IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

CASE NO: 1477/2018

In the matter between:

AUGUSTINUS PETRUS MARIA KOUWENHOVEN	Applicant
v	
THE MINISTER OF POLICE	First Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS: WESTERN CAPE	Second Respondent
THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Third Respondent
THE MAGISTRATE: PRETORIA	Fourth Respondent
THE ADDITIONAL MAGISTRATE: CAPE TOWN	Fifth Respondent

Coram: Fortuin *et* Cloete JJ
Heard: 5 and 6 August 2019
Delivered: 19 September 2019

JUDGMENT

CLOETE J (FORTUIN J concurring):

Introduction

[1] The applicant asks this court to declare unlawful, invalid and to set aside:

1.1 The decision of the fourth respondent (*'the Pretoria Magistrate'*) on 6 December 2017 to issue a warrant for his arrest in terms of s 5(1)(b) of the Extradition Act 67 of 1962 (*'the Act'*);

1.2 Consequently the warrant itself, his arrest on 8 December 2017, and the proceedings before the fifth respondent (*'the Cape Town Magistrate'*) which have been suspended pending the determination of this application[1]; and

1.3 The issue by the third respondent (*'the Justice Minister'*) on 22 February 2018 of a notification in terms of s 5(1)(a) of the Act, which provides in relevant part that a magistrate may issue such a warrant *'…upon receipt of a notification from the Minister to the effect that a request for the surrender of such person has been received [by him]*'.

[1] At para [6] of the applicant's main heads of argument it was stated: *'if the warrant and arrest are found to be invalid, then it flows as a matter of law that the relief sought in paragraphs 1 to 5 of the amended notice of motion falls to be granted.'* The complaint concerning the manner of the applicant's arrest was not pursued in argument. The extradition enquiry itself has not yet commenced.

[2] In addition the applicant seeks an order declaring that he is entitled to damages *'for his unlawful detention from 8 December 2017'* until the date of judgment in this application.

[3] The Pretoria and Cape Town Magistrates abide the Court's decision. The remaining respondents oppose the relief sought.

[4] Section 5(1)(b) of the Act provides:

> *'**5. Warrants of arrest issued in Republic.**—(1) Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person— …*
>
> *(b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic.'*

[5] The applicant contends that the warrant was issued unlawfully for the following reasons: (a) his arrest was in breach of an undertaking given by the South African Police Service (*'SAPS'*) represented by Warrant Officer Willem van der Heever (*'Van der Heever'*) who, when applying for the warrant, failed to disclose that undertaking; (b) there was no urgency as required by art 16 of the European Convention on Extradition (*'the Convention'*); (c) the Pretoria Magistrate *'rubber-stamped'* the application; (d) Van der Heever's supporting affidavit was deposed before one of his colleagues at Interpol Pretoria; (e) the

Pretoria Magistrate failed to comply with s 8 of the Act; and (f) the proceedings were afflicted by bad faith and abuse of process.

[6] Section 8 of the Act reads as follows:

> *'**8. Magistrate to furnish Minister with particulars relating to issue of certain warrants.**—(1) Any magistrate who, under paragraph (b) of subsection (1) of section five or under section seven, issues a warrant for the arrest or further detention of any person other than a person alleged to have committed an offence in an associated State[2], shall forthwith furnish the Minister with particulars relating to the issue of such warrant.*
>
> *(2) The Minister may at any time after having been notified that a warrant has been issued as contemplated in subsection (1)—*
>
> *(a) in the case where the warrant has not yet been executed, direct the magistrate concerned to cancel the warrant; or*
>
> *(b) in the case where the warrant has been executed, direct that the person who has been arrested be discharged forthwith,*
>
> *if the Minister is of the opinion that a request for the extradition of the person concerned is being delayed unreasonably, or for any other reason that the Minister may deem fit.'*

Factual Matrix

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[2] *'associated State'* means any foreign State in respect of which s 6 applies (in terms of the definition thereof in s 1 of the Act). Section 6 in turn pertains to endorsement of warrants of arrest issued in certain foreign States in Africa, and has no application in the instant matter.

[7] The applicant is a Dutch national who was born on 15 September 1942. From 2012 he regularly visited South Africa for a few weeks at a time, but has not travelled outside of this country since he last entered it on a visitor's visa on 18 December 2016. According to the applicant, this is because of ill health.

[8] Criminal proceedings against him commenced in the Netherlands in 2005. On 21 April 2017 he was ultimately convicted by the Court of Appeal in Den Bosch of two broad categories of offences: (a) co-perpetrating the illegal supply of weapons to the regime of Charles Taylor (the erstwhile president of Liberia) during the period 2001 to 2003 which are contraventions of the Dutch Sanctions Act, 1977; and (b) participating in war crimes committed by Liberian forces and/or members of the Liberian militia during the period 2000 to 2002, in armed conflict between Liberia and Guinea. He was sentenced to 19 years imprisonment.

[9] On 24 April 2017 the applicant lodged an appeal, and on 15 June 2017 the convicting court rejected his request that the operation of his sentence be suspended pending the outcome thereof. His appeal in the Netherlands was subsequently dismissed and on 31 May 2019 the applicant lodged a petition at the European Court of Human Rights, which was still pending when the matter was argued before us.

[10] The events leading up to the applicant's arrest on 8 December 2017 are as follows. On 22 April 2017 (i.e. one day after his conviction in the Netherlands) Interpol in The Hague despatched a Red Notice by email to Interpol Pretoria

with a request to provisionally arrest the applicant *'…because of the risk of escaping your country. Could you please take the necessary measures to trace and arrest subject in your country'.* The Dutch authorities provided the applicant's address as […] H. Avenue, Camps Bay, in accordance with an earlier declaration made by him on 11 January 2017. Also included was a letter from the Advocate General of the Netherlands confirming the intention to submit a request to the South African authorities for the applicant's extradition in terms of art 12 of the Convention.

[11] The email was in turn circulated by Interpol Pretoria to its officials on 23 April 2017. One of them was Van der Heever who describes himself as being stationed at *'Interpol Extradition'*.

[12] According to Van der Heever he considered the request and discussed it with Mr Herman Van Heerden (*'Van Heerden'*) who is employed by the South African Department of Justice and Constitutional Development (*'DOJ'*) as Principal State Law Advisor: International Legal Relations. Following thereon, Van der Heever informed Interpol in The Hague that it would be best to await the request for the applicant's extradition before seeking to arrest him because *'… (a) that seemed to me the best way of ensuring that the extradition process proceeded smoothly and (b) at that stage the authorities in the Netherlands did not have any evidence that the applicant was a flight risk'.*

[13] This was conveyed to the applicant's attorney, Mr Gary Eisenberg (*'Eisenberg'*), during a telephone call which the latter made to Van der Heever

on 2 May 2017. Also agreed during that telephone call was that once the extradition request was received, arrangements would be made for the applicant to hand himself over to the SAPS for his first appearance before a magistrate in terms of s 9 of the Act. This was confirmed by Eisenberg in an email to Van der Heever on the same day *'especially in light of our client's age and medical condition'*. Although that email contains no other qualification, it is Van der Heever's version that the undertaking furnished was based on how *'matters then stood'*.

[14] Around the same time there was a telephone conversation between *Mr Katz SC* (who, together with *Mr Cooke* appeared for the applicant) and Van Heerden of the DOJ. As we understand it, Katz made that call. On 3 May 2017 Van Heerden sent a text message to Katz in which he stated *inter alia* that *'…I have just consulted with Interpol and we agreed that he will not be arrested should we receive a request for provisional arrest. It should however be noted that should he exit the borders of South Africa he can be arrested. They* (the Dutch authorities) *are apparently busy with the drafting of an extradition request. I will inform you as soon as I have received a request…'*. Confirmation hereof was contained in an email from Eisenberg to Van Heerden the same day.

[15] On 29 June 2017 Van Heerden informed Eisenberg that electronic copies of requests for both the extradition and provisional arrest had been received, with the originals to follow through diplomatic channels. On the same day Eisenberg confirmed *inter alia* that *'... A decision has been made by the South*

African authorities, including the Department of Justice and SAPS, that a Provisional Request for the arrest of our client… will not be entertained'.

[16] Van Heerden denies that a blanket undertaking was ever given, and states that, in hindsight, he should have responded to Eisenberg accordingly. It is Van Heerden's version that, based on Katz's representations that the applicant was of ill health and not a flight risk, he told him that he has learnt from previous experience that it is not always advisable to immediately execute a request for provisional arrest, unless there is an imminent flight risk, or the authorities know that the extradition request will be forthcoming and will comply with South African domestic law.

[17] It turns out that Van Heerden erroneously advised Eisenberg that the art 16 request for provisional arrest had been received. It was in fact only received on 21 July 2017 but returned on 26 July 2017 because the requirements to render it compliant were not met. In the interim, the art 12 request for extradition received on 7 July 2017 was also returned on 13 July 2017 for the same reason.

[18] On 22 August 2017 the DOJ received an amended request for provisional arrest. A Ms Berdine Fourie of the DOJ, who dealt with the matter, perused it and was satisfied that it met the art 16 requirements. On 23 August 2017 she forwarded it to Interpol Pretoria, under a covering letter requesting assistance with the execution thereof on an urgent basis. The art 16 request dated 2 August 2017, reads in relevant part as follows:

> *'The Netherlands has sought the extradition of Mr Kouwenhoven through a formal request for extradition to South Africa dated 16 May 2017. This request has been returned by South African authorities as – in short – it does not comply with South African law. The Netherlands will therefore submit a new, revised request for extradition of Mr Kouwenhoven on short notice.*
>
> *In the meantime, I herewith request for the provisional arrest of Mr Kouwenhoven for the purpose of enforcement of the order of imprisonment. This request is based on Article 16 of the aforementioned Convention…*
>
> *The urgent need for provisional arrest pending the drafting of the revised request for extradition can be found in the risk that Mr Kouwenhoven may abscond, given the length of the prison sentence imposed on him and the nature of the offences for which Mr Kouwenhoven was convicted. Furthermore, it appears that Mr Kouwenhoven has not taken permanent residency in South Africa and will only be in South Africa temporarily, which constitutes also a real, imminent flight risk…'*

[19] On 4 September 2017 the Dutch authorities requested a progress report. On the following day Ms Fourie reported that, according to Van der Heever, Interpol Pretoria was already conducting surveillance of the applicant's movements. On 2 October 2017 the Dutch authorities requested another progress report. On 5 October 2017 Ms Fourie reported that, again according to Van der Heever, the applicant's arrest was expected in the course of the following week, and a warrant had already been prepared with the assistance of Adv Burke of the Directorate of Public Prosecutions (*'DPP'*).

[20] On 30 October 2017 Ms Fourie informed the Dutch authorities that, again according to Van der Heever, the SAPS investigation had been finalised for

bail purposes and that he would travel to Cape Town the following week to arrest the applicant.

[21] On 30 November 2017 Van Heerden learnt from intelligence sources that the applicant had sold the H. Avenue property. He became concerned that the applicant was winding up his affairs in Cape Town with a view to leaving the country. He impressed upon the SAPS to effect the arrest. Van der Heever too became concerned that the applicant had thus become a possible flight risk.

[22] On 4 December 2017 Colonel Van Rensburg of Crime Intelligence Western Cape confirmed that there was a *'sold'* sign outside the H. Avenue property. On 5 December 2017 Van der Heever informed Van Rensburg of intelligence received about the applicant's possible new address. Van Rensburg was confident that he would be able to trace the applicant within the next few days and suggested to Van der Heever that he apply for a warrant in the interim. On 6 December 2017 Van der Heever applied for the warrant which was issued by the Pretoria Magistrate. On 7 December 2017 Van Rensburg located the applicant's current address in D. Road, Bantry Bay. On Friday 8 December 2017 the applicant was arrested and brought before the Cape Town Magistrate.

[23] The applicant immediately launched a bail application supported by a comprehensive affidavit. Adv Burke (the prosecutor) asked for time to consider it. The Cape Town Magistrate ordered that the applicant be

remanded in custody until Tuesday 12 December 2017 pending finalisation of his bail application. That hearing commenced on 12 December 2017 and was concluded on 14 December 2017 when the matter was postponed since the Cape Town Magistrate required time to deliberate. On 19 December 2017 the Cape Town Magistrate ordered the applicant's release on bail. He remains on bail.

[24] Van der Heever's explanation for the delay between 23 August 2017 (when Ms Fourie forwarded the compliant request for provisional arrest to Interpol Pretoria) and the application before the Pretoria Magistrate on 6 December 2017 for the issue of the warrant of arrest is as follows.

[25] He did not immediately execute the request for two reasons. First, he and his colleague, Warrant Officer Kgomo, who are solely responsible for all provisional arrest and extradition matters, were very busy with other matters at the time. Second, he first had to ascertain where the applicant was living (in particular whether at his last known address, […] H. Avenue) and the degree of permanency of his residence in the Republic.

[26] To this end, during the latter part of September 2017 he sought the assistance of the Crime Intelligence branch of the Western Cape SAPS. He was referred to Van Rensburg on or about 9 October 2017. After discussing the applicant's case with Van Rensburg, the latter undertook to determine where the applicant was living and to monitor his movements. In particular, and in light of

what Eisenberg had told him, Van der Heever requested Van Rensburg to monitor the applicant's health and physical mobility.

[27] Van Rensburg's surveillance of the applicant began with monitoring the property at […] H. Avenue. From the outset, Van Rensburg reported that the property appeared to be closed up with no activity there. Van Rensburg periodically instructed his patrollers to drive past the property to look for any sign of activity or movement. He himself drove past the property if he was in the vicinity. Van Rensburg also requested members of the community and neighbourhood watch to report to him if there was any activity or movement. None was reported.

[28] Van Rensburg was however able to trace movement of the applicant's Porsche motor vehicle. Although initially he was unable to find out where the applicant was living or to view or assess the applicant's health and physical mobility, he did ascertain that a disability tag was displayed on the vehicle and that the applicant used it to travel regularly around Cape Town.

[29] During this time Van der Heever also liaised with Adv Burke who would be handling the applicant's first appearance and (anticipated) bail application once he was brought before a magistrate in terms of s 9 of the Act. Burke agreed that the applicant should be monitored before his arrest.

[30] It was only towards the end of November 2017 when Van der Heever received the information via the DOJ that the applicant had sold his house at

[…] H. Avenue that the possibility that the applicant might be a flight risk arose. The other relevant factors were that the applicant had been convicted of very serious crimes and sentenced to a lengthy period of imprisonment; was a fugitive from justice; and although the applicant's wife had permanent residency in South Africa, he did not, having previously entered and left the country on a visitor's visa.

[31] Further, despite Eisenberg's statement to Van der Heever earlier in the year that his client was in very poor health, in October and November 2017 the applicant had been observed by SAPS intelligence officers driving himself around Cape Town on a regular basis. He appeared to be wealthy. He was well-travelled. As someone with experience in cross-border commerce, including international arms trafficking, he would probably have little trouble obtaining a false passport should he choose to do so. Given South Africa's porous borders, it was unlikely that the applicant would have difficulty leaving South Africa other than through a designated point of exit. The Dutch authorities informed Van der Heever that the applicant was a close friend of the President of Congo-Brazzaville and that this country had been his base since 2003. Neither South Africa nor the Netherlands has an extradition treaty with Congo-Brazzaville. If the applicant left for that country, he would consequently have a relatively safe haven.

[32] Given Van Rensburg's confidence that his team would locate the applicant's address within the next few days, and his suggestion that a warrant be applied for in the interim, Van der Heever decided to do so. According to him

'…the urgency arose because the applicant had taken a step – selling his house – which indicated that he may be getting ready to flee'.

[33] Van der Heever maintains that he did not give an undertaking to Eisenberg that the SAPS would not arrest the applicant pursuant to any request for the applicant's provisional arrest and regardless of any material change in circumstances. It was confined to the first request and the circumstances then prevailing. It was the second request for the applicant's provisional arrest conveyed to Van der Heever on 23 August 2017 (on which the application for the warrant was based) and the sale of the house at H. Avenue (which caused Van der Heever to agree with the Dutch authorities that the applicant may be a flight risk) which dispensed with the need for Van der Heever to mention in his application for the arrest warrant what he had told Eisenberg seven months earlier.

[34] Van Heerden's explanation for not informing Eisenberg of the intention to arrest the applicant pursuant to the second request for provisional arrest is as follows. Armed with the information contained in the letter from the Dutch authorities of 2 August 2017, it was apparent to Van Heerden that they considered the applicant to be a real, imminent flight risk. He was therefore not able to prevent the execution of the Dutch authorities' request for a provisional arrest. He could therefore also not inform the applicant's legal representatives of that request, which might cause the applicant to flee.

[35] Van Heerden states that after Ms Fourie despatched the letter of 23 August 2017 to Interpol Pretoria, matters relating to the provisional arrest of the applicant were dealt with by Interpol/SAPS. However, on about 30 November 2017, upon learning that the applicant had sold the H. Avenue property, he became concerned that the applicant was winding up his affairs in Cape Town with a view to leaving the country. It was then that he impressed upon the SAPS to effect the arrest. Van Heerden not only denies having furnished a blanket undertaking, he also denies that the applicant could ever have had the legitimate expectation that, irrespective of any subsequent change in circumstances, he would nonetheless never be arrested on the basis of a request for provisional arrest. The applicant himself concedes that Van Heerden had no authority to agree that he would not be arrested even if he became an imminent flight risk. He maintains however that he did not become such a risk.[3]

[36] Absent from Van der Heever's explanation for the delay in acting on the art 16 request is why he gave different information about execution of the request to Ms Fourie. The inference may reasonably be drawn that Van der Heever was buying himself time, and this reflects poorly upon him.

[37] However his failure to convey the true state of affairs to the DOJ does place the applicant's complaint in proper context. He maintains that, because Van der Heever purportedly decided by October 2017 to arrest him, several weeks

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[3] Applicant's replying affidavit para 18, record p942.

before he learnt of the sale of the H. Avenue property, his explanation that the arrest was prompted by that sale is both contrived and disingenuous.

[38] This however presupposes that Van der Heever was playing open cards with the DOJ (and consequently the Dutch authorities) when he was not. Moreover the applicant does not suggest that he himself drew the sale of the H. Avenue property to the attention of either Van Heerden or Van der Heever, nor did he ensure that they were informed of his current residential address. This information came to them from surveillance and intelligence at a time when they being placed under pressure by the Dutch authorities, and not as a consequence of anything that the applicant told them.

[39] According to the applicant, the H. Avenue property was placed on the market in mid-2016 and sold on 23 March 2017, i.e. before his conviction. Transfer took place on 22 August 2017. The property in D. Road was purchased jointly by the applicant and his wife in 2014 and they took up residence there at the end of 2015. The applicant maintains that there was no obligation to inform the Dutch authorities about his change of residential address in 2015; and that as far as the South African authorities are concerned, the applicant has resided at the same address since his legal representatives first communicated with them in early May 2017. He submits that there was accordingly no change of address during the period in question, and thus no need to provide any such notification to the South African authorities.

[40] What the applicant does not explain, however, is why he nonetheless declared to the Dutch authorities on 11 January 2017 that his residential address in South Africa was […] H. Avenue, as appears from the initial email from Interpol in The Hague dated 22 April 2017.[4] In the absence of any denial in this regard, it must be assumed, for present purposes, that this was information which the applicant himself provided to the Dutch authorities long after he had already vacated that property. It was also material information upon which they, and consequently the South African authorities, relied.

Discussion

[41] Every interference with an individual's physical liberty is *prima facie* unlawful, and once it is established that an interference has occurred, the burden of proof falls upon the person causing that interference to establish a ground of justification.[5] This is essentially comprised of two elements, namely that the deprivation of liberty *'…must not only be effected in a procedurally fair manner but must also be substantively justified by acceptable reasons'.*[6]

[42] Although much was made in the applicant's papers about Van Heerden breaching an undertaking, it is not that alleged breach upon which the applicant now relies. This is clear from the main heads of argument filed on his behalf, where this complaint is directed squarely at Van der Heever in his

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4 Record p852.
5 *Zealand v Minister of Justice and Constitutional Development* 2008 (2) SACR 1 (CC) at paras [24] – [25].
6 *De Klerk v Minister of Police* [2019] ZACC 32 at para [62].

representative capacity as a member of the SAPS.[7] Moreover, the complaint that the proceedings against the applicant were afflicted by bad faith and abuse of process pertains not to Van Heerden, but to the conduct of the SAPS and Adv Burke of the DPP.[8]

[43] Given the applicant's concession that any undertaking by Van Heerden could never extend to a situation where he became an imminent flight risk, it is difficult to understand why the applicant believes that the same should not apply to Van der Heever, a law enforcement officer.

[44] While Van der Heever can be criticised for inaction, and providing factually incorrect information to the DOJ (and hence the Dutch authorities) about execution of the request, there is simply insufficient evidence to compel one to the conclusion that he therefore did not act in good faith in forming the opinion that the unexplained sale of the H. Avenue property was a strong indication that the applicant had become a possible imminent flight risk.

[45] As far as Van der Heever was concerned, this constituted substantially acceptable justification to approach the Pretoria Magistrate, armed as he also was with the information received from Van Rensburg about the applicant's factual mobility and undisclosed new address. Objectively, it also cannot be found that the reasons given by Van der Heever for approaching the Pretoria Magistrate despite his "undertaking" are manifestly contrived and disingenuous as the applicant contends.

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7 These grounds are quoted in para [5] of this judgment.
8 Applicant's main heads of argument at para [7], pp 67 – 73.

[46] Having reached the conclusion that the applicant might be an imminent flight risk, Van der Heever was obliged, despite any prior undertakings, to apply without notice to the applicant for a warrant for his arrest. The reason is that a police official cannot validly undertake not to do his or her duty, and a DOJ official cannot validly undertake that the SAPS will not do its duty. Van der Heever was compelled to take steps aimed at ensuring that the applicant, considered to be a fugitive from justice, residing in South Africa and whose arrest for extradition purposes had been sought by the foreign State concerned, did not flee the country and so evade justice. *Mr Katz* himself pointed out that in terms of s 9 of the Act an extradition enquiry may only take place in respect of a person detained under a warrant of arrest or a warrant for his further detention.

[47] If one accepts this, as we do, it follows that Van der Heever's failure to disclose to the Pretoria Magistrate the so-called undertaking given months earlier to Eisenberg was not a material non-disclosure.[9]

[48] The other non-disclosures to the Pretoria Magistrate of which the applicant complains pertain to his personal circumstances and art 16 of the Convention. It was submitted on his behalf that if these disclosures had been made, it is questionable whether she would have issued the warrant.

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[9] See *Recycling and Economic Development Initiative of South Africa v Minister of Environmental Affairs; Kusaga Taka Consulting (Pty) Ltd v Minister of Environmental Affairs* 2019 (3) SA 251 (SCA) at paras [45] to [52].

[49] As pointed out by *Mr Breitenbach SC* (who together with *Ms Christians* appeared for the Police Minister, and was supported in his submissions by *Mr Petersen* who together with *Ms Mokhoaetsi* appeared for the DPP and the Justice Minister respectively), the disclosure of an individual's personal circumstances is not a requirement for the issue of a warrant of arrest in terms of s 5(1)(b) of the Act. The Pretoria Magistrate was only required to be satisfied that the applicant was a person convicted of an extraditable offence committed within the jurisdiction of a foreign State *'…as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such a person, had it been alleged that he or she committed an offence in the Republic'*.

[50] As appears from Van der Heever's affidavit and the Pretoria Magistrate's record of decision, he placed the following documents[10] before her on 6 December 2017:

50.1 His affidavit in support of the application;

50.2 The draft warrant of arrest;

50.3 The DOJ's request dated 23 August 2017 that Interpol Pretoria assist with the execution of the request for the applicant's provisional arrest;

50.4 The letter from the Department: International Relations and Co-operation (*'DIRCO'*) to the DOJ dated 17 August 2017 under cover of

[10] The documents referred to in paras 50.3 to 50.9 of this judgment were copies.

which it forwarded the *Note Verbale* also dated 17 August 2017 from the Embassy of the Netherlands requesting the applicant's provisional arrest;

50.5 The *Note Verbale*;

50.6 The letter from the Head: Department of International Affairs and Legal Assistance in Criminal Matters, on behalf of the Minister of Security and Justice of the Netherlands dated 2 August 2017, addressed to the competent authorities in South Africa concerning the provisional arrest of the applicant;

50.7 The Order of Imprisonment issued by the Court of Appeal in Den Bosch in respect of the applicant on 21 April 2017 (in English and Dutch);

50.8 The Interpol Red Notice published on 2 May 2017; and

50.9 The Convention.

[51] Together, the contents of these documents establish that the requirements of s 5(1)(b) were met; more specifically, the request for the applicant's provisional arrest and the draft warrant of arrest contained information that the applicant was a person convicted of an extraditable offence committed within

the jurisdiction of a foreign State, as would justify the issue of a warrant for his arrest, had it been alleged that he committed an offence in the Republic.

[52] They revealed that the offences for which the applicant was convicted and for which he was sentenced to 19 years imprisonment fell within the criminal jurisdiction of the Netherlands.

[53] In turn, the definition of *'Statute'* read with sections (3)(c), 4(1), 4(3)(c) and 5(2) of the Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002 provide, in effect, that persons who have committed genocide, crimes against humanity or war crimes outside South Africa after the commencement of the Rome Statute of the International Criminal Court, and who are subsequently present in this country, are deemed to have committed such crime(s) in the Republic. The Rome Statute of the International Criminal Court was adopted by the United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court on 17 July 1998 and was ratified by South Africa on 10 November 2000.

[54] Article 16 para 1 of the European Convention on Extradition states:

> *'In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law.'*

[55] According to the Explanatory Report to the Convention:[11]

> *'Paragraph 1 permits the requesting Party to request provisional arrest and it is for the requested Party alone to decide on this request; the requested Party will make this decision in accordance with its own law. It is understood, however, that the requesting Party is the sole judge of the "urgency" justifying the request for provisional arrest.'*

[56] *Mr Katz* submitted that the "understanding" that the requesting party is the *'sole judge'* of the urgency is contrary to the plain wording of article 16 para 1 that *'[t]he competent authorities of the requested Party shall decide the matter in accordance with its law'*. We were thus urged to find that the *'matter'* referred to must include the question of urgency.

[57] The reason for this became apparent as the applicant's argument developed. Although clear that art 16 was placed in front of the Pretoria Magistrate before she issued the warrant, the applicant submits that urgency is a jurisdictional fact which must be present for art 16 to be invoked for purposes of s 5(1)(b). He suggests that because he does not consider himself to be a fugitive from justice and was not about to flee South Africa in December 2017, coupled with the delay between the initial art 16 request of 22 April 2017 and the application to the Pretoria Magistrate on 6 December 2017, this jurisdictional fact was not established; and that therefore the art 16 request could not be acted upon at all. In further support of this submission he contends that neither the Dutch nor the South African authorities treated his arrest as a case of urgency.

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[11] https://rm.coe.int/16800c92bc

[58] In our view, there is no rational basis for placing the interpretation for which the applicant contends above the clear wording of the Explanatory Report. Parties to the Convention will properly follow the accepted approach in that Report, and it is not for us to simply override what the contracting parties themselves consider to be best practice. In any event, the objective evidence shows that, from the day after the applicant was ultimately convicted in the Netherlands on 21 April 2017, the Dutch authorities have been of the view that the request for his provisional arrest is an urgent one. It is also not for us to prescribe to the South African authorities what factors they should consider in any given case.

[59] We agree with *Mr Breitenbach* that, having regard to the wording of art 16.1, urgency is not a jurisdictional fact for a positive response by the South African authorities to a request from a foreign State in terms of that article. The South African authorities' response would permissibly be informed by a range of factors, including their current capacity, their assessment of the need for a provisional arrest, their assessment of the likelihood that the requesting party will be able to deliver a compliant request for extradition within the near future, and considerations of international comity. Moreover that these considerations all play a role was confirmed under oath by Van der Heever himself.[12] It also bears emphasis that nowhere in s 5 of the Act is any mention made of an urgency requirement. Accordingly, in terms of our domestic legislative instrument, urgency is not a jurisdictional fact which must be present before s 5 may be invoked.

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[12] At para 145, record p805.

[60] The Pretoria Magistrate delivered her record of decision but did not provide reasons for that decision. *Mr Katz* argued that her failure to do so, in the face of the applicant's allegation of *'rubber stamping'*, meant that such allegation must be accepted by this Court as correct. In support of this submission he relied, in particular, on *Tantoush v Refugee Appeal Board and Others*[13] which was a review application brought in terms of s 6 of PAJA[14] read with s 33 of the Constitution and thus pertained to just administrative action. The learned Judge stated:

> *'[69]. Mr* Arendse*, who appeared for the respondents, seized upon the generality of the grounds and submitted that insufficient factual and legal basis for the attack had been made out in the papers…*
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> *[70] At first glance there is some merit in Mr* Arendse's *submission, especially insofar as it concerns the attack upon the decision of the RSDO. Beyond the allegation that the RSDO acted under the dictation of Interpol officials, few other facts are alleged or averments made in the supporting affidavit regarding the other review grounds of alleged unfairness, irrationality and unreasonableness. The point loses some of its force, however, when regard is had to the supplementary affidavit filed in terms of rule 53(4), which added to the supporting affidavit once the rule 53 record had been filed. There the applicant made much of the fact that the record delivered was inadequate for the reason that it comprised one set of documents, and not two. The applicant accordingly maintained that the failure or inability of the first and fifth respondents to file separate and distinct records was clear evidence of their failure to apply their minds properly. If the decision-makers were not able to identify what documentation was served before them and which documents (such as the Amnesty International reports) were taken into account when making the decision impugned, that in and of itself, he argued, would be a reason to set aside the decisions. The allegation is made that the*

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[13] 2008 (1) SA 232 TPD.
[14] Promotion of Administrative Justice Act 3 of 2000.

> *RSDO failed to take into account the documentation and thus failed to apply her mind to the application and ignored relevant information. Because the fifth respondent did not file an answering affidavit she has not denied these allegations. The unanswered allegations of acting under dictation and a failure to properly consider the application therefore do indeed establish sufficient basis for the relief sought on the grounds that the RSDO violated the applicant's constitutional and statutory rights to reasonable, rational and procedurally fair administrative action...'*

[61] *Mr Katz* also relied on *Cash Paymaster Services (Pty) Ltd v Eastern Cape Province and Others*[15] and *Dendy v University of the Witwatersrand.*[16] In *Cash Paymaster* the Court observed that it is almost standard practice in review proceedings that an independent administrative tribunal will comply with rule 53 by making available the record of its proceedings and its reasons. In similar vein in *Dendy* (also in the context of administrative action), the Court found that *'the failure to give written reasons has an important bearing on the question whether the decision-maker or makers acted in good faith or had been influenced by ulterior or improper motives'.* These authorities were relied on in support of the submission that the same should apply to magistrates in proceedings to review their decisions.

[62] In regard to the latter, *Mr Katz* referred us to *Mphahlele v First National Bank of South Africa Ltd*[17] where the Constitutional Court stated:

> *'There is no express constitutional provision which requires Judges to furnish reasons for their decisions. Nonetheless, in terms of s 1 of the Constitution,*

[15] 1999 (1) SA 324 (Ck) at 353G-I; approved in *Tantoush* at para [87].
[16] 2005 (5) SA 357 (W) at para [53].
[17] 1999 (2) SA 667 (CC) at para [12].

> *the rule of law is one of the founding values of our democratic State, and the judiciary is bound by it. The rule of law undoubtedly requires Judges not to act arbitrarily and to be accountable. The manner in which they ordinarily account for their decisions is by furnishing reasons. This serves a number of purposes. It explains to the parties, and to the public at large which has an interest in courts being open and transparent, why a case is decided as it is. It is a discipline which curbs arbitrary judicial decisions…'*

[63] In our view, to elevate what is almost standard practice in the judicial review of administrative decisions to a principle of general application in the judicial review of judicial decisions would be to set a dangerous precedent, particularly given the wide range of functions that magistrates perform as part of their duties in the lower courts. In any event, in the instant matter the complaint is not that the magistrate failed to exercise her discretion properly, but rather that she failed to exercise any discretion at all and simply *'rubber stamped'* the application. The difficulty faced by the applicant is that, on an objective perusal of the record of decision, the Pretoria Magistrate had before her all that was necessary to inform her whether or not a warrant should be issued. Put differently, all of the relevant requirements were evident, and substantiated, by the record itself. This is not to say that there may be instances where reasons should properly be provided. It is just that, in our view, this is not of them.

[64] The Pretoria Magistrate was entitled to abide the decision of the court without furnishing reasons. As we have already concluded, her record of decision (which was delivered) objectively contained sufficient information to amply substantiate the issuing of the warrant.

[65] The applicant's next attack on the issuing of the warrant is that Van der Heever's supporting affidavit was deposed before one of his colleagues at Interpol Pretoria, namely Sergeant Estie von Hagen. The initial complaint was that it was not properly attested because Von Hagen actively participated in the process leading up to the application for the warrant. If correct, this would fall foul of regulation 7(1) of the Regulations Governing the Administration of an Oath or Affirmation (GN R1258 in GG 3619 of 21 July 1972, as amended) which provides that a commissioner of oaths shall not administer an oath or affirmation relating to a matter in which she has an interest.[18]

[66] In his affidavit, Van der Heever set out the following background facts relevant to this issue:

66.1 At Interpol Pretoria there are four distinct and separate "desks" which work independently of each other. The four desks are the Extradition Desk, which is where Kgomo and Van der Heever work; the Drugs Desk; the Fraud Desk; and the General Desk;

66.2 Von Hagen is stationed at the General Desk and as a result has no involvement or interest in extradition matters;

66.3 Von Hagen had no involvement in any of the steps taken by the SAPS relating to the applicant, save for acting as the commissioner of oaths to his affidavit requesting the issue of a warrant;

[18] Related complaints that Von Hagen's full names and business address did not appear on the affidavit were not pursued in argument.

66.4 The only reason why Von Hagen commissioned his affidavit is that she is a SAPS officer who, because she happened to be stationed at another desk at Interpol Pretoria, was readily available to do so;

66.5 Von Hagen's responsibilities at Interpol Pretoria were not affected in any way by the issuing of the warrant, nor the execution of that warrant by other SAPS members stationed in Cape Town, something in which she played no role at all; and

66.6 Von Hagen did not influence him in any way as regards the subject matter of the affidavit.

[67] All of this was confirmed in a supplementary affidavit by Von Hagen which was admitted at the commencement of argument. She specifically confirmed that: (a) although stationed at Interpol Pretoria and working at the same physical address as Van der Heever, she is not involved in matters concerning the extradition of fugitives from foreign countries; and (b) prior to commissioning the affidavit she was not aware of the request for the applicant's extradition.

[68] She added that when attesting Van der Heever's affidavit, she considered herself free to refuse to administer the oath had he not acknowledged to her that he understood its contents, had no objection to taking the prescribed oath, or did not regard it binding on his conscience. He answered all her questions satisfactorily, and she consequently administered the oath.

[69] The admission of Von Hagen's supplementary affidavit resulted in *Mr Katz* advancing only one contention, namely that even if unbiased and impartial, she did not state that she was *'independent'*; and she could not have been independent because she has an institutional interest by virtue of her employment as a fellow police officer at Interpol Pretoria.

[70] While reg 7(1) provides that a commissioner of oaths *'…shall not administer an oath or affirmation relating to a matter in which he has an interest'*, reg 7(2) stipulates that reg 7(1) *'…shall not apply to an affidavit or a declaration mentioned in the Schedule'.* The Schedule thus lists those declarations which are exempt from the provisions of reg 7(1) and paragraph 2 of the Schedule refers to:

> *'A declaration taken by a commissioner of oaths who is not an attorney and whose only interest therein arises out of his employment and in the course of his duty.'*

[71] It appears that there are two schools of thought in relation to the question whether police officers may properly act as commissioners of oaths for their colleagues.

[72] In arguing that they may not do so, *Mr Katz* relied on *Papenfus v Transvaal Board for the Development of Peri-Urban Areas*,[19] *Dyani v Minister of Safety and Security and Others*[20] and *Malan v Minister of SAPS NO and Others.*[21] It

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[19] 1969 (2) SA 66 (T).
[20] 2001 (3) All SA 310 (Tk).
[21] (M279/2017) [2017] ZANWHC 59 (11 August 2017).

appears that when *Papenfus* was decided in 1969 the wording of the applicable regulation differed, but more as a matter of form than substance. The court held:

> *'The statutory position then is that a commissioner is not forbidden to attest an affidavit relating to a matter in which he has an interest which is no more than that which automatically arises from and in the course of his employment… The regulations should in my view be so interpreted as not to preclude a legal adviser from acting as a commissioner of oaths in litigation in which his employer is concerned. The "interest" arising is too remote to fall within the general prohibition of reg. 3, and it is moreover rendered permissible by item 3 of the schedule.*
>
> *That does not however, as far as courts of law are concerned, dispose of the question whether affidavits so attested are receivable in evidence. The law of evidence or established practice may exclude such affidavits, however valid they might be regarded for extra-judicial purposes.'*[22]

[73] After considering the relevant principles, the learned Judge continued:

> *'…I am in agreement with the view that the commissioner of oaths should be independent of the office in which the affidavit to be attested by him is drawn. He cannot be regarded as independent if his partner, employee or employer is the draughtsman or deponent. The reason for this rule of evidence is stated to be that the Court requires*
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> *"the security of an independent commissioner"*
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> *(quoted in* Louw's *case,* supra*), it is clear that both the solemnity of the occasion and the need for complete understanding by the deponent of the import of his act require that an independent party should administer the oath and ensure compliance with the requirements of an oath. Thus, for instance, sec. 39 (2) of the Civil Proceedings Evidence Act, 25 of 1965, provides that*

[22] At 68H and 69C-D.

> *"the oath to be administered to any person as a witness shall be administered in the form which most clearly conveys to him the meaning of the oath and which he considers to be binding on his conscience".*
>
> *This is what the Legislature deems necessary for the administration of the oath in court – an occasion few would regard as unimpressive. So much the more it is necessary, I think, that, where a commissioner of oaths attests an affidavit at what is usually a private and informal occasion, the weightiness of the act should be impressed upon the deponent. This can best be done by a commissioner who regards himself as free to refuse to administer the oath if he feels either that the deponent does not fully appreciate the seriousness of the oath or that he does not unreservedly subscribe to what is contained in the statement he has to swear to."*[23]

[74] In *Dyani* the Court, relying *inter alia* on *Papenfus*, struck out certain affidavits of police officers because they were deposed to by colleagues of the commissioners of oaths.[24] *Dyani* was followed in *Malan*.

[75] The other line of decisions, relied upon by *Mr Breitenbach,* are *S v Sihlobo*,[25] *Grammaticus (Pty) Ltd v The Minister of the SAPS NO and Others*[26] and *Van Rooyen and Another v Minister of Police and Others.*[27] In *Sihlobo* (a 2004 decision in the same division as *Dyani*) the learned Judge, referring to reg 7 and the decision of the former Appellate Division in *R v Rajah*,[28] held as follows:

> *'[20] The difficulty I have with the dictum in the* Dyani *case is that it is not supported by the provisions of the regulation relevant to the inquiry, namely*

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[23] At 70B-F.
[24] At paras [19] – [21].
[25] [2004] JOL 12831 (Tk).
[26] Unreported, Gauteng Local Division, Johannesburg, case no 50538/2017, 12 December 2017.
[27] 2019 (1) SACR 349 (NCK).
[28] 1955 (3) SA 276 (A) at 282.

*regulation 7(2). In fact it would appear to me, although not specifically referred to, that that case was decided on the basis of the general principle as set out in regulation 7(1). To that extent it is distinguishable from the present case which falls to be determined on the exception provided by regulation 7(2). This view is fortified by the authorities which have been quoted in support of that judgment and which deal with the interpretation of regulation 7(1), more specifically those dealing with attorney employee and client interest (*Radue Weir Holdings Ltd t/a Weirs Cash & Carry v Galleus Investments CC t/a Bargain Wholesalers *1998 (3) SA 677 (E);* Papenfus v Transvaal Board, Peri-Urban Areas, supra). *The interest of attorney and client involved in these cases should, in my view, be distinguished from an interest of a policeman attesting an affidavit in a case investigated by the colleague in his office. In fact such a distinction is clear from the wording of regulation 7(2) and should be maintained, otherwise an interpretation to the contrary leads to an absurdity so glaring that it should never have been contemplated by the regulation. In fact such an interpretation would make a mockery of the appointment of police officials as* ex officio *commissioners of oaths.*

[21] Although the Dyani *case emanates from this Division and as a rule is binding on me, I am convinced that I should not follow it. The dictum in that case cannot be applied in cases involving officers in the service of the State as they are specifically excluded by regulation 7(2).*

[22] In the circumstances I find that Inspector Beneke did not have an interest in the matter and was justified in attesting the affidavit of Mynhardt.'

[76] It would appear that *Sihlobo* was not drawn to the attention of the learned Judge in *Malan.* In *Grammaticus* the Court, following the approach in *Sihlobo*, pointed out that members of the SAPS are designated *ex officio* commissioners of oaths by virtue of the office they hold under s 6 of the Justice of the Peace and Commissioners of Oaths Act 16 of 1963. It found as follows:

'[23] The applicant has not illustrated any factual basis on which Captain Mokoena had an interest in the matter, other than in exercising his functions as police officer in the service of the State. The fact that he is a colleague and superior of the deponent to the affidavit does not of itself indicate any such interest or the risk of the deponent being influenced in relation to the contents of the affidavit. It is not disputed that, although he was cited as one of the officers listed in the warrant who was authorised to participate in the execution of the warrant, he was not involved in its execution at all. Considering the proviso in reg 7(2), I am of the view that Captain Mokoena did not have an interest in the matter and as such was not precluded from commissioning the affidavit. To set aside the warrant on this basis alone, would constitute a purely technical basis and would not evidence any "abuse of power" or "gross violation" of the rights of a person to be searched.'

[77] In *Van Rooyen* the Court, following *Grammaticus*, stated:

'[34] I respectfully agree with the learned judge in Grammaticus *supra that to set aside a warrant on the basis that a police officer has an interest would constitute a purely technical basis, especially where there is no evidence of any abuse of power or gross violation (*Polonyfis v Minister of Police and Others NNO *2012 (1) SACR 57 (SCA) ([2011] ZASCA 26) of the rights of a person to be searched. In this instance it was not shown nor was it alleged that the respondents disregarded the rights of the applicants.*

[35] In any event, it was explained that, although Perumal and Luis are attached to the Directorate for Priority Crimes Investigations (the DPCI), they function in two separate units. Perumal is attached to the Serious Commercial Crime Investigation Unit whereas Luis is attached to the Serious Corruptions Investigations Unit. Furthermore, Luis' only interest arises out of the performance of his duties in service of the state. Lastly, the applicants could not show any evidence of abuse of power or gross violation of their rights.'

[78] We are in complete agreement with the views expressed and findings made in the *Sihlobo* line of decisions. While Von Hagen did not expressly use the word

"independent" it is clear from a reading of her supplementary affidavit as a whole that she satisfied that requirement. She simply acted as a commissioner of oaths for an affidavit made by another police officer where she had no interest in the matter, merely exercising her function as a designated *ex officio* commissioner of oaths by virtue of her office. There is also no evidence of abuse of power or a gross violation of the applicant's rights as a result. We thus conclude that Van der Heever's affidavit made on 6 December 2017 in support of the application for the warrant was valid.

[79] It is common cause that the Pretoria Magistrate failed to furnish the Justice Minister with particulars relating to the issue of the warrant as required by s 8 of the Act.[29] The parties are *ad idem* that the purpose of furnishing such particulars is to enable the Justice Minister to direct that the warrant be cancelled or the arrested person discharged, in his sole discretion and for any reason, including that the extradition is being unreasonably delayed. As such, s 8 forms a critical bulwark against error and abuse.

[80] The Justice Minister's response is that the Pretoria Magistrate's failure is of no consequence in the instant matter. He was made aware of the applicant's arrest on a warrant as early as 8 December 2017. He was informed thereof by officials in his department and it was well publicised in the media. He had no intention at that point to direct the applicant's immediate release, and even if he was officially informed by the Pretoria Magistrate, he would not have caused either the warrant to be cancelled or the applicant to be discharged.

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[29] Section 8 is quoted in full at para [6] of this judgment.

Moreover he was of the view that there had been no unreasonable delay on the part of the Dutch authorities.

[81] The applicant's retort is that it can never be acceptable for the Justice Minister to *'be deprived'* of the opportunity to act as a bulwark against potential error and abuse, and then for it to be suggested that his *'inability'* to protect rights makes no difference because on the facts of the particular case there is nothing he would or could have done differently. The applicant contends that he was robbed of the protection afforded by s 8 of the Act, and *'conjecture'* about what the Justice Minister might have decided if s 8 had been complied with is irrelevant. Moreover, he submits, the Justice Minister is in no position to comment on what he would have done if the Pretoria Magistrate complied, because he does not know what information she would have furnished to him. Put differently, he argues that the inevitability of a certain outcome is not a factor to be considered in determining the validity of impugned conduct.

[82] In support of these submissions *Mr Katz* relied on the oft-quoted statement of Megarry J in *John v Rees; Martin v Davis; Rees v John*:[30]

> *'As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change.'*

[30] [1970] 1 Ch 345 ([1969] 2 All ER 274) at 402D, quoted with approval in *Administrator, Transvaal and Others v Zenzile and Others* 1991 (1) SA 21 (A) at 37E-F. *Zenzile* was in turn quoted with approval in *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews and Another* 2009 (4) SA 529 (CC) at para [154].

[83] He also referred us to what was held in *Minister of Justice and Correctional Services v Walus*:[31]

> *'…The proper approach is rather to establish, factually, and not through the lens of the final outcome, whether an irregularity occurred. Then the irregularity must be legally evaluated to determine whether it amounts to a ground of review under PAJA. In this exercise the materiality of any deviance from the legal requirements must be taken into account, where appropriate, by linking the question of compliance to the purpose of the provision before concluding that a review ground under PAJA has been established. So, if the process leading to the decision was compromised, it cannot be known with certainty what the administrator would have finally decided had the procedural requirements been properly observed.'*

[84] There can be no doubt that a procedural irregularity occurred when the Pretoria Magistrate did not comply with s 8 of the Act. However what needs to be closely scrutinised and evaluated are the actual complaints made to support the contention that the applicant was therefore deprived of his s 8 protection. These are that, had the particulars been furnished, the Justice Minister: (a) would have appreciated that there had been a substantial and inexcusable delay in bringing the extradition application; and (b) would also have been aware that the arrest should not, in the absence of urgency, have been allowed on the basis of a provisional request. Not only this, so the applicant submits, but if Van der Heever had made a proper disclosure, the Pretoria Magistrate would have been able to inform the Justice Minister of the undertaking previously given by him.

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[31] [2017] 4 All SA 1 (SCA) at para [16].

[85] As to the last, the particulars furnished by the Pretoria Magistrate would not have disclosed the existence of any undertaking given by Van der Heever and therefore this cannot assist the applicant. As regards the first two complaints, for the reasons already given, neither has substance. In any event, the Justice Minister himself was of the opinion that the extradition had not been unreasonably delayed and has stated under oath that this would not have been a reason to direct that the warrant be cancelled or the applicant discharged. We are accordingly compelled to find that the procedural irregularity was not sufficiently material to justify the setting aside of the warrant.

[86] It was also submitted on behalf of the applicant that the s 8 requirement constitutes an essential part of a decision to issue a warrant for arrest in terms of s 5(1)(b), and therefore any non-compliance with s 8 automatically renders a decision under s 5(1)(b) invalid. We disagree. Section 5 makes no reference to s 8. The latter section imposes an obligation on a magistrate after the issue of a warrant to furnish the Justice Minister with particulars *'…relating to the issue of such warrant'.* Accordingly, on its plain wording, the obligation under s 8 only arises after: (a) a magistrate has decided to issue a warrant; and (b) has issued the warrant. The requirements of s 8 therefore cannot be an essential component of a decision made in terms of s 5(1)(b).

[87] The applicant's next complaint is that the proceedings against him were afflicted by bad faith and abuse of process. This had its genesis in the allegation in his founding affidavit that, because it was not necessary to arrest

him to ensure his presence at the extradition enquiry, the *'inevitable inference'* is that his arrest was intended to *'harass, intimidate, punish and persecute'* him. We have already dealt with the allegations made against Van Heerden and Van der Heever. This leaves those which the applicant made against Burke.

[88] The second rule 53 record shows that the DPP has been represented in this matter by Burke since at least 6 July 2017. On 16 October 2017 Burke addressed an email to Ms Fourie in which he stated:

> *'Upon my request Mr Kouwenhoven is being monitored by Interpol, the Hawks as well as crime intelligence. This is because Mr Kouwenhoven has, via his attorneys, indicated that he is of a frail state and ill health and requested that he should not be arrested. So far the information is that he is of sufficient health to travel extensively in his motor vehicle and lead a very active lifestyle. More time is required for proper monitoring according to W/O Van der Heever. My own feeling is that this is an important step in the process as it will be important to try and ensure that Mr Kouwenhoven, once arrested, is kept in custody. This is because the Dutch authorities believe him to be a flight risk and he seems to be a man of considerable means who will be able, once on bail, to extend this matter almost indefinitely. I believe this may be avoided if we have sufficient reason to oppose the granting of his bail.'*

[89] The applicant submits that this email is indicative of bad faith on Burke's part, and must be understood in light also of the written submissions made by Burke at the bail hearing, including the following:

> *'It is not clear why [the applicant wants] the extradition process to continue and to be released on bail for the duration thereof…*

> *It appears that the sole purpose for letting the extradition enquiry run its course is to delay [his] return to the Netherlands for as long as possible. [His] release on bail is designed purely to ease the process and ensure [his] comfort while the matter is delayed.'*

[90] The applicant contends that the only reasonable inference to be drawn from the aforegoing is that Burke was determined to ensure that he remained in custody. Burke did not believe that the applicant had the right to oppose the extradition enquiry, since in Burke's view any opposition would be an abuse. He submits that Burke pursued him with a zeal which is wholly incompatible with the duties of the prosecution service. To add insult to injury, so the applicant says, Burke had the temerity to request the magistrate following his arrest on 8 December 2017 for time to deal with his comprehensive bail application. The applicant complains that it was as a result thereof that he spent 11 days in custody while the application was pending.

[91] We disagree. The surveillance of the applicant prior to his arrest cannot reasonably be considered an abuse. Burke himself did not apply for the warrant of arrest, nor did he pressurise Van der Heever to do so. The applicant does not suggest that Burke had any influence over the Pretoria Magistrate's decision to issue that warrant. It was the SAPS who executed the warrant and who brought the applicant before the Cape Town Magistrate on Friday 8 December 2017. It was the applicant who was already prepared with a comprehensive and lengthy bail application on affidavit.

[92] Furthermore, the Cape Town Magistrate's decision to remand the matter to afford Burke a proper opportunity to deal with the bail application has not been challenged. Burke himself was not responsible for further remands and it was certainly not Burke who, of his own accord, somehow orchestrated the applicant's detention in custody until he was released on bail on 19 December 2017. Moreover, since his initial release, the applicant's bail conditions have been progressively relaxed and Burke's application to appeal the applicant's release on bail was abandoned when the applicant suffered a leg injury, on humanitarian grounds.

[93] To sum up thus far: we are not persuaded, on any of the grounds advanced by the applicant, that the decision of the Pretoria Magistrate to issue the warrant of arrest was unlawful and invalid. Consequently the warrant itself, the applicant's arrest on 8 December 2017, and the proceedings before the Cape Town Magistrate to date were all lawful. This being the case, it is not necessary to deal with the decisions in *Isaacs*,[32] *Tyokwana*[33] and the recent Constitutional Court judgment in *De Klerk v Minister of Police*,[34] which was handed down on 22 August 2019 after judgment in the present application was reserved on 6 August 2019. (These decisions would have implications for the declarator sought that all proceedings and appearances before the Cape Town Magistrate arising from his arrest on 8 December 2017 are unlawful and invalid). It is accordingly also not necessary to deal with the attendant declarator which the applicant seeks for damages.

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[32] *Isaacs v Minister van Wet en Orde* 1996 (1) SACR 314 (A).
[33] *Minister of Safety and Security v Tyokwana* 2015 (1) SACR 597 (SCA).
[34] See fn 6 *supra.*

[94] This leaves the attack on the notification issued by the Justice Minister on 22 February 2018 in terms of s 5(1)(a) of the Act.[35] The first ground advanced by the applicant flows from the Pretoria Magistrate's failure to comply with s 8. Essentially the same complaints were made and, in our view, the same considerations as those with which we have already dealt apply.

[95] The second is that the Justice Minister was falsely informed by very senior officials in the DOJ that there were no constitutional implications pertaining to the formal extradition request at a time when the present application had already been launched.

[96] The record reflects that this information was contained in a draft Cabinet Memorandum signed by these senior officials (including Van Heerden) on 20 December 2017 and 3 January 2018, and by the Deputy Justice Minister on 23 January 2018.[36] All pre-date the launching of this application on 31 January 2018. The application was served on the Justice Minister, care of the office of the State Attorney in Cape Town, on 1 February 2018. Given the sheer volume of litigation in this country against the State, coupled with its lack of resources, it would be highly unlikely that the application found its way onto the Justice Minister's desk on the same day.

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[35] The complaint that because the Justice Minister was uncertain whether the Sanctions Act contraventions were extraditable offences, this rendered the notification invalid, was not pursued, given that the war crimes convictions are extraditable offences in South Africa.

[36] Record p527.

[97] The draft Cabinet Memorandum was attached to a *'Minister Memo'* prepared by Ms Fourie dated 2 February 2018,[37] and signed by senior DOJ officials (again including Van Heerden) as well as the Deputy Justice Minister on 7, 9 and 12 February 2018 respectively. As previously stated the Justice Minister issued the s 5(1)(a) notification on 22 February 2018.[38]

[98] The applicant submits that both the Justice Minister (and Cabinet) should have been told that a constitutional challenge had already been lodged. The Justice Minister was invited to disclose whether he knew about the constitutional challenge at the time when he issued the notification and, if so, when he became aware thereof. He failed to respond to this invitation. It is the applicant's contention that, in the circumstances, the only inference to be drawn is that the Justice Minister did not know. Therefore, so the argument went, he (and Cabinet) failed to take into account relevant factors, resulting in his failure to properly apply his mind when issuing the notification.

[99] In our view this argument is contrived. At the time when the draft Cabinet Memorandum was signed no constitutional challenge had yet been launched. The subject of both the draft Cabinet Memorandum and the Minister Memo was the art 12 request for extradition itself. It had nothing to do with the applicant's provisional arrest in terms of s 5(1)(b) which forms the core

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[37] Record p518.
[38] Record p546.

constitutional challenge in the present application. However the fact of that arrest was indeed disclosed in the draft Cabinet Memorandum:[39]

> *'5.6 Mr Kouwenhoven was arrested by the South African Police Service upon a request for provisional arrest pending receipt of the extradition request. Mr Kouwenhoven appeared in court, was granted bail and is to appear again on 25 February 2018. As stated above, the Department received the request [for extradition] from the DIRCO. Upon receipt of the request the Department submitted a memorandum to the Minister, notifying the Minister regarding the request and recommending that the Minister signs a notification in terms of section 5(1)(a) of the Extradition Act… that he received the request.'*

[100] The s 5(1)(a) notification signed by the Minister states in terms that:

> *'I… give notice under section 5(1)(a) of the Extradition Act… that I have received a request for the surrender of [the applicant] from the Republic of South Africa to The Netherlands to serve a term of nineteen years imprisonment imposed upon conviction of three charges of contravening article 8 of the War Crimes Act and two charges of contravening article 2, paragraph 2 of the Sanctions Act, 1977.'*

[101] There appears to be no provision in the Act, other than s 5(1)(a), which refers to the issue by the Justice Minister of such a notification. It is presumably for this reason that the relevant State officials (including both the Justice Minister and his Deputy) refer to a notification of this kind as one furnished in terms of s 5(1)(a). We therefore disagree with the third ground advanced by the

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[39] Record p524.

applicant, namely that the sole purpose of a s 5(1)(a) notification is to obtain a warrant of arrest, and that therefore when an individual has already been arrested, the issue of such a notification is irrational. It is accepted as one of the purposes but not the only one, as the facts of this matter demonstrate.

[102] *Mr Katz* argued that there is no requirement in the Act that a s 5(1)(a) notification must be issued before an extradition enquiry may commence in terms of s 9 thereof. However, as pointed out by *Mr Petersen* on the Justice Minister's behalf, the purpose of such a notification is to inform a magistrate of the extradition request (and the magistrate may then act thereon by issuing a warrant if required). In *Harksen v President of the Republic of South Africa and Others*[40] the Constitutional Court made it clear that:

> *'[15] …Where there is an extradition treaty between South Africa and a requesting State, the Minister is authorised by the provisions of section 5(1) to set in motion the provisions of the Act by notifying the magistrate of the request. Where there is no extradition treaty between the requesting State and South Africa, it is the Minister who forwards the request for extradition to the President. Then under section 3(2) the President's consent is necessary to enable the Minister to give the notification to the magistrate. Section 3(2) and the Act as a whole regulate the domestic procedures which then govern the extradition proceedings and which protect the rights of persons present in South Africa whose surrender is sought by a foreign State.*[41]

[103] We agree with *Mr Petersen* that the evidence shows the Justice Minister did not issue the notification for the sole purpose of arresting the applicant as

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[40] 2000 (5) BCLR 478 (CC).

[41] Section 3(2) pertains to persons accused or convicted of an extraditable offence within the jurisdiction of a foreign State which is not a party to an extradition agreement. It is common cause that the Netherlands and South Africa are parties to such an agreement.

alleged. The Justice Minister emphasised that he was already aware of the applicant's provisional arrest in terms of s 5(1)(b) when he issued that notification. The compliant art 12 request from the Dutch authorities for the applicant's extradition was only received by the South African authorities on 18 December 2017, i.e. 2 days before the first date of signature on the draft Cabinet Memorandum and 10 days after the Justice Minister became aware of the applicant's provisional arrest on 8 December 2017. As *Mr Katz* himself put it, the whole idea of art 16 is an arrest to afford the requesting State the opportunity to make a final request for extradition in terms of art 12. It would therefore appear that the applicant conflated the purpose for which the warrant was issued by the Pretoria Magistrate on 6 December 2017 and the purpose of the s 5(1)(a) notification issued by the Justice Minister on 22 February 2018. It follows that this ground too must fail.

[104] **The following order is made:**

1. The review application is dismissed.

2. The applicant shall pay the costs of the first to third respondents on the scale as between party and party as taxed or agreed, including the costs of two counsel in each instance as well as any reserved costs orders.

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J I CLOETE

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C M FORTUIN