**IN THE HIGH COURT OF SOUTH AFRICA**
**(CAPE OF GOOD HOPE PROVINCIAL DIVISION)**

Case No: 4717/02

In the matter between:

**JÜRGEN HARKSEN**
Applicant

and

**THE MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT OF THE REPUBLIC OF SOUTH AFRICA** **First Respondent**

**THE DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE** Second Respondent

**THE MINISTER OF CORRECTIONAL SERVICES OF THE REPUBLIC OF SOUTH AFRICA** **Third Respondent**

**THE MINISTER OF SAFETY AND SECURITY OF THE REPUBLIC OF SOUTH AFRICA** **Fourth Respondent**

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**JUDGMENT: 05 NOVEMBER 2002**

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**VAN ZYL J:**

**INTRODUCTION**

[1] This is an application for the review, correction or setting aside of the first respondent's order, issued on 19 April 2002 pursuant to the provisions of section 11 of the *Extradition Act* 67 of 1962, in terms of which the applicant was surrendered to the relevant authorities of the Federal Republic of Germany, to be prosecuted for fraud allegedly committed by him in Germany. No relief is sought against the remaining respondents, who were not represented before us and have abided the decision of this court.

[2] Subsequent to an application during 1993 by the German government for the extradition of the applicant to stand trial in Germany on various charges of fraud, the applicant became involved in a substantial number of legal proceedings ostensibly aimed at avoiding or delaying his extradition. This culminated in his eventually indicating, during early 2002, that he would consent to an extradition order. It was envisaged that the subsequent extradition enquiry, which was to commence on 10 April 2002 before Magistrate Freitag in the Cape Town Magistrate's Court, would be of a purely formal nature.

[3] During the course of the enquiry Mr Tredoux, for the second respondent, handed up certain documentation by consent, including a draft order and a certificate in terms of section 10(2) of the *Extradition Act* 67 of 1962. After consideration thereof, the magistrate granted an order committing the applicant to prison "to await the Minister's decision with regard to his surrender to the Federal Republic of Germany". The relevant minister, being the first respondent, accordingly issued an order on 19 April 2002 in the following terms:

> Whereas Mr JÜRGEN HARKSEN was committed to prison by the Magistrate, Cape Town, in terms of section 10(1) of the Extradition Act (Act No. 67 of 1962),
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> Now therefore I, DR PENUELL MADUNA, Minister for Justice and Constitutional Development of the Republic of South Africa, in terms of section 11 of the said Act order the said accused to be surrendered to persons authorized by the Federal Republic of Germany to receive him, to be prosecuted for committing fraud.

**THE CASE FOR THE APPLICANT**

[4] The applicant admitted that he had consented to being extradited. He alleged, however, that it had always been his intention to make representations to the first respondent concerning

the specific charges on which he would stand trial in Germany, inasmuch as the German prosecuting authorities would be limited to the charges specified in the extradition order. It was incumbent on the first respondent to give him a hearing and to consider his representations. In the present instance, the applicant alleged, the first respondent had failed to do so. The ambit of the aforesaid order was hence far too wide in that it exposed the applicant to prosecution in Germany "on virtually any charge of fraud", regardless of when or against whom such fraud had allegedly been committed. An alternative argument, namely that the order was *ultra vires* in that it had been issued before expiry of the time period within which the applicant was entitled to appeal the magistrate's decision, was not pursued with any vigour and does not require further consideration.

[5] The applicant alleged further that it had been brought to his knowledge that other interested parties had made representations to the first respondent regarding his extradition to Germany. At no stage, however, had the applicant been afforded an opportunity to respond thereto. This was in conflict with "the tenets of natural justice" and justified that the order be set aside.

[6] In a further affidavit, deposed to by the applicant subsequent to delivery of the record of proceedings before the magistrate, the applicant alleged that the first respondent had not had insight into a number of relevant documents. This documentation included the written request for his extradition by the German government, the consent to his extradition signed by former President Mandela and the relevant notification signed by former Minister of Justice A M Omar. It likewise included warrants for his arrest issued by the lower court of Hamburg on 22 October 1993 and, in amended form, on 13 June 1995. In addition it would appear to have included the indictment issued by the Regional Court of Hamburg on 13 January 2000, in which a number of specified charges were preferred against the applicant.

[7] The applicant attacked the extradition order of 19April 2002 (par 3 above) in that it did not limit the prosecution for alleged fraud to those charges on which a South African court had found him extraditable. This meant that the prosecution in Germany should be limited to the charges brought by three German complainants, Siegfried Greve, Hartmut Lowack and Dietrich Liedelt, as held by Magistrate Wagenaar in an extradition enquiry conducted from late 1999 to early 2000. Although, in the extradition enquiry held on 10

April 2002, Magistrate Freitag had in fact confirmed this limitation, it was not referred to in the first respondent's order dated 19 April 2002. Therein it was simply stated that the applicant was "to be prosecuted for committing fraud". This indicated that the first respondent had not been furnished with all the relevant documentation and could hence not have applied his mind properly before making the aforesaid order.

[8] The applicant placed strong reliance on President Mandela's consent to his extradition in 1994, inasmuch as such consent was restricted to the charges of fraud contained in the warrant for his arrest dated 22 October 1993, as amended by the warrant issued on 13 June 1995. This was also the basis of Minister Omar's notification, by means of which the extradition process was set in motion. The applicant's consent to extradition was, he averred, specifically restricted to the charges relating to the three aforesaid complainants as set forth in such warrants. This appeared from the record of proceedings before Magistrate Freitag.

[9] The applicant averred that he had a legitimate expectation that the first respondent would afford him an opportunity to be heard before granting his order. This would have enabled him to draw his attention to the limitations to be placed on such order, more specifically relating to the dates of the various counts of fraud allegedly committed by him against Greve (four counts), Lowack (twenty counts) and Liedelt (two counts). At a hearing the applicant would likewise have been able to place the relevant German law, including that relating to the provisions of the German Statute of Limitations governing the prosecution of crimes, before the first respondent. From this it would have been established that all the alleged offences against the said three complainants had become "statute-barred" and hence prescribed. Extradition of the applicant would hence be "an exercise in futility" in that he could not be successfully prosecuted in Germany.

**THE RESPONSE OF THE FIRST RESPONDENT**

[10] In an answering affidavit on behalf of the first respondent, Ms Theresia Bezuidenhout, the Director: Law Enforcement in the Department of Justice, pointed out that, in the extradition proceedings before magistrate Freitag on 10 April 2002, the applicant had been represented by both senior and junior counsel. On conclusion of the proceedings, the applicant's legal representatives had expressly and unequivocally consented to the submission of documentary evidence to the magistrate and had likewise acquiesced in her findings and order. In this regard the magistrate held that there was sufficient evidence against the applicant, in respect of the

complainants Greve, Lowack and Liedelt, to warrant a prosecution on various charges of fraud. This finding was made on the strength of the evidence presented on affidavit, which the magistrate accepted "separately and independently" as sufficient to warrant a prosecution in Germany. The applicant was hence liable to be surrendered to Germany.

[11] After the magistrate had informed the applicant of his right to appeal, the applicant indicated that he was "not deciding to take anything on appeal". Shortly afterwards his legal representatives confirmed this when they conveyed to the magistrate that the applicant had in fact waived his right to appeal. Despite this assurance, the applicant brought an appeal that was heard by this court on 29 July 2002. In her judgment Traverso DJP held (in par 34) that the evidence presented at the trial "was so forceful that even without the Appellant's consent the order was justified". The appeal was accordingly dismissed with costs. An application for leave to appeal was likewise dismissed with costs.

[12] In view of the applicant's consent to extradition, Ms Bezuidenhout submitted that the applicant was not entitled to a hearing before the first respondent and was likewise not entitled to raise the issue of prescription since he had failed to raise it in the extradition proceedings. In any event, even if a South African court should be at large to establish and interpret the relevant German law, which was doubtful, the argument had no merit.

[13] Ms Bezuidenhout further submitted that President Mandela's consent was not relevant for purposes of the order issued by the first respondent on 19 April 2002. It merely served to set in motion the machinery required for the consideration of an extradition order. For the same reason the first respondent did not have to take cognizance of the indictment or the warrants of arrest. He had sufficient information before him to enable him to make a considered decision in granting the order in question. The principle of speciality (specialty) would compel the German prosecuting authorities to limit their prosecution to the charges specified in his findings by the magistrate. It could hence not be said that the first respondent's order was too wide.

[14] In a supporting affidavit deposed to by Mr Tredoux, who had represented the second respondent in the extradition proceedings, it was pointed out that he and the representatives of the applicant had agreed to hand in the relevant documentary evidence, including a certificate in terms of section 10(2) of the *Extradition Act* 67 of 1962. He had personally prepared a draft order that he furnished to the applicant's representatives. They subsequently informed him that they had discussed it with the applicant, who had consented to an order in terms thereof. It would hence not be necessary to adduce oral evidence, since the applicant wished to be extradited.

[15] In his confirmatory affidavit the first respondent confirmed that he had, on 19 April 2002,

ordered that the applicant be surrendered to the appropriate authorities in Germany. He had done so after thorough consideration of the information at his disposal and after he had applied his mind to all the relevant considerations. In addition he considered the doctrine of speciality to be binding on Germany and, in terms of international law, to be an implied condition of his order. Such order, he said, "should not be considered in isolation but in conjunction with the findings and order of Magistrate Freitag made on 10 April 2002 and the evidence presented to her during the proceedings before her". At the time of making the order he had been aware of the fact that the applicant had consented to his extradition and had had no reason to believe that the applicant did not regard his consent as binding. In any event he had subsequently considered the applicant's founding and supplementary affidavits and was satisfied that his order was correct.

**THE FIRST RESPONDENT'S AMENDED ORDER**

[16] At the commencement of argument before us, Mr Louw, for the first respondent, handed up an amended order signed by the first respondent on 14 October 2002. Mr Uijs, for the applicant, did not object thereto. It must hence be regarded as having replaced the original order dated 19 April 2002 (par 3 above).

[17] The amendment incorporates two paragraphs not appearing in the original order. They read as follows:

The reference to fraud in this order is a reference and is limited to the acts of fraud committed against the complainants Messrs Greve, Lowack and Liedelt, particulars whereof are set forth in the indictment permitted by the Regional Court of Hamburg, Federal Republic of Germany on 13 January 2000 and in respect of which Magistrate Freitag made an order in terms of section 10(1) of Act No 67 of 1962 in the Magistrate's Court of Cape Town on 10 April 2002.

Insofar as may be necessary it is hereby declared that this order is made subject to the Principle of Speciality.

**SUBMISSIONS ON BEHALF OF THE APPLICANT**

[18] Mr Uijs placed great emphasis on the failure of the first respondent to grant the applicant a hearing before making his order, even in its amended form. Although the amendment went a long way towards curing the defects in the original order, it did not, he contended, go far enough.

Had the first respondent allowed the applicant to address him, he would have been able to establish the precise ambit of the applicant's consent. In this regard Mr Uijs submitted that the applicant had not consented to extradition, but had only consented, on a limited and circumscribed basis, to being committed to prison pending extradition on the charges to which President Mandela had given his *imprimatur*.

[19] Making the order subject to the principle or doctrine of specialty, Mr Uijs suggested, did not have the effect that the German prosecuting authorities would regard themselves as bound thereby. It could not be assumed that Germany would prosecute the applicant only on the charges upon which his extradition had been ordered. At best the prosecution would be limited to the offences on which his extradition had been "sought". It had therefore been incumbent on the first respondent, Mr Uijs argued, to acquire an undertaking from the German authorities regarding the specification of envisaged charges before making his order.

[20] On the issue of prescription Mr Uijs submitted that the first respondent should have considered all the evidence placed before Magistrate Freitag in the extradition enquiry. Had he done so, he would have realised that all the charges relating to offences allegedly committed by the applicant and set forth in the indictment issued by the Regional Court of Hamburg on 13 January 2000, had become "time-barred". Extradition under such circumstances would then indeed be an exercise in futility, as averred by the applicant.

**SUBMISSIONS ON BEHALF OF THE FIRST RESPONDENT**

[21] Mr Louw dealt fully with the various issues raised by the applicant in his affidavits and expanded upon in argument by Mr Uijs. The gist of his argument was that the applicant had consented unequivocally and unconditionally to being extradited to Germany to stand trial on the various charges identified by Magistrate Freitag and confirmed by the first respondent in his amended order.

[22] Mr Louw submitted that the documentary evidence placed before the magistrate had been sufficient to justify her findings and order even without the consent of the applicant. It is clear that she had considered and applied her mind to such evidence fully and

comprehensively.

[23] Nothing, Mr Louw suggested, had prevented the applicant from making representations to the magistrate or to the first respondent, should he have wished to do so. He chose, however, not to do so, but rather to acquiesce in the findings and order of the magistrate and to accept extradition by order of the first respondent. The first respondent was hence entitled to accept that the applicant had indeed consented to the order and in fact wished to be extradited to Germany.

[24] On the issue of prescription, Mr Louw submitted, the applicant's consent to the magistrate's order clearly excluded reliance on this defence. It had not been raised during the extradition proceedings or in the subsequent appeal. In any event the court of appeal had rejected the argument on prescription, thereby rendering this issue *res iudicata*. Had it been raised, the State would doubtless have been able to adduce evidence to establish that the charges against the applicant had not prescribed. Should this court permit it to be raised on review, it would undoubtedly prejudice the State. On the other hand, if this court should be prevailed upon to apply foreign (that is German) law, it would, on the merits, rule against the applicant. For present purposes it is not necessary to deal with the arguments raised by Mr Louw in this regard.

[25] The doctrine of speciality, Mr Louw contended, would apply in the present case as a matter of course, in that the German prosecuting authorities are, in terms of international law, bound thereby. This means that the applicant may be tried only for offences covered by the factual allegations embodied in the request for extradition and in respect of which extradition has been allowed. There would hence be no obligation on the first respondent to acquire any undertaking in this regard from the German government before making his extradition order.

**CONSIDERATION OF THE ISSUES**

[26] Much of the argument raised by the applicant has already been considered, and rejected, by this court. This is clearly a last-gasp attempt by the applicant to stave off the inevitable. Even more so is this the case after substitution, with the consent of the parties, of the first respondent's order of 19 April 2002 by the amended order dated 14 October 2002. The latter substantially cured the alleged defects in the former, leaving the applicant with only the most tenuous of arguments in support of the relief sought.

[27] The issues remaining may, I believe, be reduced to three, namely the first respondent's

alleged failure: (a) to afford the applicant a hearing; (b) to consider all relevant documentation; and (c) to limit the ambit of his extradition order. I shall deal briefly with each.

***The Alleged Failure to Afford the Applicant a Hearing***

[28] There is not the slightest doubt that the applicant consented, unconditionally and unequivocally, to the findings and order of Magistrate Freitag in the extradition proceedings. He in fact made it clear that he wished to be extradited as soon as possible. This was confirmed by his legal counsel, who assured the magistrate that he had fully understood his rights. He must hence be regarded as having accepted the nature and effect of his consent.

[29] The first respondent was, at all relevant times, well aware of this consent and was perfectly justified in accepting that the applicant would likewise consent to an extradition order in terms of section 11 of Act 67 of 1962. It was certainly not incumbent upon him to invite the applicant to make representations prior to his making such order. In any event the applicant was free to make representations at any time before the granting of the order, should he have wished to do so.

[30] The fact that certain other persons or parties were allowed to make representations to the first respondent prior to his issue of the order is, in my view, quite irrelevant. It was never suggested that the applicant had been prejudiced or otherwise unfavourably affected thereby in any way. Should he have experienced any prejudice or discomfort, nothing stopped him from approaching the first respondent and requesting a hearing. At no stage was he refused the right to make representations. He simply chose not to do so.

[31] Even if the applicant had not given his consent to and acquiesced in the magistrate's findings and order, the documentary evidence submitted was so overwhelmingly persuasive that the granting of an extradition order would have been fully justified, as held by Traverso DJP in the appeal to this court against the extradition order (par 11 above).

***The Alleged Failure to Consider all Relevant Documents***

[32] It appears to be common cause that the first respondent had before him, at the time of his considering the extradition order: (a) a history of the matter as set forth in a memorandum from the Department of Justice during May 1995; (b) the order of the magistrate restricting the prosecution to charges emanating from the three complainants, Greve, Lowack and Liedelt; (c) a memorandum from the second respondent dated 11 April 2002 informing the first respondent that the applicant had consented to extradition and to the magistrate's findings and order relating to some eighty charges of fraud in respect of the said three complainants; and (d) the indictment issued by the Regional Court of Hamburg on 13 January 2000.

[33] In his confirmatory affidavit, as mentioned above (par 15), the first respondent averred that he had fully considered and applied his mind to the information at his disposal and to other relevant considerations. He expressed the view that his order should be read in conjunction with the findings and order of Magistrate Freitag, as based on the evidence submitted to her during the extradition proceedings. He had been aware of the applicant's consent thereto and had no reason to believe that he did not regard it as binding. That he had made the correct decision was in fact corroborated by his subsequent perusal of the applicant's founding and supplementary affidavits in the present matter.

[34] The amended order of 14 October 2002 (par 16-17 above) similarly reflects the fact that the first respondent had insight into the aforesaid documentation, including the indictment issued by the Regional Court of Hamburg on 13 January 2000. It is hence clear that he applied his mind fully to the case before him and was entirely justified in making the extradition order. Such order would have been competent even if the applicant had not accorded his consent to the findings and order of the magistrate.

***The Alleged Failure to Limit the Ambit of the Extradition Order***

[35] This issue has been cured by the amended order, in which the charges brought by the three complainants, Greve, Lowack and Liedelt, are specified. It now accords with the findings in the extradition enquiry before Magistrate Freitag.

[36] Even if the order had not been amended, it is clear that the fraud referred to in the original order relates to the finding, by Magistrate Freitag, of fraud committed by the applicant in respect of the said three complainants. Such finding must, in my view, be regarded as being incorporated by reference. There is no question of fraud in general and unspecified terms, or in respect of unspecified charges and complainants.

[37] The suggestion that the specific charges may, wholly or partially, have prescribed by effluxion of time has no merit at all. As correctly pointed out by Mr Louw, the issue of prescription was never raised in the extradition proceedings on 10 April 2002 or at any time between such date and the date on which the extradition order was granted, namely 19 April 2002. Just as a court of appeal will generally refuse to give consideration to a point not raised in the court below, so also, I believe, a court of review will be reluctant to do so, unless justice, fairness and reasonableness require it. See *Donelly v Barclays National Bank Ltd* 1990 (1) SA 375 (W) at 380H-381B, where somewhat more stringent requirements are laid down.

[38] Even if it should be permissible to raise the issue of prescription for the first time on review, it has already been considered and rejected by this court in the appeal against the extradition order (par 11 above), thereby rendering it *res iudicata*. See *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 554 (A). Should this not be the case, the State would be severely prejudiced inasmuch as it ostensibly refrained from leading evidence to the contrary in view of the applicant's consent to extradition. In any event, if there should indeed be merit in the prescription defence, the applicant would, I expect, not be deprived of his right to raise it in the German court where he is to stand trial.

[39] The applicant made much of the applicability of the principle or doctrine of speciality (specialty). This provides, in general terms, that an extradited person may be prosecuted, in the country to which he has been surrendered, only in respect of the offences for which extradition has been requested and granted. See *Harksen v President of the Republic of South Africa and Others* 1998 (2) SA 1011 (C) at 1039F-G; *Minister of Justice and Another v Additional Magistrate, Cape Town* 2001 (2) SACR 49 (C) at 58i-59*b*. See also the general discussion in S Bedi *Extradition in International Law and Practice* (vol II 1991) 270-279 and A Jones *Jones on Extradition and Mutual Assistance* (2001) 2-048 - 2-078 (p59-77).

[40] The first respondent made it quite clear in his confirmatory affidavit that he considered the principle of speciality to be binding on Germany in terms of international law. It was indeed

implied in his original order, dated 19 April 2002, and expressed in his amended order dated 14 October 2002, where it is stated that the order "is made subject to the Principle of Speciality". In view of this principle, there was no need to establish from the German authorities which charges they wished to press against the applicant or to acquire any undertaking from them in this regard. The relevant charges appeared with the utmost clarity in the indictment of 13 January 2000. There is no reason to believe, in my view, that the German authorities will ignore or bypass the international law and custom relating to the principle of speciality, by prosecuting the applicant on any but the charges in respect of which extradition was sought and granted.

**CONCLUSION**

[41] It follows that the applicant has failed to make out a case on any of the grounds set forth above. The application must hence be dismissed with costs, including the costs of two counsel.

**D H VAN ZYL**

I agree. It is so ordered.

**J H M TRAVERSO**

Acting Judge President