



CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 280/24

In the matter between:

**DIRECTOR OF PUBLIC PROSECUTIONS,
JOHANNESBURG**

First Applicant

NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS

Second Applicant

and

JONATHAN SCHULTZ

First Respondent

**MINISTER OF JUSTICE AND CONSTITUTIONAL
DEVELOPMENT**

Second Respondent

**MINSTER OF INTERNATIONAL RELATIONS
AND COOPERATION**

Third Respondent

Case CCT 190/25

And in the matter between:

**DIRECTOR OF PUBLIC PROSECUTIONS,
BLOEMFONTEIN**

Applicant

and

NOMALANGA MOROADI SELINA CHOLOTA

Respondent

Neutral citation: *Director of Public Prosecutions, Johannesburg and Another v Schultz and Others; Director of Public Prosecutions, Bloemfontein v Cholota* [2026] ZACC 3

Coram: Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Nicholls AJ, Rogers J, Savage AJ, Theron J and Tshiqi J

Judgment: Theron J (unanimous)

Heard on: 4 November 2025

Decided on: 23 January 2026

Summary: Extradition Act 67 of 1962 — outgoing extradition request — authority to make — separation of powers — prosecutorial independence — section 179 of the Constitution

Unlawful extradition — legal effect of US court order — criminal jurisdiction of High Court — condonation

ORDER

In Case CCT 280/24 *Director of Public Prosecutions, Johannesburg and Another v Schultz and Others*:

On application for leave to appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria):

1. Condonation is refused.
2. The applicants are ordered to pay the first respondent's costs, including the costs of two counsel.

In Case CCT 190/25 *Director of Public Prosecutions, Bloemfontein v Cholota*:

On application for direct leave to appeal from the High Court of South Africa, Free State Division, Bloemfontein:

1. The application for direct appeal is granted.
2. The appeal is partially upheld and the order of the High Court of South Africa, Free State Division, Bloemfontein is set aside.

3. It is declared:
 - (a) The National Prosecuting Authority has the power to prepare, draft and submit to the national Executive extradition requests for the national Executive to make such requests to a foreign state.
 - (b) Only the national Executive has the power to make extradition requests to foreign states.
 - (c) The respondent's extradition from the United States of America to the Republic of South Africa was unlawful on the basis that the extradition request was authorised by the applicant or an official within the National Prosecuting Authority rather than the national Executive.
 - (d) However, the fact that the extradition was unlawful as aforesaid does not of itself deprive the High Court of South Africa, Free State Division, Bloemfontein of criminal jurisdiction over the respondent.
4. The matter is remitted to the High Court of South Africa, Free State Division, Bloemfontein to determine the remaining grounds of the respondent's special plea.

JUDGMENT

THERON J (Mlambo DCJ, Kollapen J, Majiedt J, Mathopo J, Mhlantla J, Musi AJ, Nicholls AJ, Rogers J, Savage AJ and Tshiqi J concurring):

Introduction

[1] This Court is seized with two matters, which at their core concern who has the power to make outgoing extradition requests. This Court must determine whether such power lies with the National Prosecuting Authority (NPA) or the Executive.

[2] The Extradition Act¹ came into effect on 20 June 1962. Whilst it regulates in some detail how incoming requests (requests made to South Africa by foreign states) are to be managed, it is largely silent on the treatment of outgoing requests (requests made by South Africa to foreign states). Outgoing requests are referred to only tangentially in sections 19 and 20 of the Extradition Act.

Background facts and litigation history

Schultz, Case CCT 280/24

[3] These two applications were heard together. The genesis of the *Schultz* application, Case CCT 280/24, is the anticipated extradition of Mr Jonathan Richard Schultz, the first respondent in this matter. Mr Schultz is a South African citizen who has resided in the United States of America (US) since 2019. He approached the High Court of South Africa, Gauteng Division, Pretoria (Pretoria High Court) in 2022 after obtaining information that the NPA intended to seek his extradition. He sought wide-ranging relief, but the only prayer that remains relevant is a declarator that only the Minister of Justice, in his capacity as a member of the national Executive of the Republic of South Africa, has the power to make a request for Mr Schultz's extradition from the US. The Pretoria High Court dismissed Mr Schultz's application.²

[4] On appeal, the Supreme Court of Appeal set aside the Pretoria High Court's decision.³ It held that extradition requests operate at both the domestic and the international level. Therefore, extradition requests involve acts of sovereignty and necessarily implicate foreign relations. Consistent with this understanding, the Extradition Act includes several provisions giving the Minister of Justice power over incoming extradition requests. Further, the Supreme Court of Appeal noted that this

¹ 67 of 1962.

² *Schultz v Minister of Justice and Correctional Services* 2023 (2) SACR 145 (GP).

³ *Schultz v Minister of Justice and Correctional Services* [2024] ZASCA 77; 2024 (2) SACR 294 (SCA) (*Schultz SCA*).

Court in *Kaunda*⁴ affirmed that the conduct of foreign relations is a matter for the national Executive. It also relied on this Court’s *obiter dictum* (incidental remark) in *Quagliani*, which stated that the Extradition Act “gives the Executive branch all the required statutory powers to be able to . . . request the extradition of individuals who are in foreign States”.⁵ The Supreme Court of Appeal also held that the power to issue outgoing extradition requests is not a necessary function to the NPA’s prosecutorial powers. The Supreme Court of Appeal concluded that the Minister of Justice holds the power to make outgoing extradition requests to the US.

[5] The applicants in Case CCT 280/24 (the Director of Public Prosecutions (DPP), Johannesburg and the National Director of Public Prosecutions (NDPP)) initially sought leave to appeal the whole of the Supreme Court of Appeal’s order to this Court. This application for leave to appeal was delivered approximately three months late, and the applicants accordingly also seek condonation for the late filing. Subsequently however, the applicants abandoned part of the relief sought, and narrowed the relief sought, in addition to condonation, to an order only limiting the retrospectivity of the *Schultz SCA* order.

Cholota, Case CCT 190/25

[6] *Schultz SCA* became pivotal to the *Cholota* matter, where the applicant (the DPP, Bloemfontein) seeks direct leave to appeal against the judgment of the High Court of South Africa, Free State Division, Bloemfontein (Bloemfontein High Court). Ms Nomalanga Moroadi Selina Cholota, the respondent in Case CCT 190/25, was in the US when the NPA instituted proceedings against her. The NPA applied for her extradition in January 2022. Ms Cholota was arrested and brought before the United States District Court for the District of Maryland (District Court) in April 2024. Following her arrest, Ms Cholota applied directly to this Court for a declaratory order

⁴ *Kaunda v President of the Republic of South Africa* [2004] ZACC 5; 2004 (10) BCLR 1009 (CC); 2005 (4) SA 235 (CC).

⁵ *President of the Republic of South Africa v Quagliani* [2009] ZACC 1; 2009 (2) SA 466 (CC); 2009 (4) BCLR 345 (CC) at para 44.

that the application for her extradition was unlawful as it was politically motivated. This Court denied her application for direct access.

[7] The District Court, in June 2024, confirmed that there was sufficient evidence against Ms Cholota to sustain the charges against her. The District Court ordered her committal pending the US Secretary of State's decision on extradition. In July 2024, the Deputy Secretary of State issued Ms Cholota's extradition order. She was extradited to South Africa in August 2024.

[8] In the course of a criminal trial in the Bloemfontein High Court, Ms Cholota raised a special plea in terms of section 106(1)(f) of the Criminal Procedure Act.⁶ Her special plea challenged the High Court's jurisdiction over her on the basis that her extradition from the US to South Africa was unlawful. Initially, she advanced four grounds for her special plea, which did not include a challenge to the NPA's power to request her extradition from the US.

[9] A trial-within-a-trial was held to adjudicate the special plea. During her closing address on the special plea, counsel for Ms Cholota produced the Supreme Court of Appeal's judgment in *Schultz SCA* as authority for the proposition that a request for extradition must be made by the Minister of Justice.⁷ In its judgment,⁸ the Bloemfontein High Court traversed the four grounds of the special plea but made no conclusive finding on the lawfulness of the extradition as pleaded. Instead, it concluded:

⁶ 51 of 1977. Section 106(1)(f) reads:

“When an accused pleads to a charge [they] may plead that the court has no jurisdiction to try the offence.”

⁷ A copy of the *Schultz SCA* judgment was mentioned by counsel for accused 13, Mr Magashule, towards the end of that counsel's cross-examination of the State's second witness, Mr Calitz. The precise purpose was not stated by counsel. The Judge then suggested that a copy of *Schultz SCA* should be handed in. During her closing argument in the trial-within-a-trial, counsel for Ms Cholota raised for the first time, that in light of the *Schultz SCA* judgment, Ms Cholota's extradition was unlawful for having been requested by the incorrect state functionary.

⁸ *S v Mokhesi* 2025 (2) SACR 182 (FB) (*Cholota HC*).

“Ordinarily, this Court should now decide each and every ground advanced as the basis for the special plea. However, it needs mentioning that, at the hearing of the closing arguments in the trial-within-a-trial, Ms Makapela, appearing for the accused, submitted that the case for the State is stillborn since it was never shown by the State that the extradition was requested by the South African executive powers of State. The extradition was requested by members of the National Prosecuting Authority (the NPA), which was not allowed, she submitted.”⁹

[10] The Bloemfontein High Court held that it did not have jurisdiction over Ms Cholota. It considered itself bound by *Schultz SCA*. Therefore, it held that the request for Ms Cholota’s extradition was unlawful because it was made by the DPP while the Supreme Court of Appeal had held in *Schultz SCA* that it should be made by the Minister of Justice. It dismissed the DPP’s argument that the NPA’s lack of authority was not specifically raised as a ground in the special plea.¹⁰ The Bloemfontein High Court held that unlawful conduct or consequences in the extradition process could not be cured by a failure to plead the same in the special plea. It also dismissed the DPP’s argument that the national Executive was involved in the extradition request through the Department of International Relations and Cooperation (DIRCO), finding that DIRCO’s role was purely administrative. Accordingly, the Bloemfontein High Court held that it was no longer necessary to determine the grounds of the special plea as initially pleaded. It declared that Ms Cholota’s extradition was unlawful and it accordingly did not have criminal jurisdiction over the matter.

Issues for determination

[11] The following issues are to be determined in the *Cholota* matter, Case CCT 190/25:

- (a) whether this Court has jurisdiction and should grant leave to appeal directly;

⁹ Id at para 9.

¹⁰ Id at para 12.

- (b) whether there was an infringement of the DPP's right to be heard in the trial-within-a-trial;
- (c) which state functionary possesses the authority over outgoing extradition requests;
- (d) what the status and consequences of the US court order are; and
- (e) whether the Bloemfontein High Court had jurisdiction to try Ms Cholota.

[12] The following issues are to be determined in the *Schultz* matter, Case CCT 280/24:

- (a) whether condonation should be granted; and
- (b) if condonation is granted, whether the order in *Schultz SCA* can and should be varied to render it non-retrospective.

Cholota, Case CCT 190/25

Jurisdiction and leave to appeal directly

[13] The question whether the NPA or the national Executive is empowered to issue outgoing extradition requests concerns an interpretation of section 179 of the Constitution, the sections of the Constitution which empower the Executive to conduct foreign relations, the Extradition Act and the National Prosecuting Authority Act¹¹ (NPA Act), which undoubtedly engages this Court's constitutional jurisdiction. As held in *Fraser*, "issues concerning the status, powers or functions of an organ of State" are plainly constitutional matters.¹²

[14] The context which permeates this case is the exercise of public power as it relates to outgoing extraditions. This matter brings into sharp focus the separation of powers and the duties, functions and powers ascribed to the Executive and the NPA. As held in *Pharmaceutical Manufacturers*:¹³

¹¹ 32 of 1998.

¹² *Fraser v ABSA Bank Limited* [2006] ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 38.

¹³ *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* [2000] ZACC 1 (CC); 2000 (2) SA 674; 2000 (3) BCLR 241 (CC).

“One of [the Court’s] duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction.”¹⁴

[15] This matter also concerns the proper interpretation of obligations under domestic law, namely the Extradition Act and the NPA Act. Given the co-dependent relationship between extradition and criminal prosecution, it is of paramount importance to adhere to the tenets of the rule of law in such interpretation. Irregularities or unlawful conduct at any stage of the extradition process may adversely affect an extraditee’s rights to freedom and security of the person and procedural trial rights,¹⁵ and may also harm the public interest in the proper prosecution of crime. The interpretation of domestic and international law, as it relates to sections 1(c),¹⁶ 12,¹⁷ 35,¹⁸ 39(2)¹⁹ and 179²⁰ of the Constitution, also engages this Court’s jurisdiction.²¹

[16] The question whether the NPA or the national Executive has the authority to issue outgoing extradition requests therefore engages this Court’s constitutional jurisdiction. This is also a novel question that this Court has not dealt with previously.

¹⁴ Id at para 51.

¹⁵ *Geuking v President of the Republic of South Africa* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) (*Geuking*) at paras 47-8 and *Director of Public Prosecutions, Western Cape v Tucker* [2021] ZACC 25; 2021 (12) BCLR 1345 (CC) (*Tucker*) at para 35.

¹⁶ Section 1 of the Constitution reads:

“The Republic of South Africa is one, sovereign, democratic state founded on the following values:

...

(c) Supremacy of the constitution and the rule of law.”

¹⁷ Section 12 is the right to freedom and security of the person.

¹⁸ Section 35 contains the rights afforded to arrested, detained and accused persons.

¹⁹ Section 39(2) mandates courts to promote the spirit, purport and objects of the Bill of Rights when interpreting legislation or developing the common law or customary law.

²⁰ Section 179(2) empowers the NPA to institute and conduct criminal prosecutions on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.

²¹ *Fraser* above n 12 at para 47.

[17] The DPP also submits that this matter raises an arguable point of law of general public importance. The point of law is whether the Bloemfontein High Court was correct to uphold the special plea raised by Ms Cholota. The DPP submits that the matter is of significant importance as Ms Cholota is alleged to have been involved in state capture which concerns the public interest. Further, the DPP submits that the determination of this matter would impact persons who have committed crimes in South Africa and subsequently fled to extraterritorial jurisdictions. The DPP submits that finality is required to ascertain the consequences of the *Schultz SCA* order on other extraditees, in respect of whom the extradition process has been completed or is underway.

[18] A determination as to the role and authority of the NPA and the Executive in extradition proceedings will have far-reaching impact for all extraditions, making it a matter of general public importance. Thus, this matter also engages the general jurisdiction of this Court.

[19] This matter has been brought as a direct appeal on an urgent basis. The Supreme Court of Appeal has determined that the Minister of Justice has the authority to issue outgoing extradition requests. An appeal to the Supreme Court of Appeal on this same question of law would have been futile unless that Court could be persuaded that its very recent judgment in *Schultz SCA* was clearly wrong.

[20] It is in the interests of justice that this matter be finalised on an urgent basis as the question whether South African courts enjoy jurisdiction over Ms Cholota needs to be determined before the start of her criminal trial, alongside 17 other accused persons, in January 2026. The applicants submit that any further postponement of the matter may prejudice the other accused persons.

[21] This Court will entertain direct appeals if it is in the interests of justice to do so.²² In *MEC Development Planning*, this Court held that factors weighing in favour of granting direct appeal include the importance of the constitutional issues, preserving judicial and parties' resources, urgency and prospects of success.²³

[22] As outlined above, this matter concerns constitutional issues that have far-reaching consequences. The demarcation of authority over outgoing extradition requests and the scope of the NPA's and the Executive's powers are constitutional questions of authority. Given the closeness between the exercise of public power in issuing outgoing extradition requests and the potential of these requests to impact extraditees' constitutional rights, as well as the public interest in the proper prosecution of crime, it is an important matter deserving of a final determination by this Court.

[23] In this matter, unlike many direct appeals, this Court is in a position to consider the reasoning of lower courts on this question, as the *Schultz* matter has passed through both the Pretoria High Court and the Supreme Court of Appeal. This Court thus has the benefit of the lower courts' reasoning in making its final determination.

[24] The importance of finality in this matter arises both from the constitutional aspects regarding the exercise of public power in extradition processes as well as the potential prejudice faced by Ms Cholota's co-accused, and the NPA as the representative of the public interest in the prosecution of crime, if litigation were to be protracted. It is therefore in the interests of justice to determine the matter on an urgent basis as a direct appeal.

²² *Member of the Executive Council for Development Planning and Local Government, Gauteng v Democratic Party* [1998] ZACC 9; 1998 (4) SA 1157; 1998 (7) BCLR 855 (*MEC Development Planning*) at para 32; *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* [2006] ZACC 23; 2007 (4) BCLR 339 (CC); 2007 (4) SA 395 (CC) at para 21; and *Freedom of Religion South Africa v Minister of Justice* [2019] ZACC 34; 2019 (11) BCLR 1321 (CC); 2020 (1) SA 1 (CC) at para 21.

²³ *MEC Development Planning* id at para 32.

Infringement of the DPP's right to be heard

[25] In the Bloemfontein High Court, Ms Cholota contended that her extradition was unlawful because the state had procured it by telling lies and making misrepresentations to US authorities. She identified four specific categories of misrepresentations and concluded as follows:

“What appears pertinently clear is that it is undeniable that the State presented false and incorrect information to US authorities. Two South African Courts have already made this finding. The US authorities relied on this information in good faith, and actioned the extradition on an unknowingly unlawful basis.”²⁴

[26] As mentioned, a trial-within-a-trial was held to determine Ms Cholota's special plea. In her closing address, Ms Cholota's counsel invoked *Schultz SCA*. The state objected that Ms Cholota had not pleaded this ground in her special plea.

[27] The Bloemfontein High Court dismissed the state's objection because—

“the fundamental doctrine of legality, the rule of law, the principles of customary international law and our Constitution lie at the heart of the question before the Court, irrespective of whether the question was raised as a ground in the special plea or not. To put it differently, if something was done unlawfully in the extradition process, that wrong can never be cured by a failure to plead same in the special plea. After all, it was at least pleaded that the extradition was unlawful.”²⁵

[28] The Bloemfontein High Court upheld Ms Cholota's argument based on *Schultz SCA* and concluded that she was “free to go”.

[29] In terms of section 106(3) of the Criminal Procedure Act, when an accused raises a plea that the court has no jurisdiction to try the offence, they must specify the grounds upon which they do so:

²⁴ *Cholota HC* above n 8 at 8.

²⁵ *Id* at para 12.

“An accused shall give reasonable notice to the prosecution of [their] intention to plead a plea other than the plea of guilty or not guilty, and shall in such notice state the ground on which they base their plea: Provided that the requirement of such notice may be waived by the attorney-general or the prosecutor, as the case may be, and the court may, on good cause shown, dispense with such notice or adjourn the trial to enable such notice to be given.”

[30] In *Mutsila*, this Court held that not providing a party a reasonable opportunity to make representations “would be to commit a fundamental breach of [their] procedural rights, in the form of *audi alteram partem* [(the right to be heard)]”.²⁶ In *Joseph*,²⁷ this Court commented that procedural fairness is integral to the dignity of individuals, especially in administrative decisions affecting fundamental rights. Closing arguments are generally to summarise, interpret and apply the law to the evidence already presented, not to introduce new factual or legal issues. Similarly, in *Coppermoon*,²⁸ the Court held that new grounds of defence must generally be introduced through formal amendment to pleadings, not at the eleventh hour.

[31] In dismissing the state’s objection to the new ground, the Bloemfontein High Court overlooked the fact that section 106(3) of the Criminal Procedure Act requires an accused to disclose the grounds upon which a special plea is based. The purpose of the requirement is to afford the state an opportunity to respond to an accused’s plea. By dismissing the state’s objection, the Court denied it an opportunity to address the plea, in breach of the *audi alteram partem* principle.

[32] Ordinarily, this conclusion would compel an order remitting Ms Cholota’s matter to the Bloemfontein High Court. However, as will appear presently, in light of

²⁶ *Mutsila v Municipal Gratuity Fund* [2025] ZACC 17; 2025 (10) BCLR 1139 (CC); 2026 (1) SA 1 (CC) at para 42.

²⁷ *Joseph v City of Johannesburg* [2009] ZACC 30; 2010 (3) BCLR 212 (CC); 2010 (4) SA 55 (CC) at para 42.

²⁸ *Coppermoon Trading 13 (Pty) Ltd v Government, Eastern Cape Province* 2020 (3) SA 391 (ECB) at para 16.

this Court's findings, it is not necessary to decide the impact of the infringement of the DPP's right to be heard.

Authority over outgoing extradition requests

[33] *Schultz SCA* was the sole basis upon which the Bloemfontein High Court upheld Ms Cholota's special plea. The DPP submits that the Supreme Court of Appeal erred and that the power to make outgoing extradition requests vests in the NPA.

The nature of extradition

[34] By definition, extradition is "the surrender by one [sovereign] State, at the request of another, of a person within its jurisdiction who is accused or has been convicted of a crime committed within the jurisdiction of the other [sovereign] State".²⁹ This process, in turn, "involves three elements: acts of sovereignty on the part of two States; a request by one State to another State . . . and the delivery of the person requested for the purposes of trial and sentencing in the territory of the requesting State".³⁰

[35] Outgoing extradition requests, then, consist of two stages. Domestically, the requesting state's prosecuting authority usually prepares a request for extradition. Internationally, the requesting state generally transmits the prepared request to the requested state. So construed, the legal process for outgoing extradition "straddles the divide between State sovereignty and comity between States and functions at the intersection of domestic law and international law".³¹

[36] Crucially, the second stage of the aforementioned process necessarily involves what could be considered acts of external sovereignty. In contrast to acts of sovereignty that involve the exercise of sovereignty by the South African state within its own

²⁹ *Quagliani* above n 5 at para 1. See also *Tucker* above n 15 at para 63.

³⁰ *Quagliani* id at para 1.

³¹ *Id.*

territory, extradition involves acts where South Africa, as a sovereign state, engages with other sovereign states. Acts of external sovereignty, including extradition requests, concern foreign and diplomatic relations. When an official or state organ acts on behalf of a state, they must have the authority to bind the state.

[37] With this context in mind, the respective powers of the national Executive and the NPA regarding outgoing extradition requests must be examined.

Power of the NPA and prosecutorial independence

[38] The DPP submits that the decision to prosecute an accused who is beyond the borders of South Africa, who must accordingly first be extradited, is a power incidental to the institution of criminal proceedings as contemplated in section 179(2) of the Constitution.³² The DPP further submits that the NPA must exercise its functions without fear, favour or prejudice, in accordance with section 179(4) of the Constitution. The DPP therefore contends that the power to issue outgoing extradition requests must lie with the NPA to ensure its prosecutorial independence as a constitutional imperative.

[39] In support of these contentions, the DPP relies on sections 20(1) and 32(1) of the NPA Act, which give effect to the NPA's constitutional obligations to carry out functions incidental to instituting and conducting criminal proceedings, and to act independently. The DPP also relies on the silence of the Extradition Act in relation to outgoing extradition requests. The DPP submits that the reason the Extradition Act regulates incoming extradition requests is that there is no other regulatory framework governing them and thus the Extradition Act specifically empowers the Minister of Justice to handle such requests. The DPP submits that outgoing requests on the other hand, are already covered by section 179 of the Constitution. The DPP also references

³² Section 179(2) of the Constitution reads:

“The prosecuting authority has the power to institute criminal proceedings on behalf of the state, and to carry out any necessary functions incidental to instituting criminal proceedings.”

the provisions of the Extradition Treaty between the US and South Africa³³ (US treaty) and submits that the US treaty does not specifically empower any actor to make outgoing extradition requests. The DPP acknowledges that section 179(6) of the Constitution grants the Minister of Justice general oversight powers over the NPA, but submits that this oversight does not permit interference with the NPA's independence.

[40] Ms Cholota does not deal squarely with the merits of *Schultz SCA*, insisting that they have no place in her appeal. She maintains that the legal questions before this Court relate specifically to her special plea. Specifically, she submits that this appeal is concerned with whether the prosecution proved its case beyond a reasonable doubt in the Bloemfontein High Court and whether that Court arrived at the correct decision.

[41] It is common cause that the Constitution does not grant the NPA express powers to make outgoing extradition requests. The crux of the DPP's argument is that this authority is an implied power of the NPA's express prosecuting authority, as articulated in sections 179(2) and 179(4) of the Constitution and sections 20(1) and 32(1) of the NPA Act. This argument, therefore, requires an interrogation of the ambit of the NPA's implied power.

[42] In *Mncwabe*,³⁴ this Court considered whether the NDPP was authorised to notify two candidates of their appointments as DPPs. On whether the NDPP had the original power to notify the applicants, the Court examined the implied powers of the office of the NDPP. This Court held:

“Implied powers are the exception, not the rule. These powers only come into existence when they are *reasonably necessary to give practical effect to the express powers* laid down in legislation. Axiomatically, an implied power must draw from an enabling

³³ Extradition treaty between the Government of the United States of America and the Government of the Republic of South Africa, 16 September 1999.

³⁴ *Mncwabe v President of the Republic of South Africa; Mathenjwa v President of the Republic of South Africa* [2023] ZACC 29; 2023 (11) BCLR 1342 (CC); 2024 (1) SACR 447 (CC).

legislative provision. An implied power is ordinarily less likely to be found where the legislation is aimed at certainty.”³⁵ (Emphasis added.)

[43] In *AmaBhungane*,³⁶ this Court quoted with approval the following proposition by Professor Hoexter:

“As a general rule, express powers are needed for the actions and decisions of administrators. Implied powers may, however, be ancillary to the express powers, or exist either as a necessary or reasonable consequence of the express powers. Thus what is reasonably incidental to the proper carrying out of an authorised act must be considered as impliedly authorised.”³⁷

[44] This Court in *AmaBhungane* helpfully distinguished implied primary powers from implied ancillary powers. The former is “implied from a reading of the Act and . . . everything that is relevant to the interpretative exercise”.³⁸ Implied ancillary powers, on the other hand, come into effect only when they are necessary to fulfil or give effect to express powers. As held in *AmaBhungane*, an implied ancillary power must be an “essential corollary” of an express power.³⁹ In this case, we are dealing only with implied ancillary powers, since the power to authorise outgoing extradition requests does not stand on its own and would have to be derived from, or have its existence “pegged on”,⁴⁰ the express powers in sections 179(2) and 179(4) of the Constitution and sections 20(1) and 32(1) of the NPA Act.

[45] Our courts have developed constraining factors for the assessment of implied ancillary powers.⁴¹ Courts must have regard to the doctrine of necessity and whether

³⁵ Id at para 72

³⁶ *Amabhungane Centre for Investigative Journalism NPC v Minister of Justice and Correctional Services* [2021] ZACC 3; 2021 (3) SA 246 (CC); 2021 (4) BCLR 349 (CC).

³⁷ Id at para 66 citing Hoexter *Administrative Law in South Africa* 2 ed (Juta, Cape Town 2012) at 43-4.

³⁸ Id at para 70.

³⁹ Id at para 64.

⁴⁰ See id at para 69.

⁴¹ See *Makoka v Germiston City Council* 1961 (3) SA 573 (A); [1961] 3 All SA 495 (A) at 581-82.

the implied ancillary power is necessary to execute the express power.⁴² Courts must also consider whether the Legislature's object in conferring the express power would be defeated if the ancillary power were not implied.⁴³ In addition, courts must examine whether the express power cannot in practice be carried out in a reasonable manner unless the ancillary power is implied.⁴⁴

[46] Is the power to make outgoing extradition requests necessary to give effect to the express prosecutorial powers? In answering this question, we must consider the nature of outgoing extradition requests. As mentioned, these requests comprise both domestic and international components. With regard to the latter, the Executive, clothed with the duty and function to liaise with foreign states, is the appropriate state functionary. Beyond acting as a conduit, the Executive is specifically tasked with managing foreign affairs and has an oversight role in actions made on behalf of the state.⁴⁵ In his concurring judgment in *Kaunda*, Ngcobo J stated as follows:

“The conduct of foreign relations is a matter which is within the domain of the executive. The exercise of diplomatic protection has an impact on foreign relations. Comity compels states to respect the sovereignty of one another; no state wants to interfere in the domestic affairs of another. The exercise of diplomatic protection is therefore a sensitive area where both the timing and the manner in which the intervention is made are crucial. The State must be left to assess foreign policy considerations and it is a better judge of whether, when and how to intervene.”⁴⁶

[47] O'Regan J, in her concurring judgment in the same case, correctly found this function of the national Executive in a number of constitutional provisions:

⁴² See *Masetlha v President of the Republic of South Africa* [2007] ZACC 20; 2008 (1) BCLR 1 (CC); 2008 (1) SA 566 (CC) at para 68.

⁴³ *Johannesburg Municipality v Davies* 1925 AD 395 at 403.

⁴⁴ *City of Cape Town v Claremont Union College* 1934 AD 414 at 420-1.

⁴⁵ For a discussion of the national Executive's role in this regard see *Kaunda* above n 4 at paras 77, 172 and 243

⁴⁶ *Id* at para 172.

“It is clear, though perhaps not explicit, that under our Constitution the conduct of foreign affairs is primarily the responsibility of the executive. That this is so, is signified by a variety of constitutional provisions, including those that state that the President is responsible for receiving and recognising foreign diplomatic and consular representatives [(section 84(2)(h)], appointing ambassadors, plenipotentiaries and diplomatic and consular representatives [(section 84(2)(i)], and that the national executive is responsible for negotiating and signing international agreements [(section 231(1)]. The conduct of foreign relations is therefore typically an executive power under our Constitution. This is hardly surprising. Under most, if not all constitutional democracies, the power to conduct foreign affairs is one that is appropriately and ordinarily conferred upon the executive, for the executive is the arm of government best placed to conduct foreign affairs.”⁴⁷

[48] This is particularly important given that managing foreign affairs can be politically sensitive, requiring a balancing of strategic interests, bilateral and multilateral drivers and other quintessentially political considerations. It is quite possible that the decision to prosecute a prominent individual who has crossed our borders may increase tensions or lead to hostility from the state to which South Africa makes the request. These considerations fall squarely within the realm of the Executive.

[49] There are other important reasons for the national Executive to be entrusted with the authority to engage with foreign sovereign states, as was found in *Kaunda*. Apart from the reasons already quoted above, it is important for South Africa as a sovereign state to be consistent in its engagements with foreign states and speak with one voice. Furthermore, since foreign relations inherently concern political considerations, it is important to subject the functionary making those decisions to democratic accountability, as the Executive is.

[50] The DPP, however, cites *Kaunda* to support the proposition that the power to authorise outgoing extradition requests is necessary for prosecutorial functions. The DPP attaches particular weight to paragraph 83:

⁴⁷ Id at para 243.

“In terms of the Constitution the prosecuting authority, headed by the [NDPP], has the power to institute criminal proceedings on behalf of the State and to carry out any necessary functions incidental to the instituting of criminal proceedings. This would include applying for extradition where this is necessary.”⁴⁸ (Footnote omitted.)

[51] It is however important to read the above paragraph within the context of the entire judgment. The applicants in that case were praying for an order that demanded the South African government to request their extradition from Zimbabwe and Equatorial Guinea. In order to determine whether this relief was feasible, this Court considered the extent to which the NPA had investigated and prepared a prosecution of the applicants’ alleged crimes.

[52] In *Kaunda*, the appropriate locus of power within the South African government to authorise an outgoing extradition request was not at issue. While paragraph 83 refers to the NPA’s power to “[apply] for extradition”, it is not clear whether this “application” is an application to be made directly to a foreign state or to the national Executive, or whether the application could be overridden by diplomatic concerns. These issues were not before this Court in *Kaunda*. Instead, Chaskalson CJ referred to the “South African government” or “the government” when discussing the potential extradition of the applicants, without specifying the relevant organ of government.⁴⁹ Additionally, the statement in paragraph 83 was made *obiter*, and it is clear that *Kaunda* made no binding determination on which state functionary has the power to authorise an outgoing extradition request.

[53] Would the object of conferring prosecutorial powers on the NPA be defeated if the ancillary power were not implied? In this regard, the DPP submits that outgoing extradition requests are made for purposes of domestic prosecutions. For the executive

⁴⁸ Id at para 83.

⁴⁹ Id at paras 86 and 93.

branch to possess authority over these requests, it is argued, would constitute a serious impairment of the constitutional guarantee of the NPA's independence.

[54] The importance of prosecutorial independence needs little repetition. As held in the *First Certification Judgment*—

“[section] 179(4) provides that the national legislation must ensure that the prosecuting authority exercises its functions without fear, favour or prejudice. There is accordingly a constitutional guarantee of independence, and any legislation or executive action inconsistent therewith would be subject to constitutional control by the courts.”⁵⁰

[55] It follows that neither the national Executive nor other branches of government may interfere with the NPA's authority over prosecutorial proceedings.⁵¹ This much is not contested.

[56] Outgoing extradition requests, however, are not merely prosecutorial proceedings. As mentioned, an outgoing extradition request involves both a domestic and an international stage. The domestic stage involves the identification of the accused, investigation of the criminal conduct, preparation of the necessary docket and initiation of the request for extradition. These powers comfortably fit within the realm of the implied powers of the NPA under section 179(2) of the Constitution and the NPA Act. This is so because the NPA is uniquely placed to conduct investigations and charge accused persons, in line with sections 2 and 20 of the NPA Act.

[57] The international stage, on the other hand, cannot be entirely subsumed under prosecutorial proceedings. In *Tucker*,⁵² this Court recognised that extradition is a *sui*

⁵⁰ *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa*, 1996 [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) at para 146.

⁵¹ Only the NDPP has the power to review a decision to institute a prosecution. See sections 22(1) and 22(2)(c) of the NPA Act read with section 179(5)(d) of the Constitution.

⁵² *Tucker* above n 15. While *Tucker* dealt with the scope of a Magistrate's powers in relation to incoming extradition requests, the Court's confirmation of the uniqueness of extradition proceedings is apposite in this case.

generis (unique) procedure.⁵³ It was held that “the language of the Extradition Act, read purposively, creates a ‘bridge’ between the judicial and executive phases”.⁵⁴ This was confirmed by this Court in *Geuking*:

“[E]xtradition is deemed a sovereign act, its legal proceedings are deemed *sui generis*, and its purpose is not to adjudicate guilt or innocence but to determine whether a person should properly stand trial where accused or be returned to serve a sentence properly imposed by another state.”⁵⁵

[58] The *sui generis* nature of the international stage also accords with the actual process of outgoing extraditions. Outgoing extradition requests are typically made via diplomatic channels. More importantly, the international stage of these requests requires their transmittal between sovereign states. As the Supreme Court of Appeal rightly observed, “one of the essential elements of extradition is that it involves an act of sovereignty between two States”.⁵⁶

[59] So construed, executive authority over the issuance of outgoing extradition requests does not defeat the object and purpose of section 179 of the Constitution and the NPA Act. The NPA’s broad powers over prosecutorial proceedings cover the domestic stage of outgoing extraditions. Its independence is a shield that precludes other branches of government from unduly interfering with these powers. The *sui generis* nature of the international stage and the foreign and diplomatic relations involved, however, necessitate that the international stage also involves powers beyond the ambit of prosecutorial authority. In reality, the outcome of domestic prosecutions may be inextricably linked with the exercise of these sovereign and diplomatic powers, but such a connection does not render these powers purely prosecutorial in nature.

⁵³ Id at paras 55 and 102.

⁵⁴ Id at para 102.

⁵⁵ *Geuking* above n 15 at para 26 citing Bassiouni *International Extradition United States Law and Practice* 4 ed (Oceana Publications, New York 2002) at 66 .

⁵⁶ *Schultz SCA* above n 3 at para 25.

Therefore, prosecutorial independence cannot license the NPA to reach beyond the ambit of its authority and wield powers more properly vested in the national Executive.

[60] Are the express powers to institute criminal proceedings, and to carry out necessary functions incidental thereto, capable of being carried out in a reasonable manner if the NPA lacks the implied power to authorise outgoing extradition requests? The nature of the extradition procedure changes the hue of the process from being purely prosecutorial to involving state cooperation and diplomacy. Procedurally, there are different “phases” of the extradition process. Before an extradition request can be made, there first needs to be a decision to prosecute, which is a quintessential prosecutorial function.⁵⁷ Thereafter, the extradition request, and the supporting documentation, must be prepared. The exact form and content of the request and supporting documentation will depend on the specifics of the extradition agreement concluded with a foreign state. In terms of the US treaty, for example, the request must be in writing, supported by prescribed documents. These include, among others, a copy of the warrant of arrest, the charge sheet, information relating to the facts of the offence and the procedural history of the case, and a statement of the law relating to the relevant offence.⁵⁸

[61] By virtue of section 179(2) of the Constitution the NPA has the exclusive power to decide whether to prosecute an individual. By practical necessity, the NPA will also need to be intimately involved in, and possibly direct, the preparation of the extradition request and supporting documents. It is, after all, the body with the necessary knowledge and resources for compiling these documents. These roles and functions, however, are distinct from the power to finally authorise whether the extradition request is made or not.

⁵⁷ Id at para 40.

⁵⁸ Article 9 of the US treaty.

[62] The powers of the NPA flowing from section 179(2) of the Constitution, to *institute* criminal proceedings – express or incidental – do not include the final power to issue an extradition request to a foreign state. The DPP’s argument – that the power to make outgoing extradition requests is incidental to the institution of criminal proceedings – therefore cannot be sourced in law. The Supreme Court of Appeal in *Schultz SCA* was correct, in this regard, to conclude that for the NPA to hold the decision-making power over outgoing extradition requests “would accord to a non-executive domestic organ of state an executive function at a state-to-state level”.⁵⁹

[63] This finding does not impede prosecutorial independence in an oppressive manner. There may be instances where, after weighing political and diplomatic concerns, the Executive’s decision not to issue an extradition request hinders the NPA from pursuing a prosecution. That is a consequence of how power is devolved and allocated by the Constitution, and is justified by the broader duty that the Executive has to consider factors beyond the narrower scope of successful prosecution. This judgment, however, does not put these governmental branches necessarily at odds with each other. To the contrary, should the Executive raise objections or find a request potentially problematic, it has a constitutional duty to engage with the NPA.⁶⁰ Inter-governmental cooperation is particularly important where the functions of different state organs touch so closely on each other’s boundaries. A supportive, dialogical approach to extradition is necessary and gives effect to the constitutional principles of co-operative government and intergovernmental relations outlined in section 41 of the Constitution.

[64] Section 41(1)(e) of the Constitution obliges all spheres of government to respect the constitutional status, institutions, powers and functions of government in the other spheres. Section 41(1)(g) mandates that each sphere exercises its powers and performs

⁵⁹ *Schultz SCA* above n 3 at para 32.

⁶⁰ Section 179(6) of the Constitution. Flowing from section 179(6) of the Constitution, section 33(2) of the NPA Act requires engagement between the NDPP and the Minister of Justice on matters concerning the powers, duties and performance of the NPA, and any decisions taken by the NDPP or any DPP in the exercise of their powers.

its functions in a manner that does not encroach on the geographical, functional or institutional integrity of another sphere. Chapter 3, of which section 41 forms part, specifically governs co-operative governance between national, provincial and local spheres of government. However, the principle that different state institutions must respect each other's designated powers and functions also flows from the principle that public entities "may exercise no power and perform no function beyond that conferred upon them by law"⁶¹ and thus applies equally to all organs of state.

The power of the Executive to authorise the extradition request

[65] At the international level, the national Executive must hold authority over the issuance of outgoing extradition requests. Extradition involves "acts of sovereignty on the part of two states".⁶² Extradition requests can involve sensitive political and diplomatic considerations. The NPA, as a domestic entity, is neither positioned nor equipped to adequately deal with these considerations. Additionally, granting the NPA such power would mean that extradition requests would be made without any executive oversight. Given the importance for South Africa to speak with one voice on foreign affairs, such an outcome is untenable.

[66] The separation of powers doctrine cannot countenance the NPA exercising external sovereign powers on behalf of South Africa. Established under Chapter 8 of the Constitution, the NPA is not clothed with executive power. While both the Constitution and the NPA Act confer on it broad powers to institute and conduct criminal prosecutions, neither framework permits the NPA to intrude upon executive functions or to bind South Africa in relation to other states. Those powers are vested in the democratically accountable national Executive. This is not to say that the national Executive controls every aspect of foreign relations. Rather, the capacity to represent South Africa in engaging with other sovereign states, what I have referred to as external

⁶¹ *Fedsure Life Assurance Ltd v Greater Johannesburg Transitional Metropolitan Council* [1998] ZACC 17 (CC); 1998 (12) BCLR 1458 (CC); 1999 (1) SA 374 (CC) (*Fedsure*) at para 58.

⁶² *Mohamed v President of the Republic of South Africa* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 28.

sovereignty, vests with the national Executive, not the NPA.⁶³ As a result, the Executive cannot merely participate in the issuance of outgoing extradition by playing an administrative role akin to that of a “conduit” – it must apply its mind to the extradition request and exercise a concomitant discretion.

[67] This being said, it is not the Executive’s function, in applying its mind to the extradition request, to decide whether there is sufficient evidence to justify a prosecution or whether as a matter of law the evidence discloses an offence. Those considerations form part of the NPA function. The executive function is to determine whether, despite the NPA’s conclusion that in law there are grounds for the extradition, there are other reasons, concerned with external sovereignty, comity and foreign relations, which might warrant declining to make the extradition request.

[68] It was submitted, on behalf of the DPP, that the executive branch can voice political concerns in a consultative role without possessing final authority over outgoing extraditions. To the extent that this argument encourages co-operation between branches of government, this submission must be sustained. Insofar as the authority to authorise extradition requests to other states is concerned, however, the exercise of external sovereignty inherent to these requests militates against a finding that the NPA may engage in acts of external sovereignty through making these requests.

[69] There are practical consequences of this finding. An outgoing extradition request may be necessary for a prosecution, and a refusal by the Executive can effectively frustrate the process. The potential to undermine the efficient functioning of the NPA cannot be understated. However, it is possible to balance prosecutorial interests with interests of comity in international affairs.

[70] First, it must be noted that the NPA’s prosecutorial powers are not unlimited, and prosecutorial independence does not amount to unchecked power over all stages of

⁶³ *Kaunda* above n 4 at para 172.

a prosecution process. The texts of the Constitution and the NPA Act imply so. Section 179(2) of the Constitution only empowers the NPA “to *institute* criminal proceedings”.⁶⁴ While the NPA Act goes further by enabling the NPA to “institute”, “conduct” and “discontinue” criminal proceedings “on behalf of the State”,⁶⁵ this provision does not license the NPA to carry out acts of external sovereignty or otherwise intrude upon executive authority. Where the prosecution process overlaps with the authority of other branches of government, due deference must be given to those branches, and vice versa.

[71] For instance, arrest warrants are often crucial to prosecutions, yet section 43 of the Criminal Procedure Act places the power to issue arrest warrants squarely in the hands of the courts. While the NPA has wide powers in the preparation and application of arrest warrants, judicial control over their issuance balances the state’s interest in prosecuting suspects with individual rights to freedom and liberty. It also serves as a check against unfettered prosecutorial power. Similarly, because outgoing extradition requests involve exercises of external sovereignty and sensitive foreign relations considerations, executive oversight is appropriate.

[72] Second, insofar as concerns are raised regarding the Executive improperly blocking extradition requests for political reasons or otherwise, the exercise of the Executive’s public power in relation to extradition requests remains subject to judicial review. Public power under the constitutional dispensation must be exercised rationally⁶⁶ and lawfully.⁶⁷ In *AAA Investments*, this Court held that “[t]he exercise of public power is always subject to constitutional control and to the rule of law or, to put it more specifically, the legality requirement of our Constitution”.⁶⁸

⁶⁴ Emphasis added.

⁶⁵ Section 20 of the NPA Act.

⁶⁶ *Pharmaceutical Manufacturers* above n 13 at para 85.

⁶⁷ *Fedsure* above n 61 at 58.

⁶⁸ *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* [2006] ZACC 9; 2006 (11) BCLR 1255 (CC); 2007 (1) SA 343 (CC) at para 29.

[73] Therefore, while the NPA exercises control over the domestic preparation of outgoing extradition requests, the authority to make these requests to a foreign state vests with the national Executive. A survey of comparative jurisdictions supports this finding, as demonstrated below.

Comparative law

[74] In Canada, the Minister of Justice, a member of the Executive, is in charge of outgoing extradition requests.⁶⁹ Under section 78(1) of Canada's Extradition Act,⁷⁰ "[t]he Minister [of Justice], at the request of a competent authority, may make a request to a State or entity for the extradition of a person". Section 77 defines "competent authority" as "the Attorney General" or the "Attorney General of a province who is responsible for the prosecution of the case". Section 3(9) of Canada's Director of Public Prosecutions Act⁷¹ enables the Canadian Director of Public Prosecutions, the head of the federal prosecuting authority,⁷² to "exercise any powers or perform any duties or functions of the Attorney General under the Extradition Act".

[75] These statutes establish a two-stage process. First, the prosecuting authority submits a request to the Minister of Justice. Thereafter, the Minister of Justice, after exercising their discretion, "may make" an outgoing extradition request to another state. This process accords with the legal nature of outgoing extradition requests: that they operate at the intersection of domestic and international law. It also affirms that the Minister of Justice is responsible for authorising outgoing extradition requests and retains discretion in exercising this power.

[76] While extradition laws in other states are not as explicit, they too support the proposition that the executive branch holds the authority over outgoing extraditions. In

⁶⁹ Section 14 of the Constitution Act, 1867 and section 2(1) of Canada's Department of Justice Act RSC 1985 c J-2.

⁷⁰ SC 1999 C 18.

⁷¹ SC 2006 C 9 S 121.

⁷² Id at section 3..

India, section 19 of the Extradition Act⁷³ states that unless an extradition treaty provides otherwise, a “requisition for the surrender of a person accused or convicted of an extradition offence committed in India . . . may be made by the Central Government”.

[77] In Spain, article 824 of the Criminal Procedure Act⁷⁴ states that “[p]rosecutors . . . will request that the Judge or Court proposes to the Government that it requests extradition of those accused or convicted in final judgement”. Article 831 goes on to state that unless an applicable treaty provides otherwise, “[t]he request for extradition will be made in the form of a request addressed to the Ministry of Justice”. These provisions highlight the role of Spanish judges in initiating outgoing extradition requests and confirm that the final authority to request extradition is that of the Executive.

[78] In Australia, section 40 of the Extradition Act⁷⁵ provides that an outgoing extradition request “shall only be made by or with the authority of the Attorney General”. In New Zealand, section 61 of the Extradition Act⁷⁶ provides that an outgoing extradition request may “be made only by or with the authority of . . . the Minister [of Justice]”. Both the Attorney General in Australia and the Minister of Justice in New Zealand form part of the executive branch of government, confirming that the issuance of outgoing extradition requests is an executive function.

[79] Of note, extradition requests between Australia and New Zealand operate under a special regime known as the “backing of warrants”. Under this regime, extradition requests do not require executive approval.⁷⁷ Instead, a valid arrest warrant suffices.⁷⁸ This regime, however, is an exception to the general rule. Its existence is specifically

⁷³ 34 of 1962.

⁷⁴ 260 of 1882.

⁷⁵ 4 of 1988.

⁷⁶ 55 of 1999.

⁷⁷ Section 61(1)(b) of New Zealand’s Extradition Act and sections 28 and 40 of Australia’s Extradition Act.

⁷⁸ *Id.*

provided for in national legislation. Moreover, this regime only applies to extradition requests between selected states. In other words, this regime operates with acknowledgement that outgoing extradition requests are executive functions and only carves out exceptions under limited circumstances.

[80] Similar reciprocal regimes can be found in other countries, including Kenya⁷⁹ and Uganda.⁸⁰ It is important to note that in those jurisdictions, the power to apply such regimes to a specific country is vested in the Executive.⁸¹ In other words, while there are examples of the Executive choosing to relinquish its control over outgoing extraditions with respect to designated countries, the prosecution authorities do not bypass the Executive without its authorisation.⁸² There is no similar regime between South Africa and the US.

Who within the Executive can authorise outgoing extradition requests?

[81] The Supreme Court of Appeal in *Schultz SCA* held that the Minister of Justice has the authority to issue outgoing requests to the US.⁸³ It based this finding on the fact that the Minister of Justice was the member of the executive authority who represented South Africa in concluding the US treaty.⁸⁴ While, as concluded above, our constitutional system and the separation of powers mandate that the national Executive controls outgoing extradition requests, these principles do not require any particular member of the Executive to exercise this power. The executive power of the state is vested in the President⁸⁵ and exercised together with the other members of their

⁷⁹ Part III of Kenya's Extradition (Contiguous and Foreign Countries) Act, 65 of 1968.

⁸⁰ Part II of Uganda's Extradition Act of 1964.

⁸¹ Section 61(1)(b) of New Zealand's Extradition Act; section 11(1) of Kenya's Extradition (Contiguous and Foreign Countries) Act; and section 17 of Uganda's Extradition Act.

⁸² A similar conclusion would apply to the other regional regimes, such as the European arrest warrant system. These regimes permit bypasses of executive oversight in individual extradition requests because an international agreement allowing such was entered into previously. They are, thus, not comparable to the case at hand.

⁸³ *Schultz SCA* above n 3 at para 50.

⁸⁴ *Id* at para 46.

⁸⁵ Section 85(1) of the Constitution.

Cabinet.⁸⁶ It is the President's prerogative to assign powers and functions to Ministers,⁸⁷ and no constitutional provision favours the Minister of Justice in particular to exercise the power over outgoing extraditions. In this regard, the Supreme Court of Appeal's judgment is incorrect.

[82] The Supreme Court of Appeal relied on the many provisions in the Extradition Act empowering the Minister of Justice to support its finding that the Minister has the power to authorise outgoing extradition requests. While these provisions do confer on the Minister of Justice a range of powers over *incoming* extradition proceedings, the Extradition Act does not directly address the authority to issue *outgoing* extradition requests.

[83] This judgment's conclusion that the power to authorise outgoing extradition requests vests with the Executive is primarily premised on principles of external sovereignty, executive power and the separation of powers. In the absence of clear statutory provisions, the Minister of Justice's power over incoming extradition requests cannot be imputed to outgoing requests. Instead, as a member of the national Executive, the Minister of Justice's extensive powers over incoming requests simply support the general proposition that extradition requests, insofar as they concern sovereign powers and foreign affairs, fall within the purview of the Executive.

[84] In some cases, in negotiating and signing extradition treaties, the national Executive has already made specific designations. For example, South Africa's extradition treaty with the United Arab Emirates specifies that the Director-General of the Department of Justice and Constitutional Development shall "make and receive" extradition requests.⁸⁸ Another example is the Southern African Development Community's Protocol on Extradition, which states that "[a] request for

⁸⁶ Section 85(2) of the Constitution.

⁸⁷ Section 91(2) of the Constitution.

⁸⁸ Article 2 of the Extradition Treaty between the Republic of South Africa and the United Arab Emirates, 25 September 2018.

extradition . . . shall be transmitted through the diplomatic channel, directly between the Ministries of Justice or any other authority designated by State Parties”.⁸⁹ Although the US treaty does not specify a person or entity responsible for issuing outgoing requests, it, alongside many other extradition treaties, designates the Department of Justice and Constitutional Development for purposes of consultation in connection with the processing of individual cases.⁹⁰ The validity of these specific delegations is not before this Court, and this judgment makes no pronouncement on this issue beyond the conclusion that the authority to issue outgoing extradition requests vests with the national Executive.

[85] In the case of Ms Cholota, it is common cause that her extradition was requested by the DPP, and not by a member of the Executive. In terms of this judgment, and in line with the Supreme Court of Appeal’s judgment in *Schultz SCA*, the DPP did not have the power to make Ms Cholota’s extradition request. To the extent that the Bloemfontein High Court found that her extradition was, for this reason, irregular and unlawful, it was correct. This, however, is not the end of the enquiry. What remains to be decided is whether the Bloemfontein High Court was correct in declining to exercise jurisdiction merely because of the DPP’s lack of authority.

The status of the US court order

[86] The DPP contends that, even if Ms Cholota’s extradition was requested by the incorrect South African state functionary, her extradition occurred as a result of an unchallenged US court order. The DPP further submits that the US court order rendered Ms Cholota’s extradition lawful even if the request was wrongly authorised. The DPP argues that South African courts do not have the power to impugn foreign court orders and that Ms Cholota’s remedy lies in challenging the US court order in the US.

⁸⁹ Article 6.1 of the Southern African Development Community’s Protocol on Extradition, 3 October 2002.

⁹⁰ See for example Article 22 of the US treaty (stating that the US Department of Justice and the South African Department of Justice “may consult with each other . . . in connection with the processing of individual cases and in furtherance of efficient implementation of this Treaty”); Article 23 of the Extradition Treaty between the Republic of South Africa and the Arab Republic of Egypt, 22 October 2001; and Article 22 of the Treaty between the Republic of South Africa and the Republic of India on Extradition, 16 October 2003.

[87] This argument is misconceived. Ms Cholota’s complaint is not aimed at any irregularity committed by US officials in extraditing her, but at the actions of South African officials in requesting her extradition. South African courts are empowered to determine the lawfulness of the exercise of public power by South African officials at the stage of the *request* for extradition. In *Affordable Medicines*,⁹¹ this Court said:

“The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the doctrine of legality, which is part of that law. The doctrine of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the legislature and the executive ‘are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law.’”⁹²

[88] Where the actions of South African officials render an extradition request irregular or unlawful, it cannot be that subsequent regular and lawful extradition proceedings in the requested state erase the irregularity or unlawfulness. The unlawful conduct of South African functionaries does impact on the question whether a South African court should exercise criminal jurisdiction over the extradited person.⁹³ This argument of the DPP must accordingly fail.

The High Court’s jurisdiction to try Ms Cholota

[89] As discussed, the Bloemfontein High Court declared that Ms Cholota’s extradition was “done unlawfully for want of a valid and lawful request for her extradition by the South African executive power”. It consequently found that it did not have jurisdiction to try Ms Cholota with the offences she was charged with.

⁹¹ *Affordable Medicines Trust v Minister of Health* [2005] ZACC 3; 2005 (6) BCLR 529 (CC); 2006 (3) SA 247 (CC).

⁹² *Id* at para 49.

⁹³ *S v Ebrahim* [1991] ZASCA 3; 1991 (2) SA 553 (A) (*Ebrahim*) at 582B-D.

[90] The Bloemfontein High Court’s conclusion is based on the principle that—

“if there were unlawful or improper conduct on the part of the organs or the functionaries of the South African State in foreign territory aimed at securing the presence of an accused in South Africa, the South African Courts are precluded from trying anyone for crimes committed within its borders.”⁹⁴

[91] The Bloemfontein High Court relied on *Ebrahim*⁹⁵ for this principle. In *Ebrahim*, the accused, a member of uMkhonto weSizwe,⁹⁶ had been unlawfully abducted from eSwatini (previously Swaziland) by agents of the South African state, forced to enter South Africa and handed over to the South African police, who then arrested him. Following his conviction for treason, he appealed to the Appellate Division. That Court conducted a survey of Roman and Roman-Dutch authorities to determine the common law position in South Africa, and found that the High Court did not have jurisdiction over the accused. Its reasoning is apparent from the following passage:

“A number of fundamental legal principles are contained in those rules, to wit, those aimed at the conservation and furtherance of human rights, proper foreign relations and the sound administration of justice. The individual must be protected against unlawful detention and against abduction, the limits of jurisdiction must not be exceeded, political sovereignty must be respected, the process of law must be equitable to those persons affected thereby and the abuse thereof must be avoided to protect and further the dignity and integrity of the administration of justice. This applies equally to the State. When the State is a party to a case, for example in criminal cases, it must come to court, as it were, ‘with clean hands’. If the State itself was involved in a kidnapping across state borders, as in the present case, its hands are not clean.”⁹⁷ (Own translation.)

⁹⁴ *Cholota HC* above n 8 at para 3.

⁹⁵ *Id.*

⁹⁶ uMkhonto weSizwe was the military wing of the African National Congress.

⁹⁷ *Ebrahim* above n 93 at 582B-D.

[92] The DPP argues that the default position that an accused be brought to trial must be balanced against the constitutional requirement that the state follows a lawful procedure to bring the criminal to trial, and courts should only decline to exercise jurisdiction where it would bring the administration of justice into disrepute by condoning egregious unlawful conduct by the state. The DPP argues that the *Ebrahim* principle was articulated in the particular context of egregious unlawful conduct by state functionaries, as they participated in the unlawful abduction of the accused.

[93] On the other hand, the DPP contends that the current case at most involved the prosecution making a *bona fide* (good faith) error of law. This error was entirely technical, in that the extradition request was made by the DPP and not by a member of the Executive, and there was no reason to believe that the request would not have been made, if the state parties had known that the power vests in the Executive.

[94] There can be no doubt that the *Ebrahim* principle remains an important feature of South African law. The rule of law and the constitutional guarantee of procedural fairness in criminal cases must be jealously guarded. The impunity of the apartheid state, particularly in the context of arrests and criminal proceedings, was an outright violation of fundamental rights which cannot be repeated or justified in our constitutional order. In *Makwanyane*, this Court emphasised the decisive break from state impunity; unequivocally placed human rights at the centre of its analysis of criminal sanction; and demanded the state to do the same in “everything that it does”.⁹⁸ State violence, purposeful disregard for the law and the political will to bring opponents of the government to trial at any cost is not sanctioned in our human rights-based dispensation.

[95] The *Ebrahim* judgment has been referred to with approval by the House of Lords in *Bennet*, where it held that the Judiciary should “accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action

⁹⁸ *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 144.

and to refuse to countenance behaviour that threatens either basic human rights or the rule of law”.⁹⁹

[96] The House of Lords in *Latif* reaffirmed *Bennet* and articulated the particular dilemma for the rule of law, where it is required to exercise criminal jurisdiction over a person who has been brought to court in an irregular or unlawful manner:

“If the court always refuses to stay such proceedings, the perception will be that the court condones criminal conduct and malpractice by law enforcement agencies. That would undermine public confidence in the criminal justice system and bring it into disrepute. On the other hand, if the court were always to stay proceedings in such cases, it would incur the reproach that it is failing to protect the public from serious crime. The weaknesses of both extreme positions leave only one principled solution. The court has a discretion: it has to perform a balancing exercise. If the court concludes that a fair trial is not possible, it will stay the proceedings. . . . In this case the issue is whether, despite the fact that a fair trial was possible, the judge ought to have stayed the criminal proceedings on broader considerations of the integrity of the criminal justice system. The law is settled. Weighing countervailing considerations of policy and justice, it is for the judge in the exercise of his discretion to decide whether there has been an abuse of process, which amounts to an affront to the public conscience and requires the criminal proceedings to be stayed (see *Bennet v Horseferry Road Magistrates’ Court* [1993] 3 All ER 138, sub nom *R v Horseferry Road Magistrates’ Court, ex p Bennett* [1994] 1 AC 42). *Bennett* was a case where a stay was appropriate because a defendant had been forcibly abducted and brought to this country to face trial in disregard of extradition laws. The speeches in *Bennett* conclusively establish that proceedings may be stayed in the exercise of the judge’s discretion not only where a fair trial is impossible but also where it would be contrary to the public interest in the integrity of the criminal justice system that a trial should take place. An infinite variety of cases could arise. General guidance as to how the discretion should be exercised in particular circumstances will not be useful. But it is possible to say that in a case such as the present the judge must weigh in the balance the public interest in ensuring that those that are charged with grave crimes should be tried and the competing public

⁹⁹ *R v Horseferry Road Magistrates’ Court, Ex parte Bennett* [1994] 1 AC 42 at 61-2.

interest in not conveying the impression that the court will adopt the approach that the end justifies any means.”¹⁰⁰

[97] The *Ebrahim* principle was also adopted by the Supreme Court of Zimbabwe in *Beahan*, where the Court held:

“[I]n order to promote confidence in and respect for the administration of justice and preserve the judicial process from contamination, a court should decline to compel an accused person to undergo a trial in circumstances where his appearance before it has been facilitated by an act of abduction undertaken by the prosecuting State. There is an inherent objection to such a course both on grounds of public policy pertaining to international ethical norms and because it imperils and corrodes the peaceful coexistence and mutual respect of sovereign nations.”¹⁰¹

[98] The Supreme Court of Zimbabwe went on to find, however, that the facts in the case under consideration differed markedly from those of *Ebrahim*. It held:

“The immutable fact is that the appellant was recovered from Botswana without any form of force or deception being practised by the agents of this country. The decision to convey him to Zimbabwe was made, and could only have been made, by the Botswana Police in whose custody he was.

Where agents of the State of refuge, without resort to extradition or deportation proceedings, surrender the fugitive for prosecution to another State, that receiving State, since it has not exercised any force upon the territory of the refuge State and has in no way violated its territorial sovereignty, is not in breach of international law.”¹⁰²

[99] The principles articulated by the House of Lords and the Zimbabwe Supreme Court are well-suited to the South African context. While *Ebrahim* established an important precedent, it should not be interpreted to mean that *any* irregularity in extradition proceedings, no matter how insignificant, should result in a court declining

¹⁰⁰ *R v Latif; R v Shahzad* [1996] 1 All ER 353 (HL) at 360h - 361e.

¹⁰¹ *S v Beahan* 1992 (1) SACR 307 (ZS) at 317C-E.

¹⁰² *Id* at 317I-318B.

to exercise its criminal jurisdiction. Such principles are not supported by the facts of *Ebrahim*, and would not strike an appropriate balance between the concern for lawful process and the imperative to combat impunity. Both these concerns support the rule of law. The test for “an affront to the public conscience” or “where it would be contrary to the public interest in the integrity of the criminal justice system”¹⁰³ would require evidence of a serious deviation from the constitutionally enshrined rights of freedom and security of person¹⁰⁴ and to a fair trial.¹⁰⁵ Put differently, a court is only divested of its criminal jurisdiction in those cases where the exercise of its criminal jurisdiction would bring the administration of justice into disrepute.

[100] As found above, the DPP did not have the necessary authority to request Ms Cholota’s extradition. Accordingly, Ms Cholota’s extradition was unlawful and irregular. The question that the Bloemfontein High Court ought to have considered was whether exercising its criminal jurisdiction over Ms Cholota, in circumstances where her extradition was requested by the DPP, and not the national Executive, would have brought the administration of justice into disrepute.

[101] In my view, this question must decidedly be answered in the negative. The Bloemfontein High Court accepted, without more, that the fact that Ms Cholota’s extradition was requested by the NPA and not the Minister of Justice, resulted in it not having criminal jurisdiction over Ms Cholota. In this, the Bloemfontein High Court failed to recognise that Ms Cholota’s case differed from the facts in *Ebrahim* in material respects. Importantly, the DPP, in requesting extradition, operated under the *bona fide* assumption that it had the necessary authority to request extradition. It was only after the delivery of the Supreme Court of Appeal’s judgment in *Schultz SCA* that the NPA had to grapple with the question of whether it had authority to do so. There has been

¹⁰³ *Latif* above n 100 at 361b-c.

¹⁰⁴ Section 12 of the Constitution.

¹⁰⁵ Section 35(3) of the Constitution.

no suggestion that, had the Executive and the NPA been aware of the correct legal position, Ms Cholota's extradition would not have been requested correctly.¹⁰⁶

[102] Furthermore, Ms Cholota's case did not concern any violation of another country's sovereignty. She was extradited with the full cooperation of the foreign nation involved, the US, and in accordance with the two countries' obligations under the US treaty. There is no comparison between her case and that of the accused in *Ebrahim*, who was unlawfully abducted on foreign soil and smuggled over the South Africa-eSwatini border.

[103] Consequently, the Bloemfontein High Court erred in declining to exercise its discretion over Ms Cholota, on the mere basis that her extradition was requested by the NPA. On this basis, the appeal must succeed.

[104] The expressly pleaded grounds of the special plea have not been adjudicated upon, and are dependent on factual findings which this Court is ill-placed to make. The appropriate remedy would be for this Court to refer the matter back to the Bloemfontein High Court for adjudication of these grounds. Since these proceedings are part of a criminal trial, the question of costs does not arise.

Schultz, Case CCT 280/24

Condonation

[105] The applicants in Case CCT 280/24 seek condonation for the late filing of their application for leave to appeal. The test for condonation is whether it is in the interests of justice for this Court to grant condonation. The Court must consider the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for

¹⁰⁶ As was noted in the Bloemfontein High Court's judgment, the Executive in fact cooperated, in an administrative capacity with the NPA in seeking Ms Cholota's extradition. Although this does not render the extradition lawful, it is indicative of the fact that the error in the extradition request was *bona fide*. See *Cholota HC* above n 8 at para 16.

the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.¹⁰⁷

[106] Condonation is not there for the taking. An applicant seeking condonation must address each of the mentioned factors to the satisfaction of the court. The Supreme Court of Appeal's judgment was handed down on 23 May 2024. The applicants filed their application for leave to appeal on 17 September 2024, approximately three months after the 15-day deadline period prescribed by the Rules of the Constitutional Court lapsed. A three-month delay is substantial, and this Court has refused condonation for shorter delays in the past.¹⁰⁸

[107] The explanation for the delay proffered by the applicants leaves much to be desired. They blame the majority of the delay on their misunderstanding that the Department of Justice and Constitutional Development intended to launch an appeal, and on difficulties they had in briefing counsel, given the State Attorney's cumbersome briefing policy.

[108] Neither of these reasons is satisfactory. It cannot be that a litigant can escape the obligation to comply with this Court's rules on the mere allegation that it thought another cited party would lodge an appeal. The NPA's status as an organ of state also bears on the evaluation of the reasonableness of the delay. As a public litigant,¹⁰⁹ the NPA, unlike self-represented or indigent litigants, has the resources to abide by the timelines prescribed in the Rules of this Court and should be fully equipped to lodge an appeal within the prescribed time frame. It would be perverse to not hold the state to the timelines required of other parties, on the basis that its briefing policy is too cumbersome.

¹⁰⁷ *Grootboom v National Prosecuting Authority* [2013] ZACC 37; 2014 (1) BCLR 65 (CC); 2014 (2) SA 68 (CC) at para 22.

¹⁰⁸ *Id* at paras 24 and 35.

¹⁰⁹ See *id* at para 30.

[109] The granting of condonation remains a judicial discretion¹¹⁰ – a lengthy delay and a less than satisfactory explanation might be overlooked where the importance of the issue and prospects of success warrant it.

[110] The DPP, Johannesburg and the NDPP abandoned their appeal in respect of the merits of *Schultz SCA*, and instead only seek an order limiting the retrospective effect of the judgment. The judgment, they argue, will result in catastrophic consequences for the administration of justice, as it potentially provides a basis for persons whose extraditions have previously been requested by the NPA to now challenge and invalidate such extradition requests. This is the ground on which the NPA bases its argument that the importance of the issue warrants granting condonation.

[111] On the *Ebrahim* principle as elucidated earlier in this judgment, a court ought not to decline to exercise its criminal jurisdiction on the mere basis that the accused's extradition request was authorised by the NPA and not the executive authority. This principle, it seems to me, would hold true for any extradition request that was made prior to *Schultz SCA*. Accordingly, even without the order sought by the NPA to limit the retrospectivity of *Schultz SCA*, the harm they fear to the administration of justice is largely, if not completely, ameliorated by this Court's findings in Case CCT 190/25. Accordingly, the NPA cannot slip past the requirement of condonation on the importance of the issue, and its case has no reasonable prospects of success. Thus, condonation must be refused and the application for leave to appeal must fail on that basis. The Supreme Court of Appeal's order in *Schultz SCA* stands, although this Court's findings in Case CCT 190/25 will naturally limit the ability of persons wishing to challenge their extradition on the basis that the NPA requested their extradition.

[112] Unlike *Cholota*, the *Schultz* case does not form part of pending criminal proceedings. The case started out as a civil application by Mr Schultz for a declaratory order. In the circumstances, costs should follow the result.

¹¹⁰ Id at para 20.

Impact on parties in Case CCT 280/24

[113] There was much said at the hearing of these two matters about the impact of the DPP's appeal of the *Cholota* matter on the Supreme Court of Appeal's order in *Schultz SCA*.

[114] The applicants in Case CCT 280/24 abandoned their appeal of the merits of the *Schultz SCA* order, and since this Court is refusing condonation, the parts of its appeal that were not abandoned also fail. Accordingly, the Supreme Court of Appeal's order remains valid and binding on the parties to that litigation.

[115] Case CCT 190/25 is not an appeal of the *Schultz SCA* order and our judgment in Case CCT 190/25 does not dislodge the Supreme Court of Appeal's *Schultz SCA* order, which declared that the Minister of Justice specifically, has the power to make the extradition request for the extradition of Mr Schultz from the US. On the narrow issue of whether the NPA or the Minister of Justice has the power to authorise extradition requests, our judgment in Case CCT 190/25 makes findings on an issue that was relevant in *Schultz SCA*. Where this Court's judgment in Case CCT 190/25 differs from the Supreme Court of Appeal's judgment in *Schultz SCA*, it is this Court's judgment that creates binding precedent. There is nothing controversial in this – it is a normal incident of the doctrine of precedent.

Orders

[116] In Case CCT 280/24 *Director of Public Prosecutions, Johannesburg and Another v Schultz and Others* the following order is made:

1. Condonation is refused.
2. The applicants are ordered to pay the first respondent's costs, including the costs of two counsel.

[117] In Case CCT 190/25 *Director of Public Prosecutions, Bloemfontein v Cholota* the following order is made:

1. The application for direct appeal is granted.
2. The appeal is partially upheld and the order of the High Court of South Africa, Free State Division, Bloemfontein is set aside.
3. It is declared:
 - (a) The National Prosecuting Authority has the power to prepare, draft and submit to the national Executive extradition requests for the national Executive to make such requests to a foreign state.
 - (b) Only the national Executive has the power to make extradition requests to foreign states.
 - (c) The respondent's extradition from the United States of America to the Republic of South Africa was unlawful on the basis that the extradition request was authorised by the applicant or an official within the National Prosecuting Authority rather than the national Executive.
 - (d) However, the fact that the extradition was unlawful as aforesaid does not of itself deprive the High Court of South Africa, Free State Division, Bloemfontein of criminal jurisdiction over the respondent.
4. The matter is remitted to the High Court of South Africa, Free State Division, Bloemfontein to determine the remaining grounds of the respondent's special plea.

In Case CCT 280/24

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In Case CCT 190/25

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