REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 177/05
Reportable

In the matter between:

NELSON YESTER PABLO GARRIDO **APPELLANT**

and

THE DIRECTOR OF PUBLIC PROSECUTIONS WITWATERSRAND LOCAL DIVISION **FIRST RESPONDENT**

CLIFFORD McKELVEY **SECOND RESPONDENT**

Ms NAIDOO, MAGISTRATE RANDBURG **THIRD RESPONDENT**

THE MINISTER OF JUSTICE **FOURTH RESPONDENT**

CORAM: FARLAM, CAMERON et PONNAN JJA

HEARD: 30 AUGUST 2006

DELIVERED: 28 SEPTEMBER 2006

SUMMARY: Extraditon – enquiry under 59, Act 67 of 1962 – respondent can adduce evidence on issues relevant under s 11

Neutral citation: This judgment may be referred to as *Garrido v DPP* [2006] SCA 122 (RSA).

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JUDGMENT

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FARLAM JA

INTRODUCTION

[1] The appellant in this matter appeals against a judgment given by Willis J in the Johannesburg High Court dismissing with costs his application to review and set aside an order made by the third respondent, a magistrate sitting in the Randburg magistrate's court, committing the appellant to prison in terms of s 10(1) of the Extradition Act 67 of 1962, as amended, to await the decision of fourth respondent, the Minister of Justice, with regard to his surrender to the United States of America.

[2] The government of the United States of America sent a request to the Minister for the surrender of the appellant so that he can stand trial in the United States of America on charges relating to his alleged involvement in an conspiracy to import into the United States, possess and distribute narcotics. A warrant was issued for his arrest under s 5(1) of the Extradition Act, to which I shall refer in what follows as 'the Act'. After he had been detained under this warrant he was brought before the third respondent so that she could hold an enquiry in terms of s 9 of the Act.

RELEVANT STATUTORY PROVISIONS

[3] In order to render what follows more easily intelligible it is necessary to say something about the procedure outlined in the Act for dealing with a request from a foreign state for the surrender of a person believed to be in this country where, as is the position in the present case, there is an extradition agreement between the foreign state concerned, here the United States of America, and the Republic.

[4] Section 9 of the Act provides for the holding of an enquiry before a magistrate in whose area of jurisdiction a person whose extradition to a foreign state is sought has been arrested. Section 9 (2), as far as is material, reads as follows:

'(2) Subject to the provisions of this Act the magistrate holding the enquiry shall proceed in the manner

in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic . . . .'

[5] Section 10, as far as is material is in the following terms:

'(1) If upon the consideration of the evidence adduced at the enquiry . . . 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.

(2) For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.

(3) If the magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him.

(4) The magistrate issuing the order of committal shall forthwith forward to the Minister a copy of the record of the proceedings together with such report as he may deem necessary.'

[6] Section 11 reads as follows:

'The Minister may –

(a) order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her; or

(b) order that a person shall not be surrendered –

  (i) where criminal proceedings against such person are pending in the Republic, until such proceedings are concluded and where such proceedings result in a sentence of a term of imprisonment, until such sentence has been served;

  (ii) where such person is serving, or is about to serve a sentence of a term of imprisonment, until such sentence has been completed;

  (iii) at all, before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would, having regard to the distance, the facilities for communication and to all the

circumstances of the case, be unjust or unreasonable or too severe a punishment to surrender the person concerned; or

(iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion.'

[7] Apart from the fact that the magistrate was not empowered to rule on the contention that s 10(2) of the Act is unconstitutional (see s 170 of the Constitution) it is relevant to point out that after the hearing before her, but before she gave her judgment, the Constitutional Court considered and rejected a challenge to the constitutionality of s 10(2): see *Geuking v President of the Republic of South Africa* 2003 (3) SA 34 (CC).

FACTS

[8] The enquiry commenced on 22 August 2002. Before it began a document, headed Notice of Objection, was filed on the appellant's behalf, in which were set out sixteen grounds of objection to the extradition application. The notice stated that the appellant would raise these objections *'in limine* before he [was] called upon to answer'. In this objection reference was made to a certificate, issued in terms of s 10(2) of the Act, by Assistant United States Attorney Diana L.W. Fernandez, of the Southern District of Florida, in which she certified that she had sufficient evidence at her disposal to warrant prosecution of the appellant on the charges in respect of which his extradition was sought. The appellant asked the magistrate to declare *inter alia,* that the provisions of s 10(2) of the Act are unconstitutional and that 'no reliance [could] be placed on a certificate purported to be issued in terms of s 10(2)'. One of the other points raised on the appellant's behalf was the documents relied on by the State had been received out of time and could not be relied on.

[9] At the start of the appellant's counsel's address to the magistrate he said:
'Your worship we submitted on the previous occasion . . . a Notice of Objection, wherein various legal points were taken *in limine,* before entering into the merits.'

[10] During the course of the appellant's counsel's argument the magistrate stated that her role at that stage was not to act as the judge in the trial matter but merely to see that she had sufficient evidence to warrant a prosecution, not a conviction. The appellant's counsel then responded to this comment by saying:

'Not even at this stage. At this stage I am saying to you the papers are irregular for the following reasons . . . . Thereafter I enter into the merits and I call people to testify, [the appellant] can be called to testify, people can be called to testify in his support or against his affidavit and that is when we make that finding.'

Later on in his address the appellant's counsel said:

'I therefore submit that the papers are not properly before this court within the required time period and that your worship should on the point *in limine* uphold the respondent's contention that this matter should be dismissed and failing which your worship as I have already alluded to the next step would be to enter into the merits.'

At the end of his argument the magistrate said to the appellant's counsel:

'Is that it then? You have no further address?'

Counsel replied:

'Yes on the preliminary points. On the points *in limine* no. . . . . If it is found against me then I will enter into the merits of the case, your worship, at the next stage.'

The magistrate then reserved judgment.

[11] When she delivered her judgment the magistrate dealt with and rejected all the grounds set forth in the appellant's notice of objection and proceeded to find that the United States government had sufficient evidence at its disposal to warrant the prosecution of the respondent on the charges contained in the indictment returned by the grand jury. She concluded:

'The court therefore submits that the requirements of s 10(1) of the Extradition Act have been positively established and that the respondent be taken into custody pending the decision of the minister of justice.'

(As Willis J pointed out in the court *a quo* the magistrate presumably used the word

'submits' *per incuriam.* What she clearly meant was that she found that the requirements of s 10(1) had been satisfied and she therefore ordered that the appellant be committed to prison to await the Minister's decision with regard to his surrender.)

[12] As soon as the magistrate had finished giving her judgment the appellant's counsel pointed out that there seemed to be some misunderstanding as the points taken in the notice of objection were raised *in limine* and were not intended to deal with the merits. He said that it was the appellant's intention, as he put it, 'to delve into the merits of the matter and answer the allegations for the court to make a determination in terms of section 10 of the Act.'

[13] He stressed that it had been made clear that the notice of objection contained what he called 'an objection to the papers' and that it was his client's intention, should he not succeed with his points *in limine,* to 'answer' the papers.

[14] When the magistrate asked the prosecution's counsel to respond, he contended that there was nothing more for the court to do and that it was *functus officio.* Later on, after the appellant's counsel had again addressed the court and said that the *audi alteram partem* principle had not been complied with, counsel for the prosecution addressed the court again and submitted that, the technical objections raised by the appellant having been disposed of, it was not for the court to give a decision on the question as to whether the appellant was innocent on the charges brought against him.

[15] The magistrate then gave a further short judgment in which she said that she was of the opinion that the *audi alteram partem* principle had been complied with in that 'the State and the [appellant] were given ample opportunity to provide evidence in this enquiry.'

[16] She referred to the s 10(2) certificate that had been put before her and said that she had no discretion to go beyond the certificate and hold that there was not sufficient

evidence to warrant the prosecution of the appellant on the charges set out in the request. She added, however, that she had perused the affidavits which accompanied the request as well as the heads of argument presented by the appellant's counsel and that she was in the circumstances of the opinion that the evidence contained in the affidavits contained sufficient evidence for the appellant to be tried in the United States on the charges.

THE APPELLANT'S MAIN CONTENTIONS

[17] In his founding affidavit in support of his application for the magistrate's order committing him to prison to be reviewed and set aside the appellant stated that he had not been given the opportunity 'to lead evidence or indeed to explore factually *inter alia* the issue of what "an appropriate authority of the requesting State" may be as contemplated in the Act. . . . In particular, I have not been able to test through the leading of appropriate evidence as to whether Ms Fernandes, at whose instance the application was brought, is indeed the "appropriate authority". . . .'

[18] He also stated that he wished to adduce evidence before the magistrate to establish what he called 'the paucity of credible evidence' which the prosecution in the United States had available to lead against the appellant. This, he said, was not only relevant to the issue which the magistrate had to decide, namely the sufficiency of the evidence against him but also it brought into question the *bona fides* of the motivation provided by the United States authorities in support of its request for his extradition. Although this was a matter for the Minister to decide, he pointed out in this regard that the magistrate was obliged under s 10(4) of the Act to forward to the Minister a copy of the record of the proceedings together with such report as she might deem necessary.

RESPONSE OF THE RESPONDENTS

[19] A notice was filed on behalf of the magistrate and the Minister in which they stated that they abided the court's decision. In the answering affidavit filed on behalf of the first respondent, the Director of Public Prosecutions for the Witwatersrand Local

Division, which was deposed to by Mr JR Davidowitz, a Deputy Director of Public Prosecutions for the Witwatersrand Local Division, it was stated that although the argument on behalf of the appellant was presented in the form of an argument *in limine* it was 'directed at a final decision on the two enquiries involved in an extradition enquiry'. It was also contended that the material which the appellant wished to adduce on the alleged paucity of credible evidence against him was irrelevant to the issues to be decided during an extradition enquiry. Mr Davidowitz also stated that the appellant never advised the magistrate that the evidence he wished to present was for the purpose of influencing the Minister at the s 11 stage of the process and that the appellant could submit representations to the Minister in support of his allegation that the request for his extradition was not made in good faith.

[20] Mr Davidowitz contended that the appellant was given an opportunity to raise and argue during the enquiry the issue as to whether Ms Fernandes was the 'appropriate authority' to make the s 10(2) certificate. Mr Davidowitz also averred that 'once the objection points were not upheld by the [magistrate] there was (in terms of the Extradition Act) nothing further for the court of enquiry to consider, inquire into or investigate'. He accordingly contended that the appellant had suffered no prejudice by the magistrate's refusal to allow him the opportunity to lead evidence on the merits.

JUDGMENT IN COURT *A QUO*

[21] In his judgment in the court *a quo* Willis J dismissed the appellant's application to review the magistrate's decision because, so he held, the issues on which the appellant sought to lead further evidence before her were not permitted. The learned judge came to this conclusion because of the statements made by the advocate who appeared for the appellant before the magistrate that he wanted to lead evidence on 'the merits of the case' and that he wished, if the points *in limine* were rejected, 'to delve into the merits of the matter and answer the allegations for the court to make a determination in terms of section 10 of the Act'.

DISCUSSION

[22] In my view the judge *a quo* gave an unduly restricted interpretation to the expression 'the merits of the case', which was used in contradistinction to the preliminary points, ie, those that could be argued on the papers before the court. Thus the question as to whether Ms Fernandes was 'an appropriate authority in charge of the prosecution' in the United States could not be dealt with as a preliminary point on the papers and was capable of constituting part of 'the merits'. Furthermore evidence adduced to show that the appellant was not guilty of the charges preferred against him and that the prosecution in the United States was not in possession of any credible evidence to justify his prosecution was relevant to show, or attempt to show, that the request was not made in good faith. It is true that the question as to whether the surrender of the appellant was being requested in good faith was a matter for the Minister to consider under s 11(b)(iii) of the Act and not for the magistrate under s 10(2), but it was clearly a matter with which the magistrate could deal in her report to the Minister under s 10(4). As was said by Goldstone J in *Geuking's* case (at 50 G-H), a respondent in an extradition enquiry being held under s 10(2):

'is entitled to give and adduce evidence at the enquiry which would have a bearing not only on the magistrate's decision under s 10, but could have a bearing on the exercise by the Minister of the discretion under s 11.'

[23] Counsel for the first respondent contended that this statement was *obiter* and incorrect and that it should not be followed. I do not agree that it was *obiter.* The issue before the Constitutional Court in *Geuking's* case was the constitutionality of s 10(2). As part of his reasoning in concluding that the subsection is constitutional Goldstone J had regard in para [42] of his judgment to five matters which he said had to be borne in mind in this context. The fifth was the entitlement of a person in the position of the appellant to give evidence on matters having a bearing on the exercise by the Minister of the discretion under s 11. It follows that the statement I have quoted was part of the *ratio* of the judgment, which is accordingly binding on this Court.

[24] Apart from the fact that I am satisfied that this statement is not *obiter,* I am also of

the view that it is correct. I say this because s 9(2), as has been seen, requires a magistrate holding an enquiry to 'proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic'. The manner in which preparatory examinations are to be held is the subject of Chapter 20 of the Criminal Procedure Act 51 of 1977, in which are to be found ss 133 and 134 which, as far as is material, provide as follows:

'133. An accused may [after the charge has been put to him and he has pleaded thereto] . . . give evidence or make an unsworn statement in relation to a charge put to him . . .'

'134. An accused may call any competent witness on behalf of the defence.'

[25] The magistrate's power to make such report to the Minister as he or she may deem necessary is clearly designed to enable him or her to give assistance to the Minister in regard to the matters on which the Minister has to exercise a discretion under s 11. That being so, it is clearly appropriate that the person whose surrender to the foreign state making the request is sought should be entitled to place material before the magistrate holding the enquiry in the hope of persuading the magistrate to include material in a report to be submitted to the Minister which may induce the Minister to order that the person concerned not be surrendered on one or other of the grounds set forth in s 11(b).

[26] It is true, as Mr Davidowitz pointed out in his affidavit, that the appellant never advised the magistrate that the evidence he wished to present was for the purpose of influencing the Minister at the s 11 stage of the process but there is no provision in the Act which obliges a respondent at an extradition enquiry to indicate in advance for what purpose he or she proposes adducing evidence.

[27] In the circumstances it is clear that the magistrate failed to observe the procedural requirements of *audi alteram partem,* and that the order committing the appellant should, for this reason, be set aside. The court *a quo* therefore erred in dismissing the appellant's application to review the magistrate's order and the appeal should be allowed. For some reason, which was not explained, counsel who appeared for the first

respondent at the enquiry (and indeed before Willis J and this court) was cited as the second respondent. There was clearly no basis for so citing him and no basis exists for ordering him to pay costs. In the circumstances a costs order will only be made against the first respondent.

ORDER

[28] The following order is made:

1. The appeal succeeds with costs, such costs to be paid by the first respondent.
2. The order made by the court *a quo* is set aside and the following order is substituted therefor:

   'A The decision made by the third respondent in the magistrate's court for the district of Randburg under case number B1594/02 committing the respondent to prison to await the decision of the fourth respondent with regard to his surrender to the United States of America is reviewed and set aside.

   B The first respondent is ordered to pay the applicant's costs of suit in this application.'

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IG FARLAM
JUDGE OF APPEAL

CONCURRING

CAMERON JA
PONNAN JA