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

JUDGMENT

Reportable / Not Reportable

Case no: A261/2024

In the matter between:

**DIRECTOR OF PUBLIC PROSECUTIONS
WESTERN CAPE**

APPELLANT

and

DANIEL LOUIE

RESPONDENT

Neutral citation: *DPP v Louie* (Case no A261/2024) [2025] ZAWCHC ... (191225)

Coram: **SALDANHA, J and SLINGERS, J**

Heard: 12 September 2025, Finalised 22 September 2025

Delivered:

Summary:

ORDER

1. The discharge of the respondent by the magistrate is set aside.
2. The respondent is found to be liable to be extradited to the United States of America.
3. The respondent is to be released on bail in the amount of R25 000 (twenty five thousand rands) pending the decision of the Minister of Justice in terms of section 10(1) and/or the Ministers decision in terms of section 11 of the Extradition Act 67 of 1962 on the following conditions:
 - a. The Respondent must surrender all his passports to the Investigating Officer.
 - b. The Respondent must report to the Gordon's Bay Police Station every Friday.
 - c. The Respondent must remain in South Africa.

JUDGMENT

THE COURT

INTRODUCTION

[1] This is an appeal brought in terms of section 310(1)¹ of the Criminal Procedure Act 51 of 1977 (**'the CPA'**) read with section 310A² against the discharge of the respondent in an extradition enquiry by the Bellville magistrate's court.

[2] Prior to the hearing of the appeal the respondent formally sought condonation for the late filing of his heads of argument. This application was unopposed and was granted during the hearing of the appeal.

¹ When a lower court has in criminal proceedings given a decision in favour of the accused on any question of law, including an order made under section 85 (2), the attorney-general or, if a body or a person other than the attorney-general or his representative, was the prosecutor in the proceedings, then such other prosecutor may require the judicial officer concerned to state a case for the consideration of the provincial or local division having jurisdiction, setting forth the question of law and his decision thereon and, if evidence has been heard, his findings of fact, in so far as they are material to the question of law.

² (1) The attorney-general may appeal against a sentence imposed upon an accused in a criminal case in a lower court, to the provincial or local division having jurisdiction, provided that an application for leave to appeal has been granted by a judge in chambers.

BACKGROUND

[3] The respondent is a Canadian citizen and was originally resident in Canada, relocated to Barbados in January 2012 whereafter he established a company that distributed chemicals used in the manufacturing of synthetic cannabis and bath salts.

[4] Since about February 2011, the Drug Enforcement Administration of the United States of America ('**DEA**') had been investigating the importation, distribution, and use of designer drugs popularly known as '*bath salts*' and synthetic marijuana. 'Bath salts' is an umbrella term for a class of designer drugs which contain *inter alia* various synthetic cathinones which are classified as Schedule 1 Controlled Substances or Controlled Substance Analogues under the U.S. Controlled Substances Act.³ Synthetic marijuana is an umbrella term for synthetic cannabinoids which are similarly classified as Schedule 1 Controlled Substances or as Controlled Substance Analogues under the U.S. Controlled Substances Act. Under American law it is illegal to import and to sell Schedule 1 Controlled Substances and Controlled Substance Analogues.

[5] On 26 June 2013, the Barbados police conducted a raid on the premises of the respondent. Prior to the raid, DEA agents had made undercover purchases from the respondent. The respondent was informed that he was under investigation by the DEA and that he was facing criminal charges in the United States of America ('**the USA**'). The respondent was subsequently arrested and charged in Barbados.

[6] On 17 January 2014, the USA requested of the South African authorities the provisional arrest of the respondent. This request was fulfilled on 5 March 2014, when the respondent was arrested at Cape Town International Airport in terms of section 40(1)(k)⁴ of the CPA). At the time of his arrest the respondent was in

³ Paragraph 6 of the affidavit deposed to by Brendan Quigley, v3, page 700

⁴ 40 (1) A peace officer may without warrant arrest any person -

(k) who has been concerned in or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists that he has been concerned in any act committed outside the Republic which, if committed in the Republic, would have been punishable as an offence, and for which he is, under any law relating to extradition or fugitive offenders, liable to be arrested or detained in custody in the Republic.

possession of a boarding pass for Barbados via London, Heathrow International Airport.

[7] On 6 March 2014, the respondent appeared in the Bellville magistrate's court whereupon the matter was remanded to 7 March 2014 to allow the respondent an opportunity to obtain legal representation. On 7 March 2014, the respondent's attorney, Mr Mbazwana informed the court that he was not ready to proceed, resulting in the matter being postponed to 11 March 2014 to afford Mr Mbazwana an opportunity to consult with the respondent who, at that stage, was detained at Ravensmead police station.

[8] On 11 March 2014, an application was made in terms of section 7⁵ of the Extradition Act 67 of 1962. During this enquiry, the appellant introduced, and the court relied upon a statement by Petro Bekker from the National Department of Health which stated that Buphedrone was listed as a Scheduled 7 substance in terms of the Medicines and Related Substances Act 101 of 1965. The court ordered the further detention of the respondent.

[9] On 12 March 2014 the respondent's legal representative requested that he be released on bail. This request was opposed by the state, resulting in the matter being postponed to 19 March 2014 for the holding of a formal bail application. On 31 March 2014, the respondent was released on bail in the amount of R100 000.00.

[10] On 2 May 2014 the USA requested the extradition of the respondent by way of a diplomatic note. On 20 May 2014, the Minister of Justice and Constitutional Development issued a notification in terms of section 5(1)(a)⁶ of the Extradition Act.

⁵ **Warrants for further detention of persons arrested without warrant. -**

(1) Any magistrate may issue a warrant for the further detention of any person arrested without warrant under any law of the Republic providing for the arrest without warrant of persons liable to be apprehended under any law relating to extradition.

(2) Such a warrant for the further detention of any person may be issued upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of the 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.

⁶ 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 -

(a) 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

[11] The request for extradition was made in terms of sections 9⁷ and 10⁸ of the Extradition Act. The magistrate informed the Minister of Justice and Constitutional Development on 15 January 2015 in terms of section 8 of the Extradition Act.

[12] After the respondent was released on bail and during the period from 2014 to 2018, the extradition enquiry did not proceed as a result of the respondent's legal challenge to the amendments to Schedule 7 of the Medicines and Related Substances Act. On 24 November 2017 the magistrate's court was informed that the respondent had abandoned his legal challenge and the extradition enquiry commenced on 18 May 2018 before acting magistrate Godwan. The extradition request was based on the following charges:

⁷ Persons detained under warrant to be brought before magistrate for holding of an enquiry. -

(1) Any person detained under a warrant of arrest or a warrant for his further detention, shall, as soon as possible be brought before a magistrate in whose area of jurisdiction he has been arrested, whereupon such magistrate shall hold an enquiry with a view to the surrender of such person to the foreign State concerned.

(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 and shall, for the purposes of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he has at a preparatory examination so held.

(3) Any deposition, statement on oath or affirmation taken, whether or not taken in the presence of the accused person, or any record of any conviction or any warrant issued in a foreign State, or any copy or sworn translation thereof, may be received in evidence at any such enquiry if such document is-

⁸ Enquiry where offence committed in foreign State. -

(1) If upon consideration of the evidence adduced at the enquiry referred to in section 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 wait 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 the 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.

- (i) count 1 - conspiracy to knowingly and intentionally import a controlled substance, namely Buphedrone, an isomer of Mephedrone, into the United States from on or about July 2012, up to and including in or about June 2013;
- (ii) count 2 - conspiracy to knowingly and intentionally distribute and possess with the intention to distribute a controlled substance, namely Buphedrone, an isomer of Mephedrone, into the United States. This was for the period from July 2012 up to and including in or about June 2013; and
- (iii) count 3 - conspiracy to wilfully and knowingly commit money laundering in connection with laundering the proceeds of drug trafficking through an account in Panama and transmitting money into the United States in furtherance of illegal drug trafficking in the period from about July 2012 up to and including in or about June 2013.

[13] The enquiry was set to proceed on 7 December 2018, when the respondent took a point *in limine* challenging the admissibility of the statement by Mr Brandon F Quigley, an assistant United States District Attorney. On 22 February 2019, the magistrate ruled that the statement was admissible in the application for the respondent's extradition.

[14] In his statement Quigley stated *inter alia* that the respondent had fled Barbados pending drug charges. This was denied by the respondent.

[15] Thereafter, the application's progress came to a halt. Magistrate Godwana no longer sat at the Bellville magistrate's court and refused to return to the court to continue the enquiry with which he was seized. He only returned to continue with the enquiry on 29 March 2021, after being directed to do so by an order of court following a special review in the Western Cape High Court.

[16] During the hearing of the enquiry, the appellant presented the evidence of Colonel Westraat, a chemical expert assigned to the South African Forensic Science Laboratory. Westraat's qualifications include a BSC degree from the University of Pretoria with chemistry and biochemistry and a higher diploma in analytical chemistry from the Pretoria University of Technology and a MPhil degree in Biomedical Forensic Science from the University of Cape Town. Westraat testified

that he was also a registered professional natural scientist at the Council for Nature Scientific Professions in terms of section 23A of the National Scientific Professions Act 17 of 2003. At the time of testifying, he had 34 years' experience in forensic investigations of crime scenes.

[17] His evidence was that Buphedrone was a chemically related substance or homologue that incorporates a structural fragment similar to Cathinone. As Cathinone is listed in schedule 7 to the Medicines and Related Substances Act, Buphedrone is per implication listed in Schedule 7

[18] This followed from the wording of paragraph (vi) of the introductory part of Schedule 7 provides that:

'All preparations or mixtures of such substances containing or purporting to contain substances referred to in this Schedule include the following (unless expressly excluded or unless listed in another Schedule):

(vi) all homologues of listed substances (being any chemically related substances that incorporate a structural fragment into their structures that is similar to the structure of a listed substance and/or exhibit pharmacodynamic properties that is similar to listed substance in the Schedules), unless listed separately in the Schedules.'

[19] Cathinone became listed under Schedule 7 of Act 101 of 1965 in Government Notice 31387 of 5 September 2008. In 2012, the Minister of Health updated section 22A(2)⁹ of Act 101 of 1965 which updated Schedule 7 to include all homologues of all listed substances.

[20] The enquiry was then postponed to 7 October 2022 for Colonel Westraat to be cross examined and to afford the respondent an opportunity to consult with an

⁹ All preparations or mixtures of substances containing or purporting to obtain substances referred to in this Schedule include the following (unless expressly excluded or unless listed in Another Schedule):..

(vi) all homologues of listed substances (being any chemically substances that incorporate a structural fragment into their structure that is similar to the structure of a listed substance and/or exhibit pharmacodynamic properties similar to the listed substance in the schedules), unless listed separately in the Schedules.

expert. Although the respondent had an expert present for his cross examination of Westraat, he did not formally appoint an expert and there was no expert evidence presented on his behalf. On 7 October 2022, the appellant closed its case. Thereafter, the matter was delayed for the respondent to consult with and obtain a new legal representative.

[21] The respondent testified in support of his case and submitted a legal opinion from Monty R Rhodes dated 3 May 2012. This opinion included the following conclusion and remark:

'However, in our opinion, we caution that given the structural similarity of buphenone to currently scheduled chemical compounds, such as cathinone, the continued sale and importation of this material may have a higher risk associated with it compared to previous compounds we have reviewed. We therefore recommend you request a supplemental opinion to consider potential criminal claims associated with this particular research chemical (buphedrone) if the structure and/or purity of this product are changed in any material respect in the future, or if there are changes to the federal laws discussed herein.'

[22] The court *a quo* gave an unwritten judgment on 1 December 2012 and ruled at the end of the enquiry that the respondent be discharged in terms of section 2 of the Extradition Act.

[23] On 7 February 2024, the appellant requested a stated case in terms of section 310 of the CPA. On 19 June 2024, the magistrate presented a judgment titled '*Stated Case: In Terms of section 310(1) of the Criminal Procedure Act 51 of 1977*'. In this judgment, the magistrate found that the appellant failed to make out a case for the extradition of the respondent to the USA on the basis that the appellant failed to prove the requirement of dual criminality.

[24] On 9 July 2024, the appellant filed a notice of appeal. The appellant contends that the magistrate failed to properly consider and apply the doctrine of dual

criminality and that he misapplied the standard for sufficiency of evidence under section 10(2)¹⁰ of the Extradition Act.

[25] On 22 October 2024, the magistrate filed a notice of '*Reasons For Judgment*' in terms of Rule 51(8)(a)¹¹ where he recorded that the written reasons for judgment were placed on file on 19 June 2024 and that he has nothing further to add.

[26] The appellant proposed that the questions of law which this court has to determine could be formulated as:

(a) Question 1: Did the Magistrate err in law by finding that Buphedrone, being a homologue of Cathinone, was not a "dangerous or undesirable dependence-producing substance" or a "prohibited substance" as contemplated in Schedule 7 of the Medicines and Related Substances Act 101 of 1965, thereby incorrectly concluding that the importing of Buphedrone (as charged in Count 1) did not constitute a criminal offence in South Africa?

(b) Question 2: Did the Magistrate err in law by holding that the distribution and possession of Buphedrone (as charged in Count 2) did not constitute a contravention of Section 22A(9)(a) read with Section 22A(10) and Section 22A(11)(a) of the Medicine and Related Substances Act 101 of 1965, on the basis that Buphedrone was not a controlled substance under the Schedule of the Act?

(c) Question 3: Did the Magistrate err in law by holding that the proceeds derived from the sale of Buphedrone were not "proceeds of unlawful activities" as defined in Section 1 of the Prevention of Organised Crime Act 21 of 1998,

¹⁰ 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.

¹¹ Upon the delivery of a notice of appeal the relevant judicial officer shall within 15 days thereafter hand to the registrar or clerk of the court a statement in writing showing (so far as may be necessary having regard to any judgment in writing already hand in by him or her) -

(i) the facts he or she found to be proved;

(ii) the grounds upon which he or she arrived at any finding of fact specified in the notice of appeal as appealed against;

(iii) his or her reasons for any ruling of law or for the admission or rejection of any evidence so specified as appealed against. A statement referred to in paragraph (a) shall become part of the record.

(iv) (c) This rule shall also, so far as may be necessary, applied to a cross-appeal.

thereby incorrectly finding that the alleged laundering of such proceeds (as charged in Count 3) did not constitute a contravention of Sections 4 or 5 of the said Act?

(d) Question 4: Did the Magistrate err in law by misinterpreting or misapplying the principle of statutory interpretation by admitting expert evidence but not applying the expert evidence in determining whether Buphedrone fell within the ambit of the relevant schedules or definitions of the Medicines and Related Substances Act 101 of 1965, which resulted in the discharge of the accused on Counts 1 - 2 and also, as a consequence, on Count 3?

THE REQUIREMENT OF DUAL CRIMINALITY

Questions (a,) (b) and (c)

[27] These proceedings arose in the context of the Extradition Treaty between the Republic of South Africa and the United States of America. In terms of section 2 (3) *ter*¹² of the Extradition Act, the then Minister of Justice and Constitutional Development gave notice that the Parliament of the Republic of South Africa had on 3 November 2000 agreed to the ratification of the extradition treaty between the Republic of South Africa ('**South Africa**') and the USA. The exchange of the instrument of Ratification brought the treaty into force on 25 June 2001¹³.

[28] Article 1 of the treaty records the agreement between the respective parties to extradite to each other, subject to provisions of the treaty, persons who the authorities in the Requesting State have charged with or convicted of an extraditable offence. Article 2 deals with the nature of extraditable offences and sub-article 3 (a) provides that:

'For the purposes of this Article, an offence shall be an extraditable offence whether or not the:

¹² The Minister 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.

¹³ Government Notice No. R.593 29 June 2001

(a) laws in the Requesting and Requested States place the offence within the same category of offences or describe the offence by the same terminology or ...'

[29] An extraditable offence is defined in Section 1 the Extradition Act as 'any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State.'

[30] In an email dated 17 January 2014 addressed to the Director-General, Chief Directorate International Legal Relations of South Africa, the US Department of Justice made an Urgent Request to the Republic of South Africa¹⁴ for the provisional arrest for extradition of the respondent. The request was made pursuant to Article 13

¹⁴ 1. Pursuant to Article 13 of the Extradition Treaty between the United States and the Republic of South Africa, signed on September 16, 1999 (entered into force June, 2001), the U.S. Department of Justice requests the provisional arrest for purpose of extradition of Daniel M. Louie, also known as "Dan" Louie (LOUIE). LOUIE is a citizen of Canada and Barbados and resides in Barbados. According to United States law enforcement agents, on or about January 11, 2014, LOUIE arrived in Cape Town, Republic of South Africa, on British Airways flight 043 from London, with his travel starting from Toronto, Canada. LOUIE is scheduled to depart Cape Town on February 4, 2014 aboard British Airways flight 058 to London, returning to Toronto. Although LOUIE has booked a flight to return to Canada, his travel plans have been varied and not always predictable. In view of the difficulty in predicting if LOUIE will return to Canada, his provisional arrest in South Africa is urgent. Drug Enforcement Administration (DEA) Country Attache/Special Agent Arthur Staples at the US Embassy in Pretoria is the point of contact regarding the case. DEA Special Agent Staples can be reached at +27(0) 1[...], or by e-mail at a[...].

2. LOUIE is wanted to stand trial in the United States for drug trafficking and money laundering. LOUIE is charged by an indictment, number #13 CRIM 822, filed on October 21, 2013, in the United States District Court for the Southern District of New York, with:

Count One: Conspiracy to knowingly and intentionally import a controlled substance, namely Buphedrone, an isomer of Mephedrone, into the United States from on or about July 2012, to on or about July 2013, in violation of Title 21, United States Code, Sections 952, 960 and 963;

Count Two: Conspiracy to knowingly and intentionally distribute and possess with intent to distribute a controlled substance, namely Buphedrone, an isomer of Mephedrone, from on or about July 2012, to on or about July 2013, in violation of Title 21, United States Code, Sections 846 and 841(a)(1); and

Count Three: Conspiracy to commit money laundering in connection with laundering the proceeds of drug trafficking, from on or about July 2012, to on or about July 2013, in violation of Title 18, United States Code, Section 1956(a)(2)(A), 1956(a)(2)(B)(i), and 1956(h).

The maximum punishment for these offences up to 20 years imprisonment as to each count.

3. The offenses with which LOUIE is charged are covered under Articles 2(1) and 2(2) of the Treaty. Special Agent Staples has been advised by South African law enforcement authorities that Buphedrone is schedule 7 controlled substance under the law of South Africa.

of the Treaty¹⁵. Paragraph 2 of the Urgent Request stated that the respondent was wanted to stand trial in the United States for drug trafficking and money laundering. It referred to the respondent being charged by indictment No. 13 CRIM 822, filed on October 21, 2013 in the United States District Court for the Southern District of New York and three counts were listed therein (referred to above). The US State Department stated that the charges that the respondent faced were covered under Articles 2 (1) and 2 (2) (above) of the Treaty. It also stated that 'Special Agent Staples has been advised by South African law enforcement authorities that Buphedrone is Schedule 7 controlled substance under the law of South Africa (sic).'

[31] The US State Department stated further that on October 21, 2013, a warrant for the arrest of the respondent had been issued by a United States Magistrate of the District Court for Southern District of New York based on the charges in the indictment. It claimed that the arrest warrant remained valid and executable to apprehend the respondent for the charges filed in the indictment. The request further set out the facts of the case that the respondent faced in the United States, which for present purposes is not necessary to repeat and has already been set out earlier in this judgment.

[32] The purpose of extradition is to secure the return for trial or punishment of persons accused or convicted of crimes. Extradition is essentially a process of intergovernmental legal assistance and based on the principle of reciprocity. In this matter the legal basis of the extradition is based on the Treaty as referred to above.

[33] Central to the application for the extradition of the respondent is the requirement of dual criminality which the appellant was required to be satisfied.

¹⁵ 1. In case of urgency, the Requesting State may, for the purpose of extradition, request the provisional arrest of the person sought pending presentation of the documents in support of the extradition request. A request for provisional arrest may be transmitted through the diplomatic channel or directly between the Republic of South Africa Department of Justice and the United States Department of Justice. The facilities of the International Criminal Police Organization (INTERPOL) also may be used to transmit such a request. The application may also be transmitted by post, telegraph, telefax or any other means affording a record in writing.

2. The application for provisional arrest shall contain:

- (a) a description of the person sought;
- (b) the location of the person sought, if known;
- (c) a description of the offence(s);
- (d) a concise statement of the acts or omissions alleged to constitute the offence(s);

Schippers, AJA (as he then was) in *Patel v National Director of Public Prosecutions* 2017 (1) SACR 456 (SCA) stated at paragraph 8:

'[8] The principle of double (or dual) criminality is internationally recognized as central to extradition law. The principle requires that an alleged crime for which extradition is sought is a crime in both the requested and requesting states. In other words, the crime for which extradition is sought must be one for which the requested state would in turn be able to demand extradition. Oppenheim puts it succinctly:

"No person may be extradited whose deed is not a crime according to the criminal law of the State which is asked to extradite as well as the State which demands extradition."

[9] Double criminality, a substantive requirement for extradition, is predicated on the premise of reciprocity in the sense of equivalent mutual treatment deriving from mutuality of legal obligations. Shearer, states that the double-criminality rule is based on reciprocity:

"The validity of the double criminality rule has never seriously been contested, resting as it does in part on the basic principle of reciprocity, which underlies the whole structure of extradition, and in part on the maximum of *nulla poena sine lege*. For the double criminality rule serves the most important function of ensuring that the person's liberty is not restricted as a consequence of offences not recognised as criminal by the requested State. The social science of a State is also not embarrassed by an obligation to extradite a person who would, not according to its own standards, be guilty of acts deserving punishment. So far as the reciprocity principle is concerned, the rule ensures that a State is not required to extradite categories of offenders for which it, in return, would never have occasion to make demand. The point is by no means an academic one even in these days of growing uniformity of standards; in Western Europe alone sharp variations are found among the criminal laws relating to such matters as abortion, adultery, euthanasia, homosexual behaviour, and suicide."

[10] The principle of double criminality is closely related to extraditable offences. This is evident from the provisions of both the Act and the treaty.'

[34] Importantly, the renowned Professor John Dugard in his work, *International Law, A South African Perspective*¹⁶ states at page 219 in relation to the principal of double criminality that:

'The principle of double criminality requires that the conduct claimed to constitute an extraditable crime should constitute a crime in both the requesting and the requested state. It is not necessary that the offence should have the same name in both states, provided that they are substantially similar.'

THE ENQUIRY IN TERMS OF SECTION 9 OF THE EXTRADITION ACT

[35] As already indicated in the period 2014 to 2018 there was a considerable delay in the enquiry because the respondent approached the Western Cape High Court with an application to nullify the legislative process on how the Minister of Health had made certain amendments to Schedule 7 of the Medicines Act. The application was brought essentially on the same grounds as in the matter of *Smit v Minister of Justice and Correctional Services and Others* 2020 ZACC 29¹⁷.

[36] During this period of delay on 15 March 2016 Mephedrone was listed in Schedule 7 of the Medicine's Act¹⁸.

¹⁶ 2005, Juta, Third Edition.

¹⁷ "On 17 September 2020, the Constitutional Court found that section 63 granted the Minister plenary legislative power without adequate guidance or oversight, effectively allowing the executive to amend the law without parliamentary approval. This was deemed a violation of the separation of powers principle enshrined in the Constitution. The Court declared section 63 and the subsequent amendments made under its authority to be constitutionally invalid. However, to avoid legal uncertainty and disruption, the Court suspended the declaration of invalidity for 24 months, providing Parliament with an opportunity to rectify the constitutional defect. The invalidity was however not retroactive."

¹⁸ Government Gazette No 39815 Vol 609 page 21.

[37] On 24 November 2014, the then legal representative of the respondent, a Mr. Slabbert informed the court that the respondent had abandoned the High Court review application.

[38] At the commencement of the enquiry, the previous counsel for the respondent, Mr. Katz sought to challenge the admissibility of documents submitted into the enquiry which had been produced by the US authorities. The court found the documents to be admissible.

[39] The enquiry only re-commenced on 29 March 2021. At the commencement of the hearing, counsel for the appellant Mr Badenhorst, indicated that it had intended to call Ms. Petro Bekker as an expert witness, but that she would no longer be called as she had left the employ of the State. In an affidavit dated 3 February 2014, Ms. Bekker had contended, incorrectly so, that Buphedrone was a positional isomer of Cathinone. In this regard she stated at paragraph 6 of her affidavit dated 3 February 2014;

"Buphedrone and any preparation containing Buphedrone is a Schedule 7 medicine/substance. Buphedrone is alpha-methylamino-Butyrphenone MABP (Cas 166593-10-8) is a positional isomer of cathitone'

[40] The appellant presented an affidavit by Colonel Hendrik Johannes Jakobus Westraat (Colonel Westraat) dated 17 March 2021 and sought to lead him as an expert witness in the enquiry. In his affidavit as indicated, Colonel Westraat set out extensively his qualifications as a forensic analyst, that he had 34 years experience in chemical analysis and 28 years in forensic investigation of crime scenes. In paragraph 3 and onwards of the affidavit he stated:

'3. I have been asked by Colonel Jooste to compile an affidavit regarding the scheduling, of the compound Buphedrone, in South Africa.

4.1 Buphedrone is a chemically related substance (Homologue) that incorporates a structural fragment in its structure, that is similar to Cathinone ((-) - (s)-2-amino propiophenore). Because Cathinone is listed in Schedule 7

of Act 101/65, Medicines and related Substances Act, buphedrone is therefor also per implication listed in Schedule 7 (Schedule 7 (vi)).

4.2 Act 101 of 1965 Section 22 A (I) prohibits the use, possession manufacture or supply of any substance listed in Schedule 7 by any person other than those listed in Section 22 (A) (a) (i) - (ii) (Pharmacists, Medical Practitioner, Dentist, Veterinarian, etc).

4.3 In terms of Section 29(K) transgressions of Section 22 (A) constitutes an offence.

4.4 Section 30 (i) states "Any person who is convicted of an offence referred to in Section 29 shall be liable to a fine, or to imprisonment for a period not exceeding ten (10) years".

4.5 Buphedrone is not listed in the Drug and Drug Trafficking Act, Act 140 of 92.

5.1 Find attach structural formula for Cathinone and its homologue Buphedrone-Annexure A.'

[40] There was once again, objection by counsel for the respondent, Mr. Katz this time to the use of the affidavit of Colonel Westraat and him being called as an expert witness. After lengthy argument from both Mr. Katz and Mr. Badenhorst, the magistrate made the following ruling:

'I will accept that Colonel Westraat can give evidence.

Now, the issue with regards to whether Colonel Westraat can give evidence with regards to questions of law, I am still of the view that if Colonel Westraat is going to give evidence with regards to questions of law, the respondent surely will be entitled to an objection. I will make a ruling on that.

With regards to the fact that to disregard whatever he is going to say, I do not think I am going [to] allow it. I am going to allow him to say whatever he wants to say. The counsel for the respondent is able to cross-examine him on the issues that are on the statement. ..

...

I am not going to make a ruling now with regards to whether his statement is admissible or not.

I will make [a] ruling with regards to that later on when I am going to make a decision....

... I am going [to] allow him to lead evidence with regards to what is in his statement. '

[41] The evidence of Colonel Westraat was then led by the appellant. Colonel Westraat sought to show that Buphedrone was listed in Schedule 7 of the Medicines Act and explained why that was so as homologues of listed substances are also considered to be listed. In this regard he referred to Government Notice No 227, Dated 15 March 2012, Government Gazette 35149, Department of Health, which provided;

'All preparation or mixtures of such substances containing or purporting to contain substances referred to in this Schedule include the following (unless expressly excluded or unless listed in another Schedule):

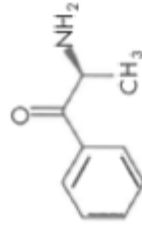
(iv) The isomers of any of the salts referred to in (iii), where the existence of such isomers is possible.'

[42] In respect of the diagram, Annexure A, referred to in his affidavit(included hereunder) he stated as follows:

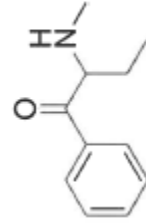
'Cathinone is a stimulant and that is listed in Schedule 7... Buphedrone, the structure at the bottom, is very similar, almost identical to the structure at the top. So the structure at the bottom contains a fragment of the structure on the top. The structure on the top is Cathinone, it is listed... because Buphedrone contains that fragment, Buphedrone is also listed in Schedule 7 of the Medicines Act.'

ANNEXURE A

CATHINONE- Listed in Schedule 7 of Act 101 of 1965



**BUPHERONE - Homologue of Cathinone and therefor per definition listed in
Schedule 7 of Act 101 of 1965**



[43] During the initial cross-examination by Mr. Katz, it appeared and rather tediously, that much was made about Colonel Westraat's references to the law in his affidavit. However, Colonel Westraat remained adamant that the focus of his testimony was to confirm that Buphedrone was a homologue of Cathinone and deferred the legal issues to the court to deal with. The matter was thereafter postponed to enable the respondent and his legal representatives to consult with an expert.

[44] The matter proceeded again on 7 October where further cross-examination was conducted by the respondent's new counsel, Mr. Stander. In relation to the affidavit by Ms. Bekker, Mr. Stander submitted 'it is such a basic chemistry error that I am astounded it has not been brought to the Court's attention'. The magistrate thereupon permitted Mr. Stander to cross-examination Colonel Westraat on the affidavit by Ms. Bekker. Colonel Westraat was adamant that Bekker was incorrect in stating that Buphedrone was a positional isomer of Cathinone. Stander sought to make much of the inconsistent position between Colonel Westraat and the affidavit by Ms Bekker used by the appellant in the earlier proceedings and relied upon in unsuccessfully opposing the release of the respondent on bail¹⁹.

¹⁹ The release of the respondent on bail by the magistrate that dealt with the bail application was based primarily on the finding that the respondent did not pose a flight risk and no reference or reliance was placed in the bail judgment on the affidavit of Ms. Bekker. Colonel Westraat, nonetheless,

[45] Counsel for the appellant correctly pointed out that much of the cross-examination by Mr. Stander of Westraat dealt with irrelevant aspects relating to the Drugs Act. Colonel Westraat for his part maintained that when the extradition proceedings commenced in 2014 Buphedrone was not a listed substance under the Drugs Act. He explained further; 'what I am telling you here today is that if mephedrone is listed in the Drugs Act then [Buphedrone will be listed as an isomer of mephedrone].'

[46] Colonel Westraat emphasised, in response to the questioning by Mr. Stander, as follows: 'I do not understand why we keep on referring to the Drugs Act, given the fact that I already specified many times that my affidavit states that it is a homologue and it is in the Medicines Act, not the Drugs Act.'

[47] Counsel for the appellant in the appeal, Ms. Christians correctly pointed out that Mr. Stander had simply missed the point where he contended that the Drugs Act was relevant: 'Firstly, in terms of dual criminality, there is a particular date in time that is relevant to the term dual criminality. It is the date of extradition. In this case, it can be interpreted as 25 April 2014 when the United States made the request for extradition. Alternatively, 2 May 2014, when it was granted, since you have gone there. That is the relevancy of it and let me then explain to you why that is so relevant, because one then has to determine whether the possession or the distribution of Buphedrone was prohibited at a particular point in time and therefore it is important and one cannot simply give generic evidence as to it is in the Drugs Act, maybe it is not. There was an amendment. We are not going to tell the court when the exact particularity of Buphedrone is relevant.' Needless to state, in our view, any reliance placed on the Drugs Act before the magistrate was misplaced.

[48] Colonel Westraat repeatedly emphasized that on 15 March 2012, Regulation 227(above), provided that homologues became relevant in Schedule 7 of the Medicines Act.

remained adamant that Ms. Bekker was wrong and maintained his position that Buphedrone was a homologue of Cathinone.

[49] Counsel for the appellant, Ms. Christians correctly pointed out that Mr. Stander then quite astonishingly put to Colonel Westraat that 'homologues are irrelevant' and went on to put to Colonel Westraat that 'Buphedrone as an isomer of mephedrone was only listed in the Medicines Act as a controlled substance in the Law Amendment Act, published on 15 March 2016'. Colonel Westraat for his part did not dispute that and went on to explain his point about the fact that homologues had already been included as far back as March 2012. Mr. Stander did not challenge that evidence of Colonel Westraat but sought to contend that homologues were not part of American law and that the extradition request refers to 'isomers'. Needless to state, Mr. Stander again in our view, completely missed the point.

[50] By way of summary, Colonel Westraat's evidence was that Buphedrone was a substances covered by Schedule 7 to the Medicines Act, more specifically it is a homologue of the Schedule 7 listed substance Cathinone. Colonel Westraat confirmed that Buphedrone was therefore covered by paragraph (vi) of the introductory part of Schedule 7 referred to above and which is repeated here for no more than emphasis: 'All preparations or mixtures of such substances containing or purporting to contain substances referred to in this Schedule include the following (unless expressly excluded or unless listed in another Schedule) (vi) all homologues of listed substances (being any chemically related substances that incorporate a structural fragment into their structures that is similar to the structure of a listed substance and/or exhibit pharmacodynamics properties similar to the listed substance in the schedules), unless listed separately in the Schedules.'

[51] That was the expert evidence led by the appellant in support of the requirement of dual criminality. Despite having his own expert on hand during the cross-examination of Colonel Westraat, the respondent did not call the expert or any other. During the course of his own testimony, the respondent again referred to the legal opinion dated 3 May 2012 and a later opinion dated 16 August 2013 from his United States attorney Dr. R. Rhodes on behalf of the law firm Sutton McAughan Deaver PLLC, which he relied upon in his bail application²⁰.

²⁰ Buphedrone has been described as being chemically related to mephedrone (4-methylmethcathinone; (4-methylephedrone; (R,S(-2-methylamino-1-(4-methylphenyl)propan-1-one). It was first synthesized in 1928 in studies on synthetic homologues of ephedrine [Hyde, J.F., et al.,

[52] It was, however, common cause that the Medicines Act had not listed Buphedrone as a stand-alone substance in 2014 when the enquiry started. In this regard, the appellant relied on double criminality on the basis that Buphedrone was a homologue of Cathinone when the extradition request was made and/or when the enquiry commenced. In this regard see the remarks of Schippers, AJ in Patel (referred to above) where at paragraph 40 he stated:

'[40] For the above reasons I have come to the conclusion that the double-criminality rule must be satisfied as at the date of the request for the extradition of a fugitive, not the date on which he is alleged to have committed the offences in the foreign state. The court a quo thus rightly dismissed the appeal under s 10(1) of the Act'.

[53] Counsel for the appellant correctly pointed out that although Buphedrone was specifically added to Schedule 2 Part 1 of the Drugs and Drug Trafficking Act 140 of 1992 on 12 December 2002 it was of no relevance to this appeal.

JUDGMENT IN THE ENQUIRY

[54] The magistrate handed down an unwritten judgment on 1 December 2023 in which he discharged the respondent in terms of section 10(3)²¹ of the Extradition Act. The judgment of the magistrate with respect is hardly a model of clarity. Regrettably, he seemed to have been way led in both his reasoning and findings by the three different legal representatives who appeared on behalf of the appellant in the enquiry.

[55] In respect of the issue relating to dual criminality he stated:

"Synthetic Homologs of d,l-Ephedrine", J. Am. Chem. Soc., 50 (8), pp. 2287-2292 (1928)], and can be considered both a cathinone derivative and a homologue of methcathinone.

A 'homolog' of a chemical compound is a compound belonging to a series of compounds differing from each other by a repeating unit, such as methylene bridge (--CH₂--). [See, Glossary of Terms Used in Medicinal Chemistry, IUPAC Recommendations 1998].

²¹ 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.

'is a question of law. And then how would that be cured by an expert if the question is something is not clearly raised in the Act? The expert himself, who testified on behalf of the Appellant, with due respect, the issue with regards to any definition to any chemical compound was not an issue for this court. The issue whether it is an isomer, a [indistinct], or whatever was never an issue that was requested by this court to be clarified. The question here is whether, as per the extradition request, Buphedrone is a listed substance in terms of a South African Act, or whether it is an isomer of methadone, that was the issue before court with regards to the extradition.

As to the chemical compounds and any other thing, with respect, if the law is not clear on that part then we had to deal with something else.

...

What the expert testified to, with respect, under cross-examination, in my view, he failed to answer certain critical questions and with respect, whatever the expert was here to do in court in order to try and clarify the position of Buphedrone as sitting here, myself, I am still not sure what the expert managed to clarify to me. As I am speaking today, as I am still not sure, I do not know whether Buphedrone is an isomer of mephedrone.'

[56] As indicated, it appears that the magistrate appeared to have asked himself the wrong questions in arriving at his decision. Moreover, there is nothing unclear nor vague about the legislation. It simple required a sensible reading of the text. Ms. Christians also correctly pointed out that the magistrate had simply laboured under a misapprehension that one or both of two propositions needed to be established:

- i. First, that Buphedrone was a listed substance in a South African Act; and/or
- ii. Second, that Buphedrone is an isomer of mephedrone.

[57] In framing the questions for his determination it appeared that the magistrate appears to have contemplated that in respect of the first proposition, Buphedrone should be specifically listed, that the term Buphedrone should be reflected expressly in a South African statute.

[58] Furthermore, that relying on the extradition request that the appellant was required to have proved that Buphedrone was a listed substance in a South African statute, which it was clearly not.

[59] The point missed by the magistrate, was that Buphedrone was shown to be a homologue of a substance listed in the Medicine's Act, which was Cathonine, Buphedrone would likewise therefore be a prohibited substance under South African law. Strangely, as Ms. Christians pointed out, no mention whatsoever, was made by the magistrate, of the word homologue in the oral judgment.

[60] It also appeared from the magistrate's judgment that he had concluded that Colonel Westraat's evidence was 'irrelevant' and by implication, inadmissible. The appellant contended that inasmuch as the magistrate had considered the questions in the enquiry incorrectly, the magistrate's decision to discharge the respondent was made as a result of not only one but of several errors of law.

[61] In this regard the magistrate found, amongst others, that:

'The expert testimony of Colonel Westraat, with due respect, cannot assist this court, was irrelevant. It is tainted with many things. Under cross-examination he answered several different answer which myself I could not understand. As I say right up until today whether Buphedrone is an isomer of Mephedrone right up until today. In terms of any Act in the Republic of South Africa it is still not clear and apparent to me.'

The magistrate thereupon rejected the evidence of Colonel Westraat. He further went on to state that in his view Colonel Westraat was never an 'expert for this matter'. The magistrate was also of the view that because a Colonel Jooste of the HAWKS had asked him to testify on behalf of the appellant as endlessly prompted by Mr Stander in cross examination, that Colonel Westraat's evidence was tainted with bias in favour of the appellant.

[61] As a result of the magistrates discharge of the respondent on what the appellant contended were errors of law, on 7 February 2025, it addressed a letter in

terms of section 310 of the CPA to the magistrate in respect of the following questions:

15.1 Does the conspiracy to knowingly, intentionally, and unlawful importation of Buphedrone into the Republic of South Africa constitute a domestic offence for extradition?

15.2 Does the conspiracy to intentionally distribute and possess, with the intention to distribute Buphedrone in the Republic of South Africa, constitute a domestic offence for extradition?

15.3 Does the conspiracy to commit money laundering, willfully and knowingly in connection with laundering of the proceeds of drug trafficking through an account in Panama and transmitted into the Republic of South Africa in furtherance of illegal drug trafficking constitute a domestic offence for extradition?

15.4 Was the Presiding Magistrate's failure to pronounce on whether the Respondent was extraditable to the United States of America on a count of conspiracy to commit money laundering not such a serious irregularity that it constituted a failure of justice?

[62] On 19 June 2024, the magistrate furnished what he headed Judgment, Stated Case in terms of section 310 (1) of the Criminal Procedure Act 51 of 1977.

THE FINDINGS OF FACT MATERIAL TO THE QUESTIONS OF LAW

[63] The magistrate stated that the real issue to be determined by the court in the extradition enquiry was whether the importing (count 1), distributing and possession (count 2) and laundering of the proceeds of selling Buphedrone an isomer of Mephedrone (count 3) 'are a crime in South Africa (sic)'. With reference to the definition of an extraditable offence in the Extradition Act the issues for determination by the magistrate was whether the appellant had proved dual criminality of the offences in both the requesting state (United States) and the requested state South Africa as the pre-requisite for an extradition.

[64] The magistrate went on to state:

'6. The [DPP] closed its case after leading the evidence of Colonel Hendrik Johannes Jacobus Westraat, the only witness for the Appellant who's evidence is that Buphedrone is a chemically related substance (Homologue) that incorporates a structural fragment in its structure that is similar to cathinone and because cathinone is listed in Schedule 7 of the [Medicines Act] is therefore also per implication listed and therefore establishes dual criminality.

7. The [DPP] submitted that Buphedrone or any preparation containing Buphedrone is a Schedule 7 substance in terms of [the Medicines Act] and ought to be clarified with expert evidence, that it is not possible for the court to make this determination without the expert evidence and that this is a factual determination not legal...

8. The respondent submits that the [DPP] cannot lead expert evidence on a legal issue, in the context of dual criminality whether conduct constitutes a crime is a legal question not a factual question and you may only lead evidence on the factual question not a legal issue.

9. The question is whether expert evidence is called on questions of law, court finds in favour of the respondent, to determine dual criminality is the function of the court, it is the court that has to interpret, ascertain and administer the law. Whether Schedule 7 of [the Medicines Act] or [Drugs Act] is applicable or otherwise to United States of America's Titles and Codes to establish dual criminality is the function of the court. It is a question of law, the rule of law must be applied prior to reaching a conclusion, arguments may be heard not evidence.'

QUESTIONS OF LAW

[65] The magistrate found in respect of the issue of dual criminality, that despite the appellant disavowing the evidence of Bekker, the magistrate found that her evidence was relevant in as much as it had been submitted as part of the bail application(. Moreover, it appears that during the course of argument by Mr. Badenhorst on 29 March 2014 with regard to the challenge of the expert evidence in the enquiry, reliance was placed by him on the affidavit of Ms Bekker. Such reliance

was clearly misplaced as Colonel Westraat was subsequently emphatic in his disavowance of the correctness of Bekker's evidence with regard to Buphedrone being an isomer of Cathinone. Colonel Westraat emphatically agreed with Mr Stander on that score.

[66] The magistrate further went on to find that Colonel's Westraat's evidence was purely legal in nature even though he presented as an expert witness. Clearly that was with reference to paragraphs 4.1 (in part), 4.2, 4.3, 4.4, 4.5 and 5.2 of the affidavit deposed to by Colonel Westraat as set out in paragraph [40] above. Despite the actual evidence of Colonel Westraat, the magistrate simply stated that not much was said about 5.1, the structural formula of Cathinone and its homologue Buphedrone. In that regard Colonel Westraat had clearly explained that Annexure A diagrammatically depicted composition of both Cathinone and its homologue Buphedrone. The magistrate simply ignored that evidence.

[67] Under the heading 'Decision and Reasons on Questions of Law' the magistrate stated, amongst others, the following:

'17. No evidence was led by the [DPP] to challenge or dispute the testimony of the respondent. The evidence of the respondent stands as correct.

18. The Act itself Schedule 7 of section 22A (2) Medicines and Related Substances Act 101 of 1965 act is so vague and not clear I cannot determine with certainty in interpreting the ordinary grammatical meaning or words in the Act conclude that scientific words Buphedrone or Mephedrone which are not listed in any statute in the republic of South Africa as at date of request, used in the United States of America's codes falls within the ambit of the Act, I cannot find that they fall within the ambit of the act.

Cathinone the listed substance in Schedule 7 introduced by Government Notice 31387 of 5 September 2008 is not defined in the Act, whether it is a homologue, isomer, esters and ethers or salts of Buphedrone and Mephedrone is not clear in terms of the Act. The chemical makeup, the structure or pharmacodynamics properties of Cathinone to compare with Buphedrone and Mephedrone is not specified in the Act. The Act is not written

in clear and accessible manner and the court cannot with any certainty find in favour of the applicant.'

[68] The chemical definitions of all of the substances listed in the various Schedules in the Medicines Act (and for that matter even those substances referred to in the Drugs Act and other related legislation) are not included in the legislation itself. The chemical description and definitions are therefore provided by the necessary chemical experts to assist a court or anyone that needs to access the legislation. That is in fact what the respondent himself did in having sought the chemical expertise and assistance of Dr. Rhodes in respect of the United States legislation.

[69] The magistrate thereupon went on to reiterate that the affidavit of Ms. Bekker was still before the court and in as much as it was relied upon by appellant's counsel on 29 March 2014 in support of leading the evidence of Colonel Westraat. The magistrate was of the view that Bekker's evidence had not been withdrawn and she had not been called to submit an affidavit to address the views expressed by Colonel Westraat in his evidence. As already indicated the magistrate went on to dismiss the evidence of Colonel Westraat who he also claimed was evasive, not credible and that he lacked any independence.

THE MAGISTRATE'S ERRORS OF LAW IN DEALING WITH THE RESERVED QUESTIONS REFERRED TO UNDER (a), (b) and (c) (above).

[70] The questions of law before the magistrate in the enquiry were simply whether the import, distributing, possession and the laundering of the proceeds of the sale of Buphedrone are crimes in South Africa. Counsel for the appellant correctly pointed out that these legal questions entailed both a factual enquiry (on the nature and composition of the substance Buphedrone) as testified to by Colonel Westraat and a legal determination as to whether the possession, import, distribution and laundering of the substance Buphedrone are crimes in South Africa.

[71] It is so that Colonel Westraat in his affidavit expressed opinions on legal issues such that Buphedrone is a prohibited substance under Schedule 7 of the

Medicines Act. That was a question for the magistrate to determine. However, the magistrate's opinion on the legal question had to be based on an anterior question of fact, i.e. whether Buphedrone is a homologue of Cathonine. That was a factual question based on expert chemical evidence.

[72] Counsel for the appellant correctly pointed out that based on established legal principles and on a proper appreciation of both the evidence of Colonel Westraat and the provisions of the Extradition Act, the magistrate's discharge of the respondent was based on the following errors of law:

- i. The magistrate had incorrectly framed the enquiry before him as purely a question of law and had consequently disregarded the factual evidence that was led.
- ii. That the magistrate had decided not to admit the evidence of Colonel Westraat in the light of what he regarded as the contradictory evidence of Bekker and his assessment of Colonel Westraat as having not answered questions by Mr. Stander on behalf of the respondent. In that regard, it is apparent that the magistrate had decided not to admit Colonel Westraat's evidence. I should point out that though, that was a ruling which the magistrate should have made during the course of the enquiry, to have enabled the parties to have considered what further evidence, if any, they could or should have led in the light of the magistrate's findings on admissibility.

[73] Counsel for the appellant and in our view, correctly so, pointed out that the stated case provided by the magistrate regrettably appeared to be somewhat incoherent in structure and difficult to follow or to understand. However, what was clear was that the magistrate incorrectly framed the questions before him as purely a question of law i.e. the interpretation and application of the relevant statutory provisions. In that regard the magistrate in disregarding the uncontested evidence of Colonel Westraat on the composition of Buphedrone as a homologue of Cathonine, as evident from the diagram submitted into evidence and his explanation thereof was a misdirection by the magistrate. The finding of the inadmissibility of Colonel Westraat's evidence was correctly regarded as a question of law by the appellant.

Moreover, the dismissal of Colonel Westraat's evidence as purely legal in nature flew in the face of the actual expert evidence, he led on the chemical composition of Buphedrone in relation to Cathonine.

[74] Moreover, there was no challenge by any expert evidence to that of Colonel Westraat that Buphedrone was a homologue of Cathonine. Counsel for the appellant correctly pointed out that the magistrate himself in the stated case/ judgment with reference to Cathonine refers to its 'homologue Buphedrone'. Thus, despite all the obfuscation in his judgment and stated case, the magistrate appeared to have understood that Buphedrone was a homologue of Cathonine. Yet the magistrate continued to rely on what he regarded as the vagueness of the legislation by not having specifically designated Buphedrone as a scheduled substance under Schedule 7. Simply stated, in as much as Cathonine was a scheduled substance under Schedule 7 and Buphedrone being a homologue of Cathonine, it was both logically and axiomatic (per the legislation itself) that Buphedrone was covered by the prohibition under Schedule 7.

[75] In our view, counsel for the appellant correctly submitted that the magistrate had formulated the question before him incorrectly, whether as an admissibility issue in respect of the evidence of Colonel Westraat or whether by his failure to have properly appreciated the material nature and content of the evidence that Colonel Westraat proffered.

[76] In our view, based on the evidence of Colonel Westraat with regard to the chemical composition of Buphedrone in relation to Cathonine, the South African offences described are substantially similarly of the US offences and therefore the dual criminality requirement had been met by the appellant.

[77] It follows in respect of question (c), that the magistrate had in fact erred in law by holding that the proceeds derived from the sale of Buphedrone were not 'proceeds of unlawful activities' as defined in section 1²² of the Prevention of

²² Any property or any service, advantage, benefit or reward which was derived, received or retained, directly or indirectly, in the Republic or elsewhere, at any time before or after the commencement of

Organised Crime Act of 1998 ('**POCA**'). He incorrectly found that the alleged laundering of such proceeds (as in count 3) did not constitute a contravention of sections 4 or 5 of POCA.

[78] In our view, the magistrate had in respect of question (d) clearly erred in law by misinterpreting and misapplying the principles of statutory interpretation by not admitting the expert evidence of Colonel Westraat and failed to apply such evidence in determining whether Buphedrone fell within the ambit of the relevant schedules and definitions under the Medicines Act which resulted in the magistrate incorrectly discharging the respondent not only on counts 1 and 2 but also as a consequence, count 3.

SUBSTITUTION

[79] Section 8(1)(c)(ii)(aa)²³ of the Promotion of Administrative Justice Act 3 of 2000 ('**PAJA**') provides that a court may, in judicial review proceedings in terms of section 6(1) of PAJA²⁴ grant any order that is just and equitable and which in exceptional cases could include the substitution or variation of the administrative action or correcting a defect resulting from the administrative action.

[80] In this matter the appellant seeks substitution of the decision taken by the magistrate.

[81] In *Trencon Construction (Pty) Ltd v Industrial Development Corporation of South Africa Ltd and Another*²⁵ the Constitutional Court held that the factors which must be considered when determining if a case is 'exceptional' are:

this Act, in connection with or as a result of any unlawful activity carried on by any person, and includes any property representing property so derived;

²³ The court or tribunal, in proceedings for judicial review in terms of section 6 (1), may grant any order that is just and equitable, including orders-

(c) setting aside the administrative action and-

(ii) in exceptional cases -

(aa) substituting or varying the administrative action or correcting a defect resulting from the administrative action

²⁴ Any person may institute proceedings in a court or a tribunal for the judicial review of an administrative action.

²⁵ 2015 (5) SA 245 (CC)

- (i) whether the court would be in as good a position as the administrator to make the decision;
- (ii) whether the decision was a foregone conclusion;
- (iii) the issue of delay, if any, and;
- (iv) bias or incompetence on the part of the administrator.

[82] The Constitutional Court went on to hold that if it is established that the review court is in as good a position as the administrator to make the decision, then the court must consider whether the decision was a foregone conclusion and then to consider the issue of delay and bias or incompetence.

[83] When considering whether the review court is in as a good a position as the administrator, the court will have regard to whether the administrator had specialised or particular expertise to make the decision and whether or not the review court was placed in possession of all the information pertinent to making the decision.

[84] Furthermore, in determining whether or not the decision was a foregone conclusion, the review court would consider whether only one correct decision was possible.

[85] Substitution can only be granted if it would be fair to all the parties and if the review court was satisfied that it would be just and equitable to grant substitution.²⁶

[86] In the present matter, this court is in as a good position to make a decision as the court *a quo*. The decision to be made does not require any specific expertise or specialised knowledge and all the information relevant to the making of the decision is before this court.

[87] Section 10(1) of the Extradition Act provides that:

'if upon consideration of the evidence adduced at the enquiry referred to in section 9(4)(a) and (b)(i) the magistrate finds that the person brought before

²⁶ *Swanepoel NO v Profmed Medical Scheme* 2025 (1) SA 33 (CC)

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.' (own emphasis)

[88] It is clear from the wording of section 10(1) that an order committing a person to prison must follow a finding that there is sufficient evidence to warrant a prosecution for the offence in the foreign state concerned. Thus, it can be said that the decision, depending on the sufficiency of the evidence, is a foregone conclusion.

[89] In the present matter there has been a delay of more than 10 years. Primarily this delay was occasioned by the respondent challenging the validity of the amendment to the Schedule of the Medicine and Related Substances Act which was not prosecuted to finality but was abandoned and his change in legal representation. The refusal of the magistrate to finalise the enquiry was the second primary reason for the delay of the hearing.

[90] This substantial delay in finalising the matter impacts negatively on the administration of justice and on South Africa's obligations it has in terms of the extradition agreement it concluded with the United States of America.

[91] In the circumstances, we are of the view that this is an exceptional case which justifies substitution in terms of section 8(1)(c)(ii)(aa) of PAJA. Furthermore, we are of the view that it would be fair to the parties and just and equitable that this matter be finalised. The respondent is entitled to have this matter concluded and not to have it cloud his life.

[92] The parties, at the request of the court, also made further written submissions after the hearing of the appeal as to whether the court could and should release the appellant on bail if the appeal is upheld. The parties agreed that if the appeal was to be upheld, the appellant should in the interests of justice and given his record of

complying with his earlier bail conditions, be released on bail or his own recognisance pending the decision of the Minister in term of section 11 of the Extradition Act. We agree, that it would be in the interest of justice that the respondent be released on bail pending the decision of the Minister.

[93] The appellant is also advised herewith of his right of appeal against the decision of this court in terms of Section 10 of the Extradition Act.

[94] Therefore, we make the following order:

4. The discharge of the respondent by the magistrate is set aside.
5. The respondent is found to be liable to be extradited to the United States of America.
6. The respondent is to be released on bail in the amount of R25 000 (twenty five thousand rand) pending the decision of the Minister of Justice in terms of section 10(1) and/or the Ministers decision in terms of section 11 of the Extradition Act 67 of 1962 on the following conditions:
 - a. The Respondent must surrender all his passports to the Investigating Officer.
 - b. The Respondent must report to the Gordon's Bay Police Station every Friday.
 - c. The Respondent must remain in South Africa.

SALDANHA, J
Judge of the High Court, Cape Town

I agree.

SLINGERS, J
Judge of the High Court, Cape Town

Appearances

For appellant: AG Christians

Instructed by: Western Cape Director of Public Prosecutions

For respondent: A De Jongh

Instructed by: Legal Aid South Africa