THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 162/2020

In the matter between:

TIMOTHY GORDON MARSLAND **APPELLANT**

and

THE ADDITIONAL DISTRICT COURT MAGISTRATE, KEMPTON PARK **FIRST RESPONDENT**

THE DIRECTOR OF PUBLIC PROSECUTIONS, JOHANNESBURG **SECOND RESPONDENT**

Neutral citation: *Marsland v The Additional District Court Magistrate, Kempton Park and Another* (162/20) [2021] ZASCA 14 (10 February 2021)

Coram: MAYA P, VAN DER MERWE and MAKGOKA JJA, and EKSTEEN and POYO-DLWATI AJJA

Heard: 24 November 2020

Delivered: This judgment was handed down electronically by circulation to the parties' representatives via email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 10:00 am on (10 February 2021).

Summary: Extradition – interpretation of Article 10(5) of the Southern African Development Community Protocol on Extradition – ss 4(1), 5(1)*(a)* and *(b)* of the Extradition Act 67 of 1962 – direct receipt of formal extradition documentation under s 4(1) by Minister of Justice not required – notification envisaged in s 5(1)*(a)* not applicable to extradition proceedings triggered by provisional arrest under s 5(1)*(b)*.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Matojane and Dippenaar JJ sitting as court of review):

The appeal is dismissed.

JUDGMENT

Poyo-Dlwati AJA (Maya P, Van der Merwe and Makgoka JJA and Eksteen AJA concurring)

[1] The core issue for determination in this appeal is whether a provisional arrest under s 5(1)*(b)* of the Extradition Act 67 of 1962 (the Act) had lapsed, for the reason that the Minister of Justice (the Minister) neither personally received the relevant

extradition request nor issued a notice in terms of s 5(1)*(a)* of the Act, within 30 days of the arrest.

[2] The Republic of South Africa (South Africa) and the Republic of Botswana (Botswana) are among the signatories to the Southern African Development Community Protocol on Extradition (the Protocol),[1] which the RSA ratified in April 2003 and came into force on 1 September 2006. The preamble of the Protocol reads as follows:

'We, the Heads of State or Government of:

….

The Republic of Botswana

. . .

The Republic of South Africa

NOTING with concern the escalation of crime at both national and transnational levels, and that the increased easy access to free cross border movement enables offenders to escape arrest, prosecution, conviction and punishment;

CONVINCED that the speedy integration amongst State Parties in every area of activity can best be achieved by seeking to create and sustain within the Southern African Development Community, such conditions as shall eliminate any threat to the security of our people;

DESIRING to make our co-operation in the prevention and suppression of crime more effective by concluding an agreement on extradition;

BEARING in mind that the establishment of a multilateral agreement on extradition will greatly enhance the control of crime in the Community. . .'

[3] South Africa and Botswana are also parties to the Extradition Treaty (the Treaty), which they signed in February and March 1969, respectively. There is, therefore, well-established co-operation between the two countries with regard to

[1] Signed by the Republics of South Africa and Botswana on 3 October 2002 in Luanda, Angola and agreed upon also by the Republics of Angola, Malawi, Mauritius, Mozambique, Namibia, Seychelles, Zambia and Zimbabwe, the Democratic Republic of the Congo, the Kingdoms of Lesotho and Swaziland, and the United Republic of Tanzania.

extraditions. It was, however, common cause before us that the Protocol, and not the Treaty, was paramount in this case, as Article 19 of the Protocol provides:

'The provisions of any treaty or bilateral agreement governing extradition between any two State Parties shall be complementary to the provisions of this Protocol and shall be construed and applied in harmony with this Protocol. In the event of any inconsistency, the provisions of this Protocol shall prevail.'

[4] Against this backdrop, Botswana caused Interpol to issue a Red Notice request for the provisional arrest of the appellant, Mr Timothy Gordon Marsland, who has dual citizenship in South Africa and the United Kingdom, and residency in Botswana. Consequently, on 12 July 2019 the appellant was arrested at OR Tambo International Airport whilst *en route* to Germany. The arrest was effected through a warrant issued by a magistrate in terms of s 5(1)*(b)* of the Act. In the Red Notice it was alleged that the appellant had laundered funds to the sum of BWP200 000 from Botswana Public Officers Fund, whilst he was a director of Capital Management Botswana, which was entrusted to manage and invest these funds. He was also accused of attempting to obtain, by false pretences, an amount of BPW71 000 000 from the First National Bank of Botswana.

[5] The appellant made his first appearance before the first respondent, the Additional District Court Magistrate, Kempton Park on 15 July 2019. The matter was then postponed to 8 August 2019 for a bail application. On 8 August 2019, his application to be released on bail was refused by the first respondent. Thereafter, the matter was postponed to 23 August 2019 and the prosecutor, on behalf of the second respondent, the Director of Public Prosecutions, Johannesburg, handed the first respondent three documents, namely:

(a) a *Note Verbale* from Botswana, dated 17 July 2019, requesting the extradition of the appellant;

(b) a letter from the Department of International Relations and Co-operation (DIRCO), dated 19 July 2019, addressed to the Director General, Department of Justice and Constitutional Development (the Department), enclosing the *Note Verbale*; and

(c) a letter from the office of the Director General of the Department, dated 12 August 2019, addressed to the National Director of Public Prosecutions (the NDPP) enclosing the *Note Verbale* as received from DIRCO. Paragraph 3 of that letter requested the NDPP to 'kindly note that the Department is to submit a memorandum to the Minister, requesting the Minister to issue a notification in terms of s 5(1)*(a)* of the Extradition Act, 1962'.

[6] Thereafter, the second respondent made an application to the first respondent for the matter to be transferred to another court for purposes of an enquiry envisaged in s 10 of the Act.[2] The appellant opposed that application on the ground that no extradition application was pending before any court in South Africa. He argued that no notification, as envisaged in s 5(1)*(a)* of the Act, had been issued by the Minister, and thus no extradition application had been received. He contended that as the period of 30 days contemplated in Article 10(5)[3] had lapsed since the arrest and no application had been received for his extradition, his detention was unlawful. He accordingly sought to be released from detention.

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[2] Section 10(1) of the Act provides, 'if upon consideration of the evidence adduced at the enquiry referred to in ss 9(4)*(a)* and *(b)*(i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court'.

[3] Article 10(5) of the Protocol provides:

'Provisional arrest shall be terminated if the Requested State has not received the request for extradition and supporting documents through the channel provided for in Article 6 within thirty (30) days after the arrest. The competent authorities of the Requested State, in so far as it is permitted by the law of that State, may extend that delay with regard to the receipt of the documents. However, the person sought may be granted bail at any time subject to the conditions considered necessary to ensure that the person does not leave the country; and

The provision of paragraph (a) shall be without prejudice to the right of the person so arrested to be released in accordance with the domestic law of the Requested State.'

[7] The first respondent dismissed the application for the appellant's release. She found that the application for his extradition had in fact been received by the Minister and the second respondent prior to the expiry of the 30 - day period referred to in Article 10(5) of the Protocol. In her ruling, she pointed out that the appellant had conceded that the documents for his extradition had been received by the second respondent. Dissatisfied with this ruling, the appellant launched an application in the Gauteng Division of the High Court, Johannesburg (the high court) for the review and setting aside of the first respondent's decision and other incidental relief.

[8] On 10 September 2019 the high court dismissed the application with costs. It found that the extradition request and the accompanying documents were indeed received by the Minister and the second respondent on 12 August 2019. It held that there was no requirement in the Protocol that the Minister must issue a s 5(1)*(a)* notice as proof of receipt of the extradition request, where the arrest was pursuant to a warrant issued by a Magistrate in terms of s 5(1)*(b)* of the Act. The appellant's application for leave to appeal to this Court was refused by the high court, but was subsequently granted by this Court.

[9] The appellant contended that the provisional arrest had terminated in terms of Article 10(5) of the Protocol. The grounds of the appellant's argument before us were two-fold. First, as at 12 August 2019, the Minister had not received the request from Botswana for his extradition as contemplated in Article 6 of the Protocol. Secondly, the Minister had by that date not issued a notification in terms of s 5(1)*(a)* of the Act to commence the extradition, which was required even though the appellant's arrest was effected in terms of s 5(1)*(b)* of the Act.

[10] The principles for interpreting documents and legislation are trite and have been restated on numerous occasions by this Court.[4] As this Court put it in *Endumeni* at para 18:[5]

'Interpretation is the process of attributing meaning to the words in a document, be it in legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.' And, as the Constitutional Court held in *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit N O and Others and Another*,[6] when construing legislation courts must promote the spirit, purport and objects of the Bill of Rights. Wherever possible, without straining the language of a statutory provision, it must be given an interpretation that is within constitutional bounds in preference to one that involves an infringement of constitutionally protected rights.

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[4] See *Natal Joint Municipality Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[5] See fn 4.
[6] *Investigating Directorate: Serious Economic Offences and Others v Hyundai Motor Distributors (Pty) Ltd and Others: In re Hyundai Motor Distributors (Pty) Ltd and Others v Smit N O and Others* [2000] ZACC 12; 2000 (1) SA 515 (CC) para 21 to 26.

[11] It is appropriate at this stage to consider the relevant provisions of the Act and the Protocol. These are ss 3(1), 4(1), 4(2), 5(1)*(a)*, 5(1)*(b)* and 8 of the Act, which must be read together with Articles 6 and 10(5)*(a)* of the Protocol.

[12] Section 3(1) of the Act provides for one of three grounds upon which a person may be extradited from this country.[7] It reads:

'Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence.'

[13] Section 4(1) of the Act on the hand provides:

'Subject to the terms of any extradition agreement any request for the surrender of any person to a foreign State shall be made to the Minister by a person recognised by the Minister as a diplomatic or consular representative of that State or by any Minister of that State communicating with the Minister through diplomatic channels existing between the Republic and such State.'

On the other hand, s 4(2) provides that any such request received in terms of an extradition agreement by any person other than the Minister, shall be handed to the Minister.

Article 6 provides for a method by which the request for extradition shall be made. It reads:

'A request for extradition shall be made in writing. The request, supporting documents and subsequent communications shall be transmitted through the diplomatic channel, directly between the Ministries of Justice or any other authority designated by the State Parties.'

[7] Sections 3(2) and (3) of the Act are not applicable. Section 3(2) provides for an extradition to a foreign State where there is no extradition agreement but the President has consented in writing to such extradition, whilst s 3(3) provides for an extradition to a designated State regardless of whether the offence was committed before or after the designation of such State and whether or not a court in the Republic had jurisdiction to try such person for such offence.

[14] Section 5(1)*(a)* of the Act provides:

'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 upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister.'

Section 5(1)*(b)* on the other hand provides that:

'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 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.'

[15] It is necessary to examine in some detail the three documents that were handed to the first respondent in court on 23 August 2019. The *Note Verbale* No. 164/2019 FS from Botswana reads:

'The High Commission of the Republic of Botswana presents its compliments to the Department of International Relations and Co-operation of the Republic of South Africa and has the honour to submit a request for an extradition of Timothy Gordon Marsland. The esteemed Department is further requested to transmit the enclosed dossier to the relevant South African Authorities. The High Commission of the Republic of Botswana avails itself of this opportunity to renew to the Department of International Relations and Co-operation of the Republic of South Africa the assurances of its highest consideration.'

The document was received by DIRCO on 17 July 2019 in line with the common cause fact that DIRCO deals mostly with international relations as well as diplomatic matters between the RSA and other countries.

[16] As I have pointed out, the second document was a letter from DIRCO to the Director General of the Department, dated 19 July 2019, which simply enclosed the *Note Verbale* and requested that the documents be forwarded to the relevant authorities. The third document was also a letter from the office of the Director General enclosing the *Note Verbale* and indicating the Department's intention to

submit a memorandum to the Minister, requesting him to issue a notification in terms s 5(1)*(a)* of the Act.

[17] The *Note Verbale* constituted a request by Botswana for the extradition of the appellant, as envisaged in the Act and the Protocol. A dossier was attached to it with a request that it be handed over to the relevant department. In accordance with Article 6, the request was in writing. The request and the supporting documents were received by DIRCO and forwarded to the Director General of the Department. Thus, the request was 'transmitted through the diplomatic channel' and received by the Ministry of Justice, as required by Article 6.

[18] There is no substance, therefore, in the appellant's argument that the request for his extradition had not been properly received as at 12 August 2019. It was submitted on behalf of the appellant that the request had to be received by the Minister directly. For that interpretation to be accepted, one would have to ignore the words 'diplomatic channel' and 'Ministries' in Article 6 of the Protocol, as well as the context in which those words were used. Needless to say, this would not yield a sensible meaning. The Oxford Dictionary describes 'ministry' as (in certain countries) 'a government department headed by a Minister'. This meaning of the word 'ministry' puts to bed the argument that the request had to be received directly by the Minister.

[19] As I have said, it was further argued on behalf of the appellant that a s 5(1)*(a)* notice had to be issued by the Minister, as evidence that a request for the extradition of the appellant had been received. There is no merit in this argument either, as the appellant's arrest was effected in terms of s 5(1)*(b)* of the Act. Section 5(1)*(a)* and s 5(1)*(b)* provide for two separate procedures for the arrest of a person sought to be extradited. This is clearly evidenced by the disjunctive 'or' between the subsections.

An arrest, therefore, can be either in terms of s 5(1)*(a)* or *(b)* and the requirements of the one are not applicable to the other.

[20] It was further submitted on behalf of the appellant that the letter dated 12 August 2019 from the Director General of the Department to the NDPP[8] was confirmation that the Department knew that the Minister had to issue a s 5(1)*(a)* notice before any extradition process could commence. For this submission, reliance was placed upon *Palazzolo v Minister of Justice and Constitutional Development and Others.*[9] However, that submission was misplaced as the court in *Palazzolo* made it clear that the Act does not oblige the Minister to issue a notice in terms of s 5(1)*(a)*.[10] As I have demonstrated, such a notice is not applicable when the arrest has been effected in terms of s 5(1)*(b)*.

[21] Lastly, it was submitted that in the absence of a requirement that a notice be issued by the Minister, the provisional arrest process could be subject to abuse. It was contended that the police could willy-nilly arrest people under the pretext that they would be extradited, and thereafter leave them to languish in prisons with no extradition proceedings being put in motion. However, this argument ignores the provisions of s 8 of the Act, which enjoin the magistrate, after issuing a warrant for the arrest or further detention of a fugitive, to immediately furnish the Minister with the particulars relating to the issue of such warrant. The Minister may at any time thereafter, in the case where the warrant has not yet been executed, direct the magistrate concerned to cancel the warrant. In the case where the warrant has been executed, he may direct that the arrested person be discharged forthwith. In my view, these are sufficient safeguards against the postulated abuse.

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[8] See para 5 above.
[9] *Palazzolo v Minister of Justice and Constitutional Development and Others* [2010] ZAWCHC 422.
[10] Ibid para 16.

[22] In the circumstances, the appeal must fail. Despite the appellant's unsuccessful challenge in asserting his right to freedom, he ought not to be mulcted with a costs order in line with the principles enunciated in *Biowatch Trust*.[11] The following order is made:

The appeal is dismissed with no order as to costs.

T P POYO-DLWATI
ACTING JUDGE OF APPEAL

[11] *Biowatch Trust v Registrar Genetic Resources and Others* 2009 (6) SA 232 (CC).

APPEARANCES

For Appellant:	C E Thompson
	Instructed by: Bernard L Du Plessis Incorporated, Johannesburg Symington De Kok Attorneys, Bloemfontein
For Respondent:	D Barnard (with P Schutte)
	Instructed by: State Attorney, Johannesburg State Attorney, Bloemfontein