



**IN THE HIGH COURT OF SOUTH AFRICA
[WESTERN CAPE DIVISION, CAPE TOWN]**

Case no: 1349/18

In the matter between:

JOYCE SEABERRY BRITTON

Applicant

And

**THE MINISTER OF JUSTICE &
CORRECTIONAL SERVICES**

First Respondent

**THE DIRECTOR OF PUBLIC PROSECUTIONS,
WESTERN CAPE**

Second Respondent

THE MAGISTRATE, PRETORIA

Third Respondent

THE ADDITIONAL MAGISTRATE, CAPE TOWN

Fourth Respondent

JUDGMENT DELIVERED (VIA EMAIL) ON 21 FEBRUARY 2023

SHER, J:

1. This is an application in terms of which the applicant seeks an order declaring s 5(1) of the Extradition Act¹ ('the EA'), and a notification which was issued by the Minister of Justice and Correctional Services and a warrant for her arrest which was issued by the magistrate of Cape Town, in terms of s 5(1)(a) thereof, to be inconsistent with the Constitution and invalid.

¹ Act 67 of 1962.

2. The applicant is a citizen of the United States of America and has been living in Cape Town since or about 2002. She is wanted for trial in two separate cases in the State of Illinois, on charges of theft, tax evasion and a failure to file tax returns between 2000 and 2003.

3. Her extradition is sought in terms of the extradition treaty which was concluded between the USA and SA in 1999, which came into force on 25 June 2001.

The facts

4. The applicant was formerly an attorney in Chicago, Illinois, who was contracted to provide legal services in adoption matters involving children who were wards of the State. In 2005 she was disbarred by the Supreme Court of Illinois.

5. The applicant is alleged to have fraudulently billed the State of Illinois, over several years, for services that were supposedly rendered by her in an amount of approximately USD 4 million, on which she failed to pay income tax and failed to submit income tax returns in which she disclosed such earnings.

6. In March 2005 an indictment was filed in the Circuit Court of Cook County, Chicago whereby the applicant was charged with 8 statutory, state offences, including theft 'by deception' and theft by 'unauthorised control over property', and a failure to file income tax returns. Based on these charges the Circuit Court issued a warrant for her arrest in April 2005.

7. In January 2006 a further indictment was filed against her in the District Court for the Northern District of Illinois, in terms of which she was charged with 6 statutory, federal offences, involving attempts to evade or 'defeat' the payment of taxes and a failure to file tax returns, in respect of which a warrant of arrest was similarly issued.

8. According to the US authorities both warrants remain valid and executable and the applicable US statutes of limitations do not bar the prosecution of the applicant on the offences for which she has been charged. In this regard, in affidavits which were filed by Assistant State Attorneys of both Courts, it was pointed out that in terms of US law the applicant's prosecution for the offences referred to commenced with the filing of the indictments against her by grand juries in the two Courts; and under US law once an indictment has been filed the periods provided for in the federal and local statutes of limitations, for the prescription of such offences, no longer run.

9. In terms of the extradition treaty the offences with which the applicant has been charged are extraditable offences in terms of the law of the USA. Although in her founding affidavit the appellant contended that that they were not offences in terms of our law, during argument this was conceded. Whilst in our law we do not have specific offences of theft 'by deception' or by 'unauthorized control over property', we do have a common law offence of theft which is wide enough to cover such terms, and we have similar statutory offences in relation to a failure to render tax returns and the evasion of tax. Thus, the principle of 'double criminality' in terms of the law of both States, as required in terms of article 4 of the extradition treaty, is satisfied.

10. The request for the extradition of the applicant was launched via a diplomatic note *verbale* which was presented by the diplomatic mission of the USA to the Department of International Relations and Co-operation, in Pretoria, in February 2017. This was followed by the transmission of several documents in support thereof, including affidavits by Maureen Merrin an assistant US State attorney for the Northern District of Illinois and James Lynch an assistant State Attorney for Cook County, as well as an affidavit by Vince Zehme, a special agent in the employ of the Inland Revenue Service of the US Department of Treasury, and copies of the Illinois indictments and warrants of arrest.

11. In their affidavits both Merrin and Lynch declared that the documentation which was submitted constituted sufficient evidence to support the request for extradition, and

in his affidavit, Lynch indicated that the State would prove its case against the applicant via 'billing documents' submitted by her, 'checks' (sic) by means of which she had been paid, and financial records and 'testimonial' evidence. Both Merrin and Lynch also submitted certificates for the purposes of s 10(2) of the EA, in which they certified that the evidence which was summarized or contained in the extradition documents was available for trial and was sufficient under the laws of the USA to justify the applicant's prosecution.

12. On 20 June 2017 the Minister of Justice issued a notification in terms of s 5(1)(a) of the EA in which he stated that he had received a request from the USA for the extradition of the applicant to stand trial in the Courts of Illinois on the various charges referred to in the indictments.

13. According to Mr H van Heerden, a principal State law adviser in the Chief Directorate: International Legal Relations of the Department of Justice and Constitutional Development, who deposed to an answering affidavit on behalf of the respondents, in issuing the notification the Minister had regard for the documents which had been forwarded to his office, as outlined above. This was confirmed by the Minister in his affidavit.

14. On the same day that the Minister's notification was issued the National Director of Public Prosecutions was informed thereof, pursuant to which steps were taken to obtain a warrant for the arrest of the applicant from the magistrate of Pretoria, as provided for in terms of s 5 of the EA. The warrant was issued on 18 July 2017.

15. It is common cause that notwithstanding that the wording of the warrant is consistent with the empowering provisions of both s 5(1)(a) as well as 5(1)(b), it was issued in terms of the former. At the time s 5(1)(a) provided that, upon receipt of a notification from the Minister stating that a request for the surrender of a person to a foreign state had been received, a magistrate could ('may') issue a warrant for their arrest.

16. During October 2017 the applicant was contacted by the police officer who had applied for the warrant, who informed her of the issue thereof. On 10 October 2017 her attorneys advised him that extradition proceedings in respect of the selfsame charges on which the applicant was being sought had previously been instituted against her and had been set aside by order of this Court ² on 18 August 2009, on the grounds that the proceedings were unlawful and/or unconstitutional. The applicant alleges that the terms of the order covered both the issue of an earlier notification by the Minister and the warrant for her arrest by the magistrate of Cape Town pursuant thereto, as well as the extradition enquiry which was pending before the magistrate.

17. In this regard, it appears from the founding affidavit that the reason why the order setting aside the earlier extradition proceedings was granted in 2009 was that, whereas in the ministerial notification which had been issued the Minister had declared that he had received a request for the extradition of the applicant this was not the case, as the diplomatic note *verbale* from the USA embassy and the supporting documents had in fact only requested the assistance of the SA state in securing the provisional arrest of the applicant,³ as a precursor to and pending a request for her extradition, and had not contained a formal request for her extradition as required in terms of s 4 of the EA.

18. In their letter to the police the applicant's attorneys further advised that in August 2009 she had informed both Interpol and the office of the DPP that she would 'avail' herself to the authorities in the event of a further request for her extradition being received. As such, the applicant remained willing and able to report to the police for the purposes of appearing in court for an extradition enquiry, and to apply for bail.

19. Pursuant to the letter, arrangements were duly made for the applicant to attend the Cape Town Magistrate's Court on 12 October 2017, where she was formally arrested in terms of the warrant and appeared before the magistrate, who made an

² Per Van Reenen J, in the matter under case no. 8448/09.

³ In terms of article 13 of the extradition agreement.

order, by agreement between the parties, whereby the applicant was released on bail of R 50 000. As part of her bail conditions the applicant was required to report to a police station once a week and not to leave the area of the Western Cape without prior consent and was required to surrender her passport.

20. On 13 October 2017 the applicant's attorneys were provided with copies of the diplomatic note dated 27 February 2017 and the notification by the Minister dated 20 June 2017, together with the bundle of affidavits and certificates which had been lodged by the US authorities in support of their request for her extradition. Further documents were provided in November 2017.

The challenges to the request for extradition

21. In her founding affidavit the applicant launched several challenges to the request for her extradition and the process which had ensued pursuant thereto.

22. In the first instance she claimed that her arrest on the basis of the warrant which was issued in terms of s 5(1)(a) was unconstitutional, as it violated her constitutional right not to be deprived of freedom arbitrarily, or without just cause.⁴ In this regard the applicant submitted that the subsection effectively compelled the magistrate to issue a warrant once he/she had received a notification from the Minister in terms thereof. The applicant contended that the wording of the subsection was such that, by issuing such a notification the Minister effectively instructed the magistrate to issue a warrant for her arrest, thereby violating her right to liberty, as the provision did not afford the magistrate an independent discretion to consider the circumstances and to decide whether the arrest was justified. Thus, the applicant contended, the provision violated the separation of powers. Consequently, the applicant submitted that her arrest was unlawful and should be set aside.

⁴ Section 12(1) of the Constitution.

23. In the second place, the applicant sought to challenge the validity of the ministerial notification itself. In this regard she contended that before issuing a notification in terms of s 5(1)(a), which would form the basis for actioning a warrant for her arrest and the start of extradition proceedings, the Minister was required to consider not only whether the formalities required by the extradition treaty and the EA had been complied with, but was also required to take into account 'all other relevant info' (sic).

24. In this regard the applicant complained that it had seemingly not been brought to the Minister's attention that a previous request for her extradition, which had failed, had been made some 11 years earlier, in 2006, and no explanation had been tendered by the US authorities for the lengthy delay in launching the second request for her extradition in 2017. The applicant pointed out that the documents which had been submitted by the USA in the previous request for her extradition during 2006-2008, had not been included in the documents which were provided to the Minister in 2017.

25. In the circumstances, in the absence of any information pertaining to the previous extradition proceedings having been before him, the Minister could not have properly applied his mind to the request for her extradition in 2017. Therefore, inasmuch as the notification from the Minister was defective, based as it was on information that was materially incomplete, the magistrate equally was not possessed of the necessary information on which to decide whether to issue the warrant for her arrest, and his decision was liable to be set aside for the same reason.

26. The applicant submitted further that the notification was in any event invalid because the legislative basis for it was housed in s 5(1)(a), the provision which empowered the issuing of the warrant, which had been declared unconstitutional by the Constitutional Court. Finally, the applicant submitted that the delay was so unreasonable that this in itself rendered the extradition proceedings unconstitutional.

The decision in *Smit*

27. On 18 December 2020 the Constitutional Court held in *Smit*⁵ (contrary to the decision of this division a year earlier⁶), that s 5(1)(a) was inconsistent with the Constitution and invalid.

28. Madlanga J for the majority pointed out that the constitutional right not to be deprived of freedom arbitrarily or without just cause⁷ has both a substantive as well as a procedural element to it. The substantive element requires that there be valid grounds for the deprivation of an extraditee's liberty, thereby ensuring that it does not occur without satisfactory or adequate reasons.⁸

29. The learned judge was of the view that the provision satisfied the substantive element, as there were adequate reasons for it, as it gave effect to the need to arrest persons who were wanted for extradition to foreign states in fulfilment of SA's international obligations, thereby complying with the requirements of reciprocity and comity.⁹

30. However, as far as the procedural element was concerned, Madlanga J was of the view that the provision fell short of what was required, unlike s 5(1)(b), which in its formulation afforded the magistrate a discretion in considering whether to issue a warrant after duly weighing-up the relevant factors which were set out therein, to wit whether there were reasonable grounds to suspect that the extraditee had committed extraditable offences, or had been convicted thereof by a competent court, in a foreign state.¹⁰ In contrast to this, s 5(1)(a) did not provide for such an exercise, and the magistrate was simply required to act on the say-so of the Minister and effectively had no discretion once a notification in terms of s 5(1)(a) had been issued by the Minister.¹¹

⁵ *Smit v Minister of Justice and Correctional Services & Ors* 2021 (1) SACR 482 (CC).

⁶ Per Francis AJ (as he then was) in *Smit v Minister of Justice and Correctional Services & Ors* 2019 (2) SACR 516 (WCC); [2019] 4 All SA 542 (WCC).

⁷ Section 12(1)(a) of the Constitution.

⁸ Para 102.

⁹ Para 104.

¹⁰ Paras 111-112.

¹¹ Para 148.

Thus, the provision made it impossible for the magistrate to act as an independent arbiter and to exercise the kind of judicial oversight necessary to ensure that there had been compliance with the procedural safeguards required in terms of s 12(1)(a) of the Constitution.¹² In the circumstances, the majority held that the subsection limited the constitutional right not to be deprived of freedom arbitrarily and without just cause and was unconstitutional, and violated the separation of powers.¹³

31. In the order which it made the Constitutional Court accordingly declared that s 5(1)(a) was inconsistent with the Constitution and invalid, and it directed that the declaration was to take effect from the date the order was made i.e. was to have prospective effect.

32. It is trite that ordinarily, as a default position,¹⁴ a simple declaration of constitutional invalidity of a legislative provision has retrospective effect, as the Court declares what the position is, objectively.¹⁵ Thus, from the moment of the issue of the declaration¹⁶ the provision will be invalid, retrospectively, either to 4 February 1997 (being the date when the (final) Constitution, 1996 came into effect), if the provision existed at that date, or to the date when it came into effect, if it was enacted after the date when the Constitution came into operation. The default position can however be departed from by the Court which issues the declaration of constitutional invalidity, in the exercise of its power to make an order that is just and equitable, in terms of s 172(1)(b) of the Constitution.¹⁷

33. Notwithstanding the directive by the Constitutional Court in *Smit* that the declaration of constitutional invalidity was to take effect from the date of the order, the applicant contended that this Court was not barred from ruling that the notification which

¹² Para 114.

¹³ Para 143.

¹⁴ *S v Bhulwana; S v Gwadiso* 1996 (1) SA 388 (CC) para 32.

¹⁵ *Gory v Kolver NO & Ors* 2007 (4) SA 97 (CC) para 39.

¹⁶ *Cross-Border Road Transport Agency v Central African Road Services (Pty) Ltd* 2015 (5) SA 370 (CC) para 20.

¹⁷ *Id*, para 21.

had been issued by the Minister in her case, and the warrant of arrest which had been issued pursuant thereto, were unconstitutional.

34. In this regard, the applicant's counsel contended that justice and equity demanded that the Court should make such an order, for a gross injustice would otherwise be done to the applicant. Applicant's counsel pointed out that the applicant had effectively sought an order on the very same basis as that which had been sought in *Smit* and would have obtained it, had the decision in *Smit* not been handed down before the decision in this matter. The applicant contended that, having had her constitutional right not to be deprived of freedom arbitrarily and without just cause violated, it would be constitutionally impermissible to allow her arrest and the ministerial notification on which it was based to stand, notwithstanding the prospectivity of the directive made in para 10 of the order in *Smit*. Consequently, the applicant submitted that this Court was at liberty either to vary the order which was made in *Smit*, or to make an order in this matter which would have retrospective effect.

35. In debating this aspect with counsel for the applicant I raised the issue of what the effect of such an order would be, assuming I had the power to make it, on extradition matters which had previously been finalized and on those which might still be pending.

36. I queried whether this would not have been one of the primary considerations in the mind of Madlanga J, when he arrived at the decision to make the order of constitutional invalidity prospective in effect.

37. The applicant contended, in response, that the terms of any order which I made could be limited as far as retrospectivity was concerned, to her case only, thereby avoiding any risk of disruption to any other, finalized and pending, matters.

38. As these aspects had not been properly raised and dealt with in the heads of argument which had been filed, or during argument, I called for supplementary

submissions to be filed on 1) the law pertaining to the retrospectivity/prospectivity of declarations of constitutional invalidity, with reference to applicable case law in comparable jurisdictions pertaining to extradition matters and 2) whether this Court was empowered to make an order in relation to and/or limiting or varying the declaration of constitutional invalidity which had previously been made by the Constitutional Court in *Smit*, and if so, whether it was empowered to do so in respect only of finalized extradition matters or in respect of those which may still be pending.

39. Considering the impact which such an order might have on extradition matters that had been finalized or those that were pending, in addition I called for submissions to be made as to whether the respondents could be called upon to place evidence before the Court as to the circumstances pertaining to matters that were pending at the time, in particular whether the persons who were sought to be extradited were in custody or on bail and the dates of their arrests, and whether the arrests had occurred in terms of s 5(1)(a) or (b).

40. In their supplementary submissions the parties were agreed that the Court was empowered to call for such evidence,¹⁸ as we were dealing with a constitutional matter, and they were further agreed that it would be necessary or at least advisable to obtain such information, with a view to making an appropriate order that would not impact beyond what was required or necessary.

41. Pursuant to the receipt of the supplementary submissions I accordingly called for such evidence to be provided before a set date. The respondents failed to comply with the direction and requested an extension in order to do so, which was granted. However, the respondents again failed to provide the information which was sought by the extended date and did not report back to the Court.

¹⁸ Vide *Prince v Minister of Justice & Constitutional Development & Ors* 2017 (4) SA 299 (WCC).

42. Unfortunately, due to administrative inefficiencies this was not noted and acted upon, and the respondents were only put to terms a considerable period of time after they had failed to comply with the extension.

43. In November 2022 the respondents' attorneys filed an affidavit in which they explained that the request to provide the additional information which was sought by the Court had been forwarded to the Chief Directorate of the International Legal Relations section of the Department of Justice and Correctional Services and had elicited a response which was inadequate. From the affidavit it appears that various follow-up requests were made in January, February, March and September 2022, which also did not elicit the necessary co-operation and the information required. Attempts by the office of the DPP to obtain some of the information from the SAPS were also unsuccessful. Although the respondent's attorneys received further documentation in October 2022, it also fell short of what was sought. Consequently, in November 2022 the respondents' attorneys indicated that they had been unable to obtain the information sought, and they requested that the application be determined on the basis of the existing evidence which was before the Court.

44. An opportunity was given to the applicant to respond to this, and both parties were afforded an opportunity to place further submissions before the Court as to any developments in the case law subsequent to the hearing of the matter, if they so wished. Neither party chose to do so.

An assessment

45. In *Cross-Border Road Transport Agency*¹⁹ the Constitutional Court reiterated that court orders must be interpreted on the basis of their terms and their context, within the judgment in which they occur, as a whole.

¹⁹ Para 22.

46. As the applicant points out, it is so that in making its declaration of constitutional invalidity in *Smit* prospective, the Constitutional Court did not set out its rationale or justification therefore, contrary to the declaration of constitutional invalidity it made in regard to s 63 of the Drugs and Drug Trafficking Act ('the Drugs Act'),²⁰ and the amendments to schedules 1 and 2 thereof.

47. In this respect Tshiqi J (for the minority) pointed out that, given that the purpose of the Drugs Act was to protect the welfare of the public and to prevent the use, possession of, and dealing in dependence-producing substances, declaring s 63 to be unconstitutional and invalid with retrospective effect would result in the setting aside of all previous amendments to the Drugs Act, which would be inimical to the public interest and the interests of 'proper administration', and prosecutions for contraventions of the Drugs Act which had been concluded, and would result in a disruption in the (pending) prosecution of suspected offenders.

48. In his judgment for the majority Madlanga J agreed that s 63 (and the amendments to schedules 1 and 2 of the Drugs Act) were inconsistent with the Constitution and that the declaration of constitutional invalidity in respect thereof should be prospective. However, in holding, for the reasons previously set out above, that the provisions of s 5(1)(a) were also inconsistent with the Constitution, he did not expressly deal with the question of retrospectivity and made no comment as to why he proposed an order in similar terms viz. one whereby the declaration of constitutional invalidity was to be prospective.

49. The fact that the learned judge failed to comment in this regard, or to expressly set out his rationale for making an order which was prospective in effect, as opposed to one which was retrospective, in accordance with the default position, does not mean that this aspect was not considered. As was pointed out in *Cross-Border*,²¹ judges must be taken to be 'well-apprised' of the consequences of a declaration of constitutional

²⁰ Act 140 of 1993.

²¹ Note 16 para 25.

invalidity, and their 'silence' when making such a declaration must not readily be understood to mean that there was 'judicial inadvertence' on their part.

50. In my view, considering the context of the minority and majority judgments in *Smit* as a whole, one must conclude that the selfsame considerations as those which motivated the minority against the default position being implemented in respect of the declaration of constitutional invalidity pertaining to s 63 of the Drugs Act, must have motivated the determination in paragraph 10 of the order of the majority, that the declaration of constitutional invalidity in respect of s 5(1)(a) of the EA was also to be prospective.

51. In this regard, making a default order which was retrospective would have nullified all extradition proceedings and orders for extradition which had been previously made, since the time when the Constitution came into operation i.e since 1997, and would have invalidated all pending extradition proceedings where extraditees had been arrested in terms of s 5(1)(a), which had not been finalized as at the date of the decision. This would obviously have caused immeasurable chaos and disruption in international relations between SA and partner states with whom it had entered into extradition treaties and would have damaged its international standing and reputation. It would, at least in regard to pending extraditions, have resulted in convicted foreign criminals and fugitives being rendered non-extraditable, resulting in a wholesale failure of justice.

52. In the circumstances, in my view there is no room to argue that there was a failure on the part of the Constitutional Court to address this issue, or that the order which it made was deficient in some way, or that it is an order which allows for this Court to make a declaration which is at odds with it. In my view this Court does not have the power to make an order of constitutional invalidity which varies or goes beyond, or behind, the order which the Constitutional Court made in *Smit*.

53. In their supplementary submissions the applicant's counsel pointed out that in *Mhlope*²² the Constitutional Court held that s 172(1)(b) of the Constitution gave the Court powers in constitutional matters that were so extensive 'that they ought to be able to craft an appropriate or just remedy even for exceptional, complex or apparently irresolvable situations' and 'whatever considerations of justice and equity point to as the appropriate solution to a particular problem, may justifiably be used to remedy' it. They also referred to the dictum in *Economic Freedom Fighters*²³ that the power to grant an order in a constitutional matter that is just and equitable is so 'wide and flexible' that it allows a Court to formulate relief that does not follow that sought in the notice of motion, in order to address the dispute before it. In my view neither of these dictums allow for this Court to make an order of constitutional invalidity which would be retrospective in effect, albeit one limited to this matter, contrary to the order which was made in *Smit*.

54. Furthermore, even if by some stretch of legal ingenuity or imagination the court had such a power, in my view it does not find application in the circumstances of this matter. In this regard, the applicant's submissions are premised on the contention that the continued restrictions to her freedom of movement and her liberty occurred pursuant to, and as a result of, her wrongful and unconstitutional arrest in terms of s 5(1)(a), to which she is still subject. I have several difficulties with these contentions.

55. In the first place, in my view the restrictions on the applicant's liberty and freedom of movement which are currently in place are not because she is still 'under arrest' as she contends, but because of the bail conditions which were set by the court with her consent and agreement, when she was released. Although her arrest occurred in terms of a warrant which was issued in terms of s 5(1)(a), it endured only for the short, momentary period until she appeared before the magistrate and was released on bail, on the same day, in terms of conditions to which she bound herself voluntarily, which set restrictions on her freedom of movement. But, from the moment the bail order was granted she was no longer 'under arrest' and her contentions in this regard are artificial

²² *Electoral Commission v Mhlope & Ors* 2016 (5) SA 1 (CC) para 132.

²³ *Economic Freedom Fighters & Ors v Speaker of the National Assembly & Ano* 2018 (2) SA 571 (CC) paras 210-211.

and contrived. In the event that she were to default on any of the bail conditions which were set she would not be capable of being arrested on the original warrant, which lost its legal force after it was executed and discharged by the order of the magistrate when releasing her on bail. As in the case of an ordinary accused who breaches their bail conditions, to arrest the applicant and to detain her in custody the police would have to be authorized to do so in terms of a fresh, so-called 'bench' warrant which is issued by the magistrate, on application.

56. In my view, the net result of all of this is that the magistrate's decision to issue the warrant, and the arrest of the applicant pursuant thereto, are matters which are beyond the remit of this court's powers, and orders declaring them to have been retrospectively inconsistent with the constitution are not competent.

57. Similarly, an order declaring that s 5(1) of the EA as a whole is inconsistent with the Constitution and invalid, as prayed for in the notice of motion, also cannot be granted. In this regard, inasmuch as it is common cause that the applicant was arrested in terms of a warrant which was issued in terms of subsection 5(1)(a) she has no cause or standing to challenge s 5(1)(b), and from a reading of her founding affidavit it is apparent that she in fact did not purport to do so. In addition, as the Constitutional Court already made an order on 18 December 2020 declaring s 5(1)(a) to be unconstitutional it is in any event not possible, let alone necessary, for this Court to do so again.

58. That leaves the prayer for an order declaring the notification by the Minister to be unconstitutional and invalid. In my view, the relief which is sought in this regard is similarly not competent.

59. Other than a reference to the Minister's notification being 'to the effect' that a request for the surrender of a person has been received from a foreign state, the content and form which it was to take was not prescribed by s 5(1)(a), nor is it dealt with in s 4, which deals with the formal requirements for an extradition request. It too does not prescribe any requirements for it, other than that it is to be made to the Minister via

diplomatic channels, subject to the terms of any extradition agreement which may be applicable. Thus, to determine what the requirements of such a notification might entail one is required to go to the extradition treaty, which in article 9 thereof sets out the agreed formalities and procedures which are to be followed.

60. In this regard, article 9 provides that a request for extradition by the USA must be made in writing and must be submitted via diplomatic channels,²⁴ and must be supported by a copy of the indictment/chargesheet²⁵ and the warrant of arrest which was issued by a judge or competent authority,²⁶ together with the relevant information pertaining to the 'facts of the offences' and the 'procedural history of the case', and a 'statement or text' of the relevant law pertaining to the offences for which extradition is sought and the punishment which can be imposed for them.²⁷ In addition, a 'statement or text' of the law relating to the lapse of time must be provided, the effect of which 'shall be conclusive' i.e. which shall be determinative for the courts in the requested State (SA).

61. If one considers the documents that were submitted to the Minister by the US authorities, on which he based his decision to issue a notification in terms of s 5(1)(a), it is evident that there was substantial compliance with the requirements provided for in the treaty.

62. To repeat what was previously set out above, the documents which were submitted to the Minister included: 1) the diplomatic note *verbale* in which the identity and particulars of the applicant were set out, together with particulars of the charges on which she was sought for trial in Illinois and the warrants of arrest which were issued for her in respect thereof, as well as the punishments which could be imposed on conviction 2) affidavits by US state attorneys Merrin and Lynch in which a full 'procedural history' of the case against the applicant was set out from the time of the

²⁴ Article 9.1

²⁵ Article 9.3(b).

²⁶ Article 9.3(a).

²⁷ Articles 9.2 (a)-(d).

investigation and her indictment by federal and District grand juries, together with particulars of the charges, including the statutory provisions which pertained thereto, and a statement that none of the charges on which the applicant is sought for trial have lapsed or are time-barred in terms of the applicable federal and local statutes of limitation 3) an affidavit from a special agent in the Inland Revenue Services section of the US Department of Treasury, which set out details of the federal tax offences committed by the applicant and of the investigations that were carried out in respect thereof and 4) copies of the indictments which were filed and the warrants of arrest which were issued. The necessary certifications of these documents were also supplied.

63. In the circumstances, the agreed procedural, documentary requirements as set out in the extradition treaty between the USA and SA were complied with, and from any perusal of the documents supplied the Minister was justified in concluding that the applicant was being sought for surrender by the US authorities, as required in terms of s 5(1)(a).

64. As I have already indicated, the documents which were submitted set out a detailed and comprehensive account of the 'procedural history of the case' being, as I understand it, the case which the US authorities seek to make against the applicant. In my view the fact that the 2017 request for extradition did not set out particulars of the previous requests for extradition in 2006-2008 and again in 2011, does not detract from this. In terms of the extradition treaty the USA complied with its obligations in relation to the information which it was required to submit to the Minister.

65. From my reading of the Act, in particular ss 4, 5 and 9 thereof it is apparent that the purpose of the issuing of a notification by the Minister in terms of s 5(1)(a) was to allow for the issuing of a warrant of arrest by a local magistrate, in order that the extraditee concerned could be brought before the magistrate in whose area of jurisdiction he/she was arrested, as soon as possible, so that an extradition enquiry with a view to their surrender to the foreign state concerned, could be held.

66. At such an enquiry the magistrate must determine whether 1) the extraditee is liable to be surrendered to the foreign state (this is a matter of law determined by reference to the extradition treaty and the provisions of the EA) and 2) whether sufficient evidence exists to warrant the prosecution of the extraditee in the foreign state on the offences for which they have been charged (this is a matter of evidence/fact which is determined by the rules pertaining to the admissibility of documents in extradition proceedings²⁸). If the magistrate finds that these two requirements have been satisfied, he/she is required to make an order committing the extraditee to prison to await the Minister's decision as to their surrender, in terms of s 11.

67. Section 11 provides that at this juncture the Minister has the power and authority either to order the surrender of the extraditee to the requesting foreign state, or to order that that they should not be surrendered, if the Minister is satisfied that it would not be in the interests of justice to do so, or that for any other reason it would be unjust or unreasonable to do so.²⁹

68. Thus, in my view, the lengthy delay on the part of the US authorities in seeking the applicant's extradition and their two previous, failed attempts to do so, are factors that will become relevant at the point when the Minister is required to make a decision in terms of s 11 as to whether the applicant is to be extradited, and are not factors which the Minister was required to take into account in order to determine whether to issue a notification in terms of s 5(1)a). All that was required for the purpose of the exercise of a power in terms of that provision, at the time when it was in force, was that the Minister was satisfied on the basis of the necessary documents and information which were to be provided in terms of the extradition treaty, that a request had been made by the USA for the surrender i.e. extradition of the applicant.

69. In the result, the application for an order setting aside the Minister's notification in terms of s 5(1)(a) must also fail.

²⁸ As set out in ss 9(2)-9(3) and 10(2) of the EA.

²⁹ Section 11(b)(iii).

70. As far as costs are concerned, following the decision of the Constitutional Court in *Harksen*³⁰ it has become common for costs orders not to be made against unsuccessful extraditees in failed extradition-related reviews, on the basis that they are essentially criminal proceedings in nature and costs orders are not ordinarily made against persons who are the subject of such proceedings. As was pointed out in *DPP v Tucker*,³¹ this is not an inviolate rule and may be departed from where the proceeding constitutes an abuse of process, or is frivolous or vexatious.

71. Although the review clearly was aimed at putting a spoke in the wheel of the extradition process, given the decision of the Constitutional Court in *Smit* it cannot be said that it was legally without merit, and it raised pertinent constitutional issues. In the circumstances I am not persuaded that a costs order should be made against the applicant.

Order

72. In the result I make the following order:

The application is dismissed.

M SHER
Judge of the High Court
(Signature appended
digitally)

Appearances:

Applicant's counsel: A Katz SC and A Adhikari

³⁰ *Harksen v President of the Republic of South Africa & Ors* 2000 (1) SACR 300 (CC); 2000 (2) SA 825 (CC).

³¹ [2022] 4 All SA 332 (WCC) para 87.

Applicant's attorneys: Walkers (Cape Town)
Respondents' counsel: N Mayosi SC and A Christians
Respondents' attorneys: State Attorney (Cape Town)