy.

We note that the Respondents have elected not to appeal against the judgment. Under these circumstances, and in view of the Court's reasoning as referred to supra, you are hereby requested to confirm that the Department now accepts that our client cannot be extradited to Italy for having allegedly been involved in the offence of Mafia-type association in terms of section 416 bis of the Italian Criminal Code, which offence led to the request for his extradition. Our client, as a South African citizen, is entitled to be informed of the Department's attitude in this regard and you are hereby requested to respond within 7 (seven) days of the date of this letter."

[7] On 18 August 2010, a response was received from the Deputy Chief State Law Advisor in which applicant's attorneys were advised that third respondent accepted the judgment and accordingly elected not to take the matter on appeal. Applicant's attorneys were further advised that the remarks of the court in paragraph 34 of the judgment, i.e. that respondents' reliance on the provisions of Act 102 of 1998 ("POCA")

and Act 12 of 2004 ("PACA"), was misplaced, were, "given the context of the judgment in its entirety,...clearly of an *obiter* nature...(and) wrong, as a matter of law." The letter concludes:

In these circumstances, we are unable to grant your client the confirmation he seeks. Should the Minister receive any request for your client's extradition in future, he will duly apply his mind to the matter in the manner required by the relevant legislation."

[8] In a further letter dated 12 November 2010, first respondent adopted the abovementioned views expressed on behalf of third respondent, and reiterated:

"I confirm, in particular, that, should a renewed request for the extradition of your client be received from any foreign authority, I shall duly consider such request within the parameters of the relevant legislation. I am not aware that any new request for the extradition of your client has been received."

[9] Attempts by the parties to set up a meeting to discuss their differences, failed, as appears from the reply of applicant's attorneys, dated 16 November 2010, in which the following is recorded:

"Insofar as it is now clear that you interpret the judgment...in the same erroneous manner as does your department..., the need for a meeting with my client's legal representatives has been obviated. The request for a meeting is therefore withdrawn. We have no alternative but to bring a further court application."

[10] The substantive relief sought by applicant in the present application is set out in paragraphs 5 and 6 of the notice of motion, as follows:

"(5) That the judgment in this matter of their Lordships Judges Fourie and Yekiso of 14 June 2010 be varied in terms of Rule 42(1)(b) by the insertion of a statement that the content of paragraphs [33] to [34] are not obiter dicta.

(6) Furthermore, and in any event –

6.1 declaring that the Applicant's aforesaid conviction of "Mafia-type" association under section 416bis of the Italian Criminal Code has no equivalent or counterpart in South African criminal law, and that, accordingly, the Applicant cannot be extradited to Italy for that offence.

6.2 declaring, more particularly, that neither the Prevention of Organised Crime Act, No. 121 of 2004, nor the Prevention of Combating of Corrupt Activities Act, No. 12 of 2004, criminalises "Mafia-type" association as does section 416bis of the Italian Criminal Code and accordingly these Acts do not have the effect of that offence also being one in terms of South African law.

6.3 declaring that, in any event, neither aforementioned Act had been promulgated at the time the Applicant was allegedly involved in "Mafia-type" activities, which led to his aforesaid conviction in Palermo and

that, by virtue of this reason alone, he cannot be extradited to Italy as a consequence of that conviction;

6.4 declaring that the Applicant may not be arrested in connection with his aforesaid conviction, whether with a view to his extradition or otherwise;

6.5 interdicting the Minister of Justice and Constitutional Development from issuing a notification of the nature provided for in section 5(1)(a) of the Extradition Act, No. 67 of 1962, as a consequence of any Italian request for the Applicant's extradition in respect of his aforesaid conviction."

We should add that applicant also seeks a costs order against first and third respondents, jointly and severally, including the costs consequent upon the employment of three counsel.

[11] In paragraph 3 of his founding affidavit, applicant describes the purpose of the application as seeking relief from the failure of first and third respondents to acknowledge and give full and proper effect to the judgment. He adds that *"their defiance is severely prejudicing me, as explained below, and frustrating the intent which underpinned the aforesaid judgment and concomitant orders"*.

[12] In detailing the subsequent events which, he alleges, have given rise to this application, applicant firstly points to the correspondence between the parties, to which we have already referred. He stresses that,

as appears from the correspondence, first respondent has aligned himself with third respondent's position that the court's reasoning in paragraph 33 and 34 of the judgment, in relation to double criminality, is *obiter* and wrong. He adds that, given the background of the matter, it is more than probable that a further Italian extradition request will be submitted to first respondent, which will be referred to a magistrate pursuant to the provisions of section 5 of the Extradition Act. This would lead to his arrest and infringement of his fundamental rights.

[13] In the latter regard, applicant also refers to an Interpol Red Notice issued by the Italian authorities during October 2010, requesting his provisional arrest for purposes of his extradition to Italy. The notice describes him as being *"armed, violent and dangerous"*, which, he says, is blatantly untrue. He contends that, having regard to the history of the matter, he has no doubt whatsoever that the South African authorities will actively co-operate with Italy in order to seek his provisional arrest pending a formal extradition application. He adds that it is also more than likely that third respondent will not inform his attorneys of any new extradition request by the Italian government.

[14] In terms of paragraph 5 of the notice of motion, applicant, firstly, seeks an order that the judgment be varied in terms of Rule 42(1)(b), by

the insertion of a statement that the content of paragraphs 33 to 34 thereof are not *obiter dicta*. In his founding affidavit, applicant alleges that there is an apparent ambiguity, within the meaning of Rule 42(1)(b), in the judgment, which ambiguity relates to the court's finding (in paragraphs 33 and 34) that POCA and PACA do not criminalise an indirect association with Mafia-type characteristics, as well as the finding that these Acts had in any event not yet been promulgated at the time that applicant was allegedly involved in Mafia-type activities in Italy. Applicant states that first and third respondents maintain that these findings were *obiter*, while he maintains that they were not. He emphasises that the need to clarify the court's judgment in this manner, arises from the first and third respondents' claims that the judgment in this regard is *obiter* and wrong.

[15] Counsel were agreed that, to invoke the provisions of Rule 42(1)(b), applicant has to show that, viewed objectively, there is an ambiguity in the judgment. It is only upon the proof of such ambiguity, that applicant would be entitled to the variation of the judgment to the extent of such ambiguity. In our view there is no ambiguity in the judgment, as contended for by applicant. The orders made in terms thereof are clear and unambiguous and applicant's counsel conceded

during argument that, viewed objectively, there is no ambiguity in the wording of paragraphs 33 and 34.

[16] It appears to us that this is rather a case where the parties' difference of opinion on whether the contents of paragraphs 33 and 34 are *obiter* or not, is dressed up as an ambiguity in the judgment, to justify the invocation of Rule 42(1)(b). In effect, applicant is not asking the court to vary the judgment by virtue of an ambiguity therein, but to supplement or interpret the judgment by pronouncing whether the content of paragraphs 33 and 34 are *obiter* or not. This the court cannot do.

[17] It should be borne in mind that this court is *functus officio* in regard to the judgment. It has no power to correct, alter or supplement the judgment. As stated by Cameron JA in **True Motives 84 (Pty) Ltd v Mahdi and Another** 2009 (4) SA 153 (SCA) at 185 D (para 98), the court is no more authoritative an exponent in interpreting its judgment than anyone else: the judgment stands on its own as a cognisable addition to our legal landscape, its meaning and effect to be interpreted according to language, legal precepts and the Constitution.

[18] We therefore conclude that applicant is not entitled to any relief in terms of paragraph 5 of the notice of motion.

[19] We now turn to the relief sought in paragraph 6 of the notice of motion. Applicant claims this relief independently from the relief claimed in paragraph 5 of the notice of motion. It will be noticed that the relief claimed in sub-paragraphs 6.1 to 6.4 of the notice of motion, constitutes the granting of declaratory orders. The relief claimed in paragraph 6.5, is interdictory in nature.

[20] The jurisdiction of a High Court to grant a declaration of rights is derived from section 19(1)(a)(ii) of the Supreme Court Act No. 59 of 1959. The section empowers a court, at the instance of any interested person, to enquire into and declare any existing, future or contingent right or obligation, notwithstanding that the applicant cannot claim any relief consequential upon such determination. This involves a two-stage enquiry: First, the court must be satisfied that the applicant is a person interested in an 'existing, future or contingent right or obligation', and then, if satisfied, it must decide whether the case is a proper one for the exercise of its discretion. See: **Langa CJ & Others v Hlophe** 2009 (4) SA 382 (SCA) at 389I-390A (para 28).

[21] In addition, section 38 of the Constitution provides that a declaration of rights is one of the forms of appropriate relief that a court may consider when it is approached by anyone alleging that their rights in

the Bill of Rights are infringed or threatened. While declaratory orders can be accompanied by mandatory and prohibitory orders, they can also stand on their own. It is furthermore trite that the grant of the declaratory order is discretionary and the court will not decide abstract, academic or hypothetical questions unrelated to an applicant's interest in an existing, future or contingent right. It should also be borne in mind that a court will normally not grant a declaratory order where the issue has already been decided by a court of competent jurisdiction, or where the legal position has been clearly defined by statute. See: **JT Publishing & Another v Minister of Safety & Security and Others** 1997 (3) SA 514 (CC) at 525A-C and **SWEAT v Minister of Safety & Security and Others** 2009 (6) 513 (C) (paras 37 and 44-45).

[22] The declaratory relief sought in paragraphs 6.2 and 6.3 of the notice of motion, relating to the question whether POCA and PACA criminalise Mafia-type association as does section 416 *bis* of the Italian Criminal Code, has been dealt with in paragraphs 33 and 34 of the judgment. We made a clear finding in this regard and it appears to us that, if an order were now to be granted in terms of paragraphs 6.2 and 6.3 of the notice of motion, it would merely amount to a restatement of what has already been decided by the court. Although the parties may differ on whether these findings were *obiter* or part of the *ratio decidendi*, it does

not detract from the fact that these issues have already been decided by the court. The granting of declaratory orders in terms of paragraphs 6.2 and 6.3 of the notice of motion, would, in our opinion, infringe upon the policy which directs a court not to exercise its discretion in favour of deciding issues that are merely abstract, academic or hypothetical.

[23] We accordingly conclude that applicant is not entitled to the declaration of rights which he seeks in paragraphs 6.2 and 6.3 of the notice of motion.

[24] This brings us to paragraphs 6.1 and 6.4 of the notice of motion. As mentioned earlier, applicant maintains that he is entitled to seek relief from this court due to the defiance of the judgment and its concomitant orders by first and third respondents. It will be immediately apparent that the relief sought by way of declarators in paragraphs 6.1 and 6.4 of the notice of motion, is not only far-reaching, but ranges beyond any finding made by us in the judgment. In paragraph 6.1, an order is sought declaring that applicant's conviction of Mafia-type association under the Italian Criminal Code, has no equivalent or counterpart at all in South African criminal law. In paragraph 6.4, the court is asked to declare that applicant may not be arrested in connection with his conviction in Italy, whether with the view to his extradition or otherwise. In effect, the relief

sought in paragraph 6.4, is based on the same premise as paragraph 6.1, namely that the Italian conviction of applicant has no counterpart at all in South African criminal law, a finding which we did not make in the judgment.

[25] As the relief sought in paragraphs 6.1 and 6.4 of the notice of motion, ranges beyond our findings in the judgment, it cannot be said that first and third respondents, insofar as this relief is concerned, have conducted themselves in a manner which amounts to the defiance of the judgment and its concomitant orders. This notwithstanding, applicant contends that he is entitled to this relief, as the subsequent conduct of first and third respondents justifies the conclusion that there is a clear and present danger that, if the South African authorities were to receive a further request for the extradition of applicant based on his Mafia-type conviction, it will be adhered to by the issuing of a section 5(1)(a) notice by first respondent. This, applicant maintains, would constitute unlawful conduct, as it would amount to a defiance of the judgment (in particular paragraphs 33 and 34 thereof) and its concomitant orders.

[26] The first difficulty that we have with this submission, is that, far from defying the judgment and its orders, the first and third respondents have given full and proper effect to the directions of the court as

contained in the orders made by it. In particular, they have not purported to give effect to the decisions of first and second respondents, which were set aside by the court. It seems to us that the highwatermark of applicant's case relating to the alleged conduct of defiance on the part of first and third respondents, is the expression of the view that the reasoning of the court in paragraphs 33 and 34 of the judgment, is *obiter*. We should add that, as appears from the correspondence, first and third respondents were also of the view that the reasoning was wrong in law, but this is of no consequence as these findings were not appealed by them. During argument the lead counsel for first and third respondents unambiguously stated that the advice given to first and third respondents that the judgment is wrong in law in these respects, is ill-conceived.

[27] It should also be borne in mind that, as appears from the correspondence, no further request has been received from the Italian Government for the extradition of applicant. First respondent has also unequivocally undertaken that, upon receipt of any future request, he will duly apply his mind to the matter in the manner required by the relevant legislation.

[28] In these circumstances, it appears to us that applicant has not shown that the subsequent conduct of first and third respondents, justifies

the conclusion that the clear and present danger for which he contends, exists. We are therefore not convinced that the circumstances justify the exercising of our discretion in favour of applicant at this stage, by granting the far-reaching declaratory relief sought in paragraphs 6.1 and 6.4 of the notice of motion.

[29] Finally, we deal with the interdictory relief sought in paragraph 6.5 of the notice of motion. One again, this relief ranges beyond the findings made in our judgment. What applicant seeks is an order interdicting first respondent from acting in terms of the Extradition Act, as a consequence of any request by the Italian Government for applicant's extradition in respect of his Italian conviction. The fact of the matter is that first respondent has not yet received any further request for applicant's extradition from the Italian Government. One cannot, therefore, anticipate whether and/or when a further request may be made. Nor can one anticipate the nature and extent of the facts upon which the Italian authorities may in the future rely, to seek the extradition of applicant. In our view, it is clearly premature at this stage to consider the granting of the wide-ranging interdictory relief sought by applicant in paragraph 6.5 of the notice of motion.

[30] What applicant is effectively asking the court to do, is to prevent first respondent from fulfilling his statutory duty to consider any further request for the extradition of applicant. Inherent in the granting of such an order, would be the same finding as is the case with paragraphs 6.1 and 6.4 of the notice of motion, namely that the Italian conviction of applicant has no counterpart at all in South African criminal law, a finding which we did not make in the judgment. In our view, applicant is not entitled to the interdictory relief sought in paragraph 6.5 of the notice of motion.

[31] It follows that the application falls to be dismissed. As far as costs are concerned, first and third respondents as the successful parties would normally be entitled to their costs. We are of the view that there are no grounds to depart from the general rule. In particular, this does not appear to be a case where applicant has raised constitutional issues of general concern, which ought to indemnify him from paying the costs of his governmental adversaries. The present litigation rather involves the application of the judgment and the evaluation of first and third respondents' conduct in the light of the findings made in the judgment. Applicant was unsuccessful in establishing conduct on the part of first and third respondents justifying the granting of declaratory and interdictory relief. In these circumstances, we believe, that he should be

liable for the costs of the application, which, in our view, justified the employment of two counsel.

[32] In the result the following order is made:

1 The application is dismissed.

2. Applicant is ordered to pay the costs of first and third respondents, including the costs of two counsel.

P B Fourie, J

Yekiso, J