LOM Business Solutions t/a Set LK Transcribers/mvd

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA CASE NO: 959/04 &

2008.03.06

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 18/4/08 SIGNATURE

In the matter between

NELLO QUAGLIANI Applicant

and

PRESIDENT OF THE REPUBLIC OF

SOUTH AFRICA AND 6 OTHERS Respondent

CASE NO: 28214/06

In the matter between:

STEVEN MARK VAN ROOYEN 1st Applicant

LAURA VENESSA BROWN 2nd Applicant

and

THE PRESIDENT OF THE REPUBLIC OF

SOUTH AFRICA AND 7 OTHERS Respondents

J U D G M E N T

PRELLER J: The above two applications both challenge the validity of the extradition agreement that was signed between the Republic of South Africa and the United States of America on 16 September 1999. Both notices of motion contain a number of prayers for further and ancillary relief that are not identical but the essence of both are the same. Although not consolidated in terms of Rule 11 the two cases were set down to be heard together. It was agreed with counsel at the outset that the two matters would be argued together subject to the right of Mr Melunsky to deal in addition with matters that are unique to the first case, being case 959/04. It was also agreed that I shall give one judgment only and, as far as may be necessary, deal separately with matters that concern case 959/04 only.

After 3 days of argument we have not nearly reached the end of the case and it was postponed for a month which was the earliest available date. On the third day Ms Williams, who appeared for the last two respondents, being the Speaker of the National Assembly and the Chairperson of the National Council of Provinces indicated that she would file a further set of affidavits in order to deal with certain points that arose in the course of argument.

When argument resumed a month later her application was opposed by the applicants. Opposing and replying affidavits had been served and filed before the resumed hearing and I ruled that the affidavits would provisionally be allowed and that I will in this judgment make known my final decision on whether the further affidavits will be admitted.

It has always been my view that it is in principle desirable that all

parties be allowed every reasonable opportunity to have their full say in trials as well as in motion proceedings. Being in possession of every fact that could be of relevance can only assist a court to come to a just decision. Further evidence should in general only be refused if its admission would be an abuse of the process or cause unfair prejudice to the opposing party. That would be in accordance with the approach suggested by Coetzee J in *Vitorakis v Wolf* 1973 (3) SA 928 (W) that litigants should be assisted to get to grips with the issues as inexpensively and expeditiously as possible without enforcing sheer formality.

In opposition to the application I was referred to the judgment in *Jay's Properties Limited v Turgin* 1950 (2) SA 694 (W). In that case a different principle applied: the applicant filed a replying affidavit from which it became clear that the deponent to the founding affidavit had no personal knowledge of the relevant facts and that the founding affidavit was hearsay. The court found that the applicant accordingly only made out a case in the replying affidavit and the application was dismissed for that reason.

That principle does not apply in the present case and although the relevant information could and should have been placed before the court much earlier, everybody had enough time to consider the further affidavits and to react thereto. No real prejudice was suffered by the applicants or any of the other respondents and I rule that the further affidavits will be accepted as part of the record and that the costs thereof as well as for the application for condonation will be costs in the cause.

The applicants rely on several irregularities in the process of

concluding the agreement and contend that their subsequent arrest and detention were accordingly unlawful and unconstitutional because they were based on the invalid extradition agreement.

It stands to reason that the extradition of a person to a foreign state constitutes a serious invasion of his basic human rights. It is likewise beyond question that every Government world-wide has a valid and legitimate interest in having convicted criminals and those suspected of having committed crimes extradited in order to serve their sentences or to stand trial.

The other side of the coin of the right of a state to have suspected or convicted criminals extradited to its criminal justice system is the obligation to reciprocate when the other state to an extradition treaty files an extradition request. Without a system of extradition agreements the ease of movement between countries would make life much easier for criminals and make a mockery of any criminal justice system. This results in a tension between, on the one hand the fundamental right of an individual and on the other a very valid interest of the state that is of substantial importance to its subjects.

The question then arises as to how the adjudication of a disputed request for extradition should be approached in view of the constitutional rights that are involved.

Section 172 (1)(a) of the Constitution reads:

"(1) When deciding a constitutional matter within its power a court –

a must declare that any law or conduct that is

inconsistent with the constitution is invalid to the extent of its inconsistency ..."

Prima facie the provision means that whenever a request for extradition is challenged the entire process up to the final decision and even the process of a conclusion of the agreement must be scrutinized and if it is found that any i was not dotted or any t not crossed, the extradition or perhaps even the agreement must be found to be invalid irrespective of the consequences.

That approach would be similar to the rigid exclusionary rule that was formulated by the American Supreme Court in the matter of *Mapp v Ohio* around the middle of the previous century. It became clear almost immediately that the rule was unworkable and the same court has been formulating exceptions to it ever since.

The conclusion of an extradition agreement between two countries is a long and involved process. The current agreement with the United State of America has now been in operation for several years and a number of persons have probably been extradited in terms of it. The consequences of invalidating that agreement now will be serious and may well be disastrous. It is therefore a step that should not be taken lightly but nevertheless must be taken if the circumstances so demand.

A possible alternative solution would be to approach the question in the manner suggested by the discretionary exclusionary rule that is contained in section 35 (5) of the Constitution. The rule deals with the admissibility of evidence that was obtained in breach of the constitutional rights of an accused in a criminal trial. The present enquiry is of course

not a criminal trial and the rule is not directly applicable. The process is, however, the prelude to an eventual criminal trial and there is much to recommend a similar approach to this preliminary procedure. The interim constitution of 1994 did not contain an exclusionary rule and the question how unconstitutionally obtained evidence should be dealt with, was considered in several cases. See e.g. *S v Melani* 1995 (2) SACR 141 (E); *Key v Attorney General Cape Provincial Division and another* 1996 (2) SACR 113 (CC) at 120 h – 121 b.

The weight of authority favoured the approach that was ultimately reflected in section 35 (5) of the Constitution. There is no guide in the Constitution similar to the latter provision to assist with the application of section 172 (1)(a), but I find much in the reasoning in the cases mentioned above to recommend a similar approach to the present enquiry. I conclude that in making a finding as to the validity or otherwise of the agreement, a balance must be struck between on the one hand the constitutional rights of the applicants and on the other the legitimate interest of the state in having reciprocal rights and obligations with other contracting states to have convicted or suspected offenders extradited and that is the approach that I propose to adopt.

The two relevant statutory provisions for this case are the following: Firstly, section 231 of the Constitution which deals with international agreements and which read as follows:

"International agreements

1. 231 (1) The negotiating and signing of all international agreements is the responsibility of the National Executive.

2. An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces unless it is an agreement referred to in sub-section 3.
3. An international agreement of a technical, administrative or executive nature or an agreement which does not require either ratification or accession, entered into by the National Executive, binds the Republic without approval by the National Assembly and the National Council or Provinces, but must be tabled in the Assembly and the Council within a reasonable time.
4. Any international agreement becomes law in the Republic when it is enacted into law by National Legistion; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.
5. The Republic is bound by international agreements which were binding on the Republic when this constitution took effect."

Only the first four sub-sections are relevant for present purposes and I do not propose to deal further with sub-section 5.

Section 2 (1) to (3) ter, of the Extradition Act 67 of 1962 reads:

"(2) Extradition Agreements

(1) The President may on such conditions as he or she may deem fit but subject to the provisions of this Act –

(a) enter into an agreement with any foreign State other than a designated State providing for the surrender on a reciprocal basis of persons accused or convicted of the commission within the jurisdiction of the Republic or such State or any territory under the sovereignty or protection of such State, of an extraditable offence or offences specified in such agreement and may likewise agree to any amendment or revocation of such agreement; and

(b) designate any foreign State for purposes of section 3 (3) and may at any time amend the conditions to which such designation was subjected to or revoke such designation,

(2) ....

(3) No such agreement or designation or any amendment thereof or revocation of the designation shall be of any force effect –

(a) until the ratification of/or accession to or amendment or revocation of such agreement or designation has been agreed to by Parliament.

(b) ....

(c) Unless provision is made by the law of the

foreign State or by the agreement that no person surrender to such State shall, until he has been returned or had an opportunity of returning to the Republic, be detained or tried in the foreign State for any offence committed prior to his surrender other than the offence in respect of which extradition was sought or an offence of which he may lawfully be convicted on a charge of the offence in respect of which extradition was sought or that no such person shall be so detained or tried without the consent of himself or the Minister.

(3) bis Notwithstanding the provisions of paragraph (c) of sub-section (3) any such agreement may provide that any person surrendered to the foreign State in question may with the consent of the Minister and with a view to his surrender to another foreign State be detained in such first-mentioned State for an offence which was committed prior to his surrender to such State and to which the agreement relates.

(3) ter The Minster shall as soon as practicable after Parliament has agreed to the ratification of, or accession to, or amendment or revocation of an agreement or the designation of a foreign State give notice thereof in the Gazette."

I wish to make a few remarks about section 231 of the Constitution.

Sub-Section 1: I do not find an express definition of the National

Executive in the Constitution, but the following provisions provide a clear enough answer:

> According to section 83 (a) the President is the head of state and head of the National Executive.
>
> Section 85 (1) provides that the executive authority is vested in the President and in terms of section 85 (2) the President exercises the executive authority together with the other members of the Cabinet.

Apart from what common sense tells one it is clear from these provisions that the National Executive is the Cabinet and which is headed by the President.

It is of interest to note that the 11 responsibilities expressly assigned to the President in Section 84 (2) do not include the negotiation or signing of international agreements despite the express inclusion of certain responsibilities regarding foreign representatives in sub-section (2) (h) and (i).

International agreements are therefore the collective responsibility of the Cabinet as a whole. As far as the provision of section (2) (1) of the Extradition Act 67 of 1962 that the President may enter into agreements with foreign States may purport to reserve that power and responsibility to the President to the exclusion of the Cabinet it would be in conflict with the Constitution and would be void.

Sub-sections (2) and (3)

The distinction between the expression "binds the Republic" in sub-sections (2) and (3) and the words "becomes law in the Republic"

makes it clear that sub-sections (2) and (3) regulate the international obligations of South Africa or as it is sometimes put, operate on the international plane. Sub-section (4) on the other hand operates on the domestic level and determines when international agreements become binding on subjects. The intention with sub-section (2) is to prevent the Cabinet from binding the country in an international agreement without the approval of Parliament.

Dugard: International law: A South African perspective 3rd Ed. page 61 and 62 explains that the long delays caused by the cumbersome process of having every international agreement approved by Parliament that was required by the Interim Constitution resulted in the present arrangement by which "formal" agreements, i.e. those of a technical, administrative or executive nature and those that do not require ratification or accession become binding without the approval of Parliament although they must be tabled in Parliament within a reasonable time.

Both the Constitution and the Extradition Act are silent on the question of which treaties are subject to ratification or accession, but that is not the problem in the present case in view of article 24 of the agreement which expressly provides that it shall be subject to ratification. I assume that agreements that are not of a formal nature will invariably contain a similar provision.

Sub-section (4)

Before 1994 the conclusion of an international agreement was the prerogative of the Executive alone and the approval of Parliament was not required. See e.g. section 6 of the previous constitution Act 110 of 1983.

In order to become part of the Municipal Law and binding on subjects, however, it had to be so incorporated by legislative process: *Pan American World Airlines Incorporated v SA Fire and Accident Insurance Company Limited* 1965 (3) SA 150 (A) at 161 c. That was also so under the Interim Constitution: *Azapo and Others v President of the Republic of South Africa* 1996 (4) SA 671 (CC) at 688 b-c.

Under section 231 (3) of the Interim Constitution the agreement by Parliament to the ratification of or accession to such an agreement was sufficient for it to become part of the law of the land provided that Parliament expressly so provides and no further legislative action was necessary.

Section 231 (4) of the Constitution marks a return to the pre-1994 position subject to the effect of the proviso to the sub-section which I must confess I find hard to understand. The proviso seems to contemplate agreements which have been approved by Parliament for the purposes of sub-section (2) but have not (yet) been enacted into the law by national legislation. A "self-executing" provision that happens to be contained in such an agreement will then be law in the Republic. The meaning of that "strange animal" as Mr de Jager for the first five respondents called it will be considered later.

In his well-prepared and very helpful argument on behalf of the applicants, Mr Hodes emphasised the difference between the two parts of the sub-section before and after the semi-colon and submitted that the terms "any international agreement" and "a ... provision of an agreement" cannot be synonymous. He also submitted that had the drafters of the

Constitution intended that entire international agreements may be self-executing it would have been easy for them to say "but a self-executing international agreement or portions of such an agreement ....". He submitted that it is accordingly clear that an entire agreement can never be self-executing.

Counsel were *ad idem* that the term "self-executing" was taken over from American Law and I was handed a host of extracts from books, articles by American as well as South African academic authors and some American judgments on the topic. I find it hard to understand the excitement among South African academic writers about this topic because of the huge difference between the American legal system and ours and also between the Constitutions of the two countries. For the same reason I found it difficult to follow the arguments of the American authors. Our Constitution is to a large extent modelled on the Constitution of Canada and yet I was not referred to any Canadian authorities on the topic. The obvious reason for that would be that there are no such authorities simply because the concept is of no interest in Canadian law. What the term means in America can be at most of academic interest to us, but I shall nevertheless briefly consider it.

The idea of a treaty or part thereof being "self-executing" arose because of clause 2 of article VI of the American Constitution which reads:

> "This constitution, the laws of the United States that shall be made in pursuance thereof and all treaties made or which shall be made under authority of the United States, shall be the supreme law of the land and judges in every state shall be bound thereby,

> anything to the contrary in state constitutions or laws notwithstanding."

I am not familiar with the American Constitution or with their legal system but had our Constitution contained a similar provision the problem would have been obvious; the executive, which has the power to conclude international agreements, but not to make laws, would be able to by-pass Parliament by concluding international agreements which would then be part of "the Supreme Law of the land".

It seems that American jurists were concerned by that very same problem as a result of which Justice Marshall for the first time raised the idea of self-executing treaties in: *Foster and Elam v Nielson* 27 US (2 PET) 253 (1829) as follows:

> "Our Constitution (article VI clause 2) declares a treaty to be the law of the land. It is consequently to be regarded in courts of justice as equivalent to an act of the legislature whenever it operates of itself without the aid any legislative provision. But when the terms of the treaty stipulation import a contract, when either of the parties engaged to perform a particular act, the treaty addresses itself to the political, not the judicial department, and the legislature must execute the contract before it can become a rule of the court."

Again subject to my ignorance of the American system it seems to me as if the learned Justice had seen the problem I have mentioned above and found a neat way around it by distinguishing treaties that required ratification or some other further step before they become

binding from those that operate of themselves without the aid of any legislative provision. Undoubtedly the vast majority of treaties, if not all of them, will fall into the former category.

I did not have the time nor the facilities to research the views of American academic writers on the idea of self-executing treaties but Dugard (Loc. Cit.) quotes the view of one professor Meyers McDougal expressed in (1951) 45 Proceedings of the American Society of International Law 102, as follows:

> "... this word self-executing is essentially meaningless and ... the quicker we drop it from our vocabulary the better for clarity and understanding."

As an illustration I may refer to the following definition proposed by Parry and Grant: Encyclopaedic Dictionary of International Law page 362 to which Mr de Jager has referred me:

> "A treaty can be described as self-executing if its provisions are automatically without any formal or specific act of incorporation by state authorities, part of the law of the land and enforceable by municipal courts."

This definition tells us nothing more than that those treaties are part of the law without any legislative provision, which is nothing more than what Justice Marshall told us in the passage quoted from his judgment but we still do not know what it is that distinguishes them from the other run of the mill treaties.

The South African academic writers to whom I have been referred are almost unanimous in their disapproval of the idea and they seem to

agree that the term is meaningless and almost impossible to apply in the context of our legal system. Even Mr de Jager has very fairly conceded that the term has a technical meaning which is foreign to our legal system and that it is impossible to give effect to the intention of the writers of the Constitution by merely attaching their ordinary meaning to the words. The words are nevertheless part of the Constitution and I have to give some meaning to them. Mr de Jager accordingly suggested that regard be had to the Afrikaans text which translates "a self-executing provision" with "'n direk uitvoerbare bepaling". Mr Hodes incidentally submitted that I cannot have regard to the Afrikaans text since only the English version had been ratified by the Constitutional Court and there is furthermore no such rule of interpretation as Mr de Jager relied upon.

I find it unnecessary to make any decision on this point because if the Afrikaans text suggests a possible interpretation that would make sense of the English text I can see no reason why I should not consider that possibility in the same manner in which I would consider an interpretation that is suggested to me in argument. According to Mr de Jager's argument the Afrikaans text suggests that if the agreement contains provisions that regulate the coming into operation of the agreement, the agreement as such will be "direk uitvoerbaar". He then submits that article 22 (clearly reference to article 24 is intended) provides that instruments of ratification shall be exchanged as soon as possible and that the agreement shall thereupon "enter into force" by itself. He further submits that the legislature (I assume that this is intended as a reference to the writers of the Constitution) contemplates a quick and

simple coming into operation ("inwerkingtreding") that does not require enactment into law by National Legislation and that the agreement becomes law in the Republic provided that it is not inconsistent with the Constitution or any Act of Parliament.

I regretfully find myself unable to agree with his submissions for the following reasons.

1. The entry into force ("inwerkingtreding") of the treaty upon the exchange of the instruments of ratification is nothing more than the treaty becoming binding on the Republic as contemplated in section 2 (31) (2) of the Constitution. It is self-evident that from the South African perspective the instruments of ratification will not be exchanged before the required approval by resolution in both the National Assembly and the National Council of Provinces. His argument ignores the clear distinction between the two processes contemplated in sub-sections 2 and 4.

2. The accelerated process proposed by him for transforming the treaty into law will be "inconsistent with the Constitution" as contemplated in the second proviso to sub-section (4) and will for that reason not be "law in the Republic".

Mr de Jager also submitted that no legislation is required in order to give effect to the provisions of the treaty since the Extradition Act and section 41 (1) (k) and other provisions of the Criminal Procedure Act "cater for every possible executive step that could or would be undertaken in terms of the treaty." That is, with respect, putting the cart before the horses. From a reading of the plain words of section 231 (4) of the Constitution it

is simply not possible to have a statute in terms of which any number of international agreements can subsequently be concluded that will have the force of law in the Republic. What the plain language of the sub-section requires is enactment into law for every new treaty. In my view that clearly means a new act of Parliament for every new treaty. I appreciate that it will be a great inconvenience if there has to be a new act passed through Parliament for every international agreement that is concluded, but that is what the Constitution said and that is what needs to be done.

It was common cause on the papers and also during argument that there was no national legislation that enacted the present treaty into law. Mr de Jager in fact expressly disavowed any reliance on the first part of sub-section (4) before the semi-colon and stated that he based his case on the treaty being self-executing. I have already found that to be not the case and it follows that both applications must succeed.

As far as costs are concerned it seems to me that there are some duplications of parties and that only the first two and also the last 2 of all the respondents should be liable for costs. I did not hear any argument on that aspect and any of the parties who may differ from my view, is free to approach me in chambers if they are of the view that my cost order should be amended.

The order that I make is the following:

1. An order is granted in terms of prayer 1 of the notice of motion.
2. The first, the second, sixth and seventh respondents in case 959/2004 (the first, second, seventh and eighth respondents

in case 28214/2006) are to pay the costs of the applicants including the costs of two counsel in both cases.

3. The order is referred to the Constitutional Court for confirmation in terms of Section 172 (2)(a) of the Constitution.

[This order was subsequently, on 19 March 2008, rectified by the deletion of paragraph 3 thereof.]

---o0o---

CASE 959/04 : N QUAGLIANI

FOR APPLICANTS	:	MR D MELUNSKY
INSTRUCTED BY	:	ERROL GOSS ATTORNEYS
FOR 1ST TO 5TH RESPONDENTS	:	MR P J J DE JAGER SC
		MR D MOHLOMONYANE
INSTRUCTED BY	:	STATE ATTORNEY
		PRETORIA
FOR 6TH AND 7TH RESPONDENTS	:	MS R WILLIAMS SC
		MS K PILLAY
INSTRUCTED BY	:	THE STATE ATTORNEY
		CAPE TOWN

CASE 28214/06 : VAN ROOYEN & BROWN

FOR APPLICANTS	:	MR P B HODES SC
		MR N KATZ
INSTRUCTED BY	:	DAVOUT WOLHUTER &
		ASSOCIATES

FOR 1ST TO 6TH RESPONDENTS	:	MR P J J DE JAGER SC
		MR D MOHLOMONYANE
INSTRUCTED BY	:	STATE ATTORNEY
		PRETORIA
FOR 7TH AND 8TH RESPONDENTS	:	MS R WILLIAMS SC
		MS K PILLAY
INSTRUCTED BY	:	THE STATE ATTORNEY
		CAPE TOWN

10

LOM Business Solutions t/a Set LK Transcribers/mvd

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA CASE NO: 959/2004

28214/06

2007-03-06

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED

DATE 21/4/06 SIGNATURE

In the matter between

NELLO QUAGLIANI Applicant

and

THE PRESIDENT OF THE

REPUBLIC OF SOUTH AFRICA & 6 OTHERS Respondents

CASE NO: 28214/06

In the matter between:

STEVEN MARK VAN ROOYEN 1st Applicant

LAURA VANESSA BROWN 2nd Applicant

and

THE PRESIDENT OF THE

REPUBLIC OF SOUTH AFRICA & 7 OTHERS Respondents

O R D E R

PRELLER J: It has just been pointed out to me that there is an ambiguity in paragraph 1 of the order that I had granted. I propose to rectify my previous order in terms of Rule 42 (1)(b).

For purposes of clarity I shall read out the full terms of the order.

Paragraph 1 of the order reads as follows:

1. It is declared that the extradition agreement signed on 16 September 1999 between the Republic of South Africa and the United States of America published in Government Gazette 22430 on 29 June 2001, has not been incorporated into the law of South Africa as a result of the fact that the requirements of section 231 (4) of the Constitution has not been satisfied and the treaty is accordingly not in force for the purposes of section 1 of the Extradition Act 67 of 1962.
2. The first, second, sixth and seventh respondents in case 959/2004 (first, second, seventh and eighth respondents in case 28214/2006) are to pay the costs of the applications which costs will include the costs of two counsel in both cases.
3. This order is referred to the Constitutional Court for confirmation in terms of Section 172 (2)(a) of the Constitution.

LOM Business Solutions t/a Set LK Transcribers/mvd

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

PRETORIA CASE NO: 959/2004

28214/06

2008-03-19

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES ~~YES~~/NO
(3) REVISED
DATE 21/4/08 SIGNATURE

In the matter between

NELLO QUAGLIANI Applicant

and

THE PRESIDENT OF THE REPUBLIC

OF SOUTH AFRICA & 6 OTHERS Respondents

CASE NO: 28214/06

In the matter between:

STEVEN MARK VAN ROOYEN 1st Applicant

LAURA VANESSA BROWN 2nd Applicant

and

THE PRESIDENT OF THE

REPUBLIC OF SOUTH AFRICA & 7 OTHERS Respondents

O R D E R

PRELLER J:

1. In terms of Rule 42(1)(b) the previous order is rectified by the deletion therein of the referral of the order to the Constitutional Court for confirmation thereof in terms of Section 172(2)(a) of the Constitution.

2. THAT the period for any application for leave to appeal against that order shall commence to run from the date of this order.