CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 41/99

JÜRGEN HARKSEN	Appellant
versus	
THE PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA	First Respondent
THE MINISTER OF JUSTICE	Second Respondent
THE DIRECTOR OF PUBLIC PROSECUTIONS: CAPE OF GOOD HOPE	Third Respondent
THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Fourth Respondent
THE MAGISTRATE, CAPE TOWN	Fifth Respondent

Heard on : 2 March 2000

Decided on : 30 March 2000

JUDGMENT

GOLDSTONE J:

[1] This case arises in consequence of a request made on 8 March 1994 to the South African government by the Federal Republic of Germany (the FRG) for the extradition of the appellant, Jürgen Harksen. The appellant is a citizen of the FRG where he is alleged to have committed serious fraud. He is presently residing in South Africa.

[2] This appeal is the most recent of a number of court proceedings initiated by the appellant in an attempt to delay or terminate extradition proceedings against him. In the light of what follows, the earlier proceedings are not relevant to the determination of the issues now before this Court.

[3] South Africa has been party to very few extradition treaties. Its withdrawal from the Commonwealth in 1961 resulted in the lapse of many of its extradition treaties with other Commonwealth States. In subsequent years, foreign States were reluctant to enter into any new extradition treaties with South Africa largely because of its policy of apartheid. While this is no longer the case, South Africa, post-1994, has entered into few extradition treaties and is not a party to one with the FRG. This, however, is no bar to the extradition of requested individuals. International law has long recognised that extradition may also be granted on the basis of reciprocity or comity.[1]

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1 The general legal basis for extradition is treaty, reciprocity or comity. International comity is said to describe those actions between States based solely on goodwill or courtesy. Reciprocity in extradition occurs where the request for surrender is accompanied by assurances of reciprocal extradition in comparable circumstances. See Bassiouni *International Extradition: United States Law and Practice* 3 ed (Oceana Publications Inc, Dobbs Ferry 1996) at 53-5; Botha "The Basis of Extradition: The South African Perspective" (1991/92) 17 *South African Yearbook of International Law* 117 at 134-47.

[4] An extradition procedure works both on an international and a domestic plane. Although the interplay of the two may not be severable, they are distinct. On the international plane, a request from one foreign State to another for the extradition of a particular individual and the response to the request will be governed by the rules of public international law. At play are the relations between States. However, before the requested State may surrender the requested individual, there must be compliance with its own domestic laws. Each State is free to prescribe when and how an extradition request will be acted upon and the procedures for the arrest and surrender of the requested individual. Accordingly, many countries have extradition laws that provide domestic procedures to be followed before there is approval to extradite.

[5] In South Africa, extradition is governed domestically by the provisions of the Extradition Act, 1962 (the Act).[2] Until amended in 1996, the Act made provision for two situations in which extradition might take place. The first is governed by the provisions of section 3(1) of the Act and applies to any person who is accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is a party to an extradition agreement[3] with South Africa. The requested person is liable to be surrendered to the requesting State, subject to the provisions of the Act, in accordance with the terms of such agreement. The second basis for

2 Act 67 of 1962.

3 I use the expression "extradition agreement" here rather than "extradition treaty" in conformity with the Act. See section 2 of the Act.

extradition is governed by the provisions of section 3(2) of the Act which prior to the 1996 amendment read as follows:

> "Any person accused or convicted of an offence contemplated by sub-section (2) of section *two* and committed within the jurisdiction of a foreign State not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the State President has in writing consented to his being so surrendered."[4]

Since 1996 there is a third situation in which a person might become liable to be extradited and that is where the foreign State which requests the surrender has been "designated" by the President.[5]

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4 By section 3(a) of Act 77 of 1996, section 3(2) was amended to read as follows:

> "Any person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State which is not a party to an extradition agreement shall be liable to be surrendered to such foreign State, if the President has in writing consented to his or her being so surrendered."

5 Section 3(b) of Act 77 of 1996 inserted subsection (3) of section 3 of the Act which reads as follows:

> "Any person accused or convicted of an extraditable offence committed within the jurisdiction of a designated State shall be liable to be surrendered to such designated State, whether or not the offence was committed before or after the designation of such State and whether or not a court in the Republic has jurisdiction to try such person for such offence."

[6] In the case before us, where there is no extradition treaty between South Africa and the FRG, the provisions of section 3(1) do not apply. The provisions of section 3(3) also do not apply because the FRG has not been "designated" by the President and in any event, the provisions of section 3(3) were added only after the extradition proceedings against the appellant were set in motion. It follows that of the three alternatives of section 3, the request from the FRG could be entertained in terms of the provisions of section 3(2) only.

[7] On 24 May 1995 the President, on receipt of a memorandum from the second respondent (the Minister), consented in writing in terms of section 3(2) of the Act to the extradition of the appellant. The Minister thereupon sent a notice in terms of section 5(1)[6] to the fifth respondent (the Magistrate) who issued a warrant for the arrest of the appellant. Thereafter an extradition enquiry was held by the Magistrate who found, under section 10(1),[7] that there was sufficient

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6 Section 5(1), although amended by section 4 of Act 77 of 1996, substantively remains unchanged. It now provides:

> "Any magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person—
> (a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister; or
> (b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic."

7 Section 10, amended by section 8 of Act 77 of 1996, remains substantively unchanged and provides:

> "(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9 (4) (a) and (b) (i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison

evidence to warrant a prosecution of the appellant in the FRG for the offences in respect of which the extradition was sought and that therefore the appellant was liable to be surrendered to the FRG. The Magistrate accordingly ordered the committal of the appellant to prison to await the Minister's decision with regard to his surrender.

[8] The appellant brought three proceedings in the Cape Provincial Division of the High Court, namely an application for a declaratory order with regard to the constitutionality of section 3(2) of the Act, an appeal against the committal order and a review of the proceedings before the Magistrate. For convenience the three proceedings were heard together. The constitutional issues raised by the appellant were dismissed. However, the review succeeded on the ground that there had been a fatal defect in interpreting material evidence in the Magistrate's Court. On that ground the committal order was set aside and the matter remitted for a new enquiry. In the High Court and in this Court the first, second and third respondents opposed the constitutional relief claimed by the appellant. The fourth and fifth respondents abided the decision of the High Court and now of this Court.

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to await the Minister's decision with regard to his or her surrender, at the same time informing such person that he or she may within 15 days appeal against such order to the Supreme Court.

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

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

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

[9] In respect of the constitutional issues, the appellant sought a certificate from the High Court in terms of rule 18 of the Rules of the Constitutional Court. A positive certificate was granted, and this Court thereafter granted the appellant leave to appeal directly to it in respect of those issues.

[10] The constitutional issues dismissed by the High Court and now raised in this appeal are:

(a) Whether section 3(2) of the Act is inconsistent with the provisions of section 231 of the Constitution;

(b) Whether the consent given by the President under section 3(2) of the Act was in conflict with the provisions of section 231(2) and (4) of the Constitution and on that ground invalid and of no force or effect.

[11] In this Court the respondents also raised an objection on the ground of res judicata. They argued that earlier proceedings in the High Court between the same parties related to the same cause of action,[8] namely the constitutionality of the section 3(2). However, this plea would become irrelevant if the appeal fails on the merits. I will return to it below.

[12] There was some debate during the hearing as to which constitution governs in this case. In my opinion the outcome of the appeal will be the same whether the provisions of the interim

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8 *Harksen v President of the Republic of South Africa and Others* 1998 (2) SA 1011 (C).

Constitution[9] or those of the Constitution are held to apply. However, as it was submitted on behalf of the appellant that the provisions of the Constitution would be more beneficial to his case, I shall assume in his favour that they govern.

The legal nature of the President's consent

[13] The appellant's submissions rely on the proposition that an international agreement was concluded in consequence of the presidential consent under section 3(2). It is therefore necessary now to consider the legal effect of that consent.

[9] Act 200 of 1993.

[14] Although presidential consent under section 3(2) may eventually have international resonance, the Act governs applications for extradition on the domestic plane only. This is true whether there is a treaty or not. Where South Africa is bound by an extradition treaty, its terms will govern the international obligations of this country to the foreign State. Nonetheless, as far as domestic law is concerned the implementation of those international obligations is expressly made subject to the provisions of the Act.[10] Similarly, in a non-treaty extradition, the surrender of the person sought is subject to the requirements of the Act. In other words, before the person whose extradition is sought may be surrendered to the foreign State, the procedures prescribed in the Act must be completed. This includes the arrest of the person under section 5(1),[11] the holding of an enquiry under section 9(1),[12] and a finding by a magistrate under section 10[13] that

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10 Section 3(1). See above para 5.

11 See above n 6.

12 Section 9(1) provides:

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

the evidence is sufficient to make the person liable to surrender. If the magistrate makes that finding, the Minister of Justice is given a discretion under section 11[14] to order the surrender of the requested person to any person authorized by the foreign State to receive him or her.

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13 See above n 7.

14 Section 11, as amended, provides:

> "The Minister may—
> (a) order any person committed to prison under section 10 to be surrendered to any person authorized by the foreign State to receive him or her. . ."

[15] The effect of section 3(2) is no less domestic in its reach than the other provisions of the Act.[15] It neither initiates nor concludes extradition. Where there is an extradition treaty between South Africa and a requesting State, the Minister is authorised by the provisions of section 5(1) to set in motion the provisions of the Act by notifying the magistrate of the request.[16] Where there is no extradition treaty between the requesting State and South Africa, it is the Minister who forwards the request for extradition to the President. Then under section 3(2) the President's consent is necessary to enable the Minister to give the notification to the magistrate. Section 3(2) and the Act as a whole regulate the domestic procedures which then govern the extradition proceedings and which protect the rights of persons present in South Africa whose surrender is sought by a foreign State.

[16] It is against that background and in that context that the appellant's constitutional grounds must be considered. Those grounds are all founded upon the provisions of section 231 of the Constitution which read as follows:

> "(1) The negotiating and signing of all international agreements is the responsibility of the national executive.
>
> (2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).

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15 That is also the view of Professor Botha, above n 1 at 137:

> "As section 3(2) does not, in fact, authorise the State President to order the extradition of the person sought, but merely classifies him as a 'person liable to be surrendered', it avoids the pitfalls inherent in comity and allows the individual full protection of the law. He is merely brought within the ambit of the Act and the hearing follows its normal course." (footnote omitted)

16 See above n 6.

(3) An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time.

(4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

(5) The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect."

The Constitutionality of section 3(2)

[17] The appellant's submission was that in the absence of express reference in section 3(2) to the provisions of section 231 of the Constitution, the President is empowered to enter into an international agreement with a foreign State without having to comply with the Constitution: that is, without the approval by resolution of each of the Houses of Parliament under section 231(2).

[18] This submission was correctly rejected by the High Court. I have already examined the purpose and effect of section 3(2) of the Act from which it emerges that presidential consent has domestic application only.[17] Section 231 of the Constitution is thus inapplicable to such consent.

17 See above paras 14 and 15.

In any event, even if section 231 of the Constitution does govern acts under section 3(2), the failure to expressly incorporate its terms cannot render that section unconstitutional. The Constitution is the supreme law of the land.[18] It is unnecessary for legislation expressly to incorporate terms of the Constitution. All legislation must be read subject thereto. To the extent that section 231 of the Constitution might apply to acts performed under section 3(2), those acts and that section must be read consistently with the provisions of the Constitution. Nothing in the terms of section 3(2) precludes the observance of the provisions of section 231 of the Constitution. This submission must therefore fail.

Whether the presidential consent is rendered invalid by the provisions of section 231 of the Constitution

[19] The appellant's remaining submissions are premised on the provisions of section 231 of the Constitution which are alleged to have rendered the presidential consent unconstitutional and invalid. These submissions are the following:

(a) Since the presidential consent under section 3(2) resulted in an international agreement, it is invalid for want of compliance with the provisions of section 231 of the Constitution;

(b) The President circumvented section 231 of the Constitution by representing to the

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18 Section 2 of the Constitution provides:
"This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled."

FRG that South Africa was agreeing to its request for extradition and is therefore estopped from denying such agreement.

I shall consider each submission in turn.

[20] The first submission was that because consent under section 3(2) resulted in an international agreement the failure by the President then to submit it to Parliament for approval by resolution under section 231(2) of the Constitution renders the extradition proceedings unlawful and invalid. Furthermore, so it was submitted, the failure to legislatively incorporate the agreement into domestic law as prescribed by section 231(4) of the Constitution also invalidates the extradition proceedings. The appellant's counsel properly conceded that in the absence of an international agreement these submissions must fail.

[21] Although the judicial determination of the existence of an international agreement may require the consideration of a number of complex issues, the decisive factor is said to be whether "the instrument is intended to create international legal rights and obligations between the parties".[19] I have already explained that the consent given by the President served merely to bring the appellant within the purview of the Act. It was a domestic act never intended to create international legal rights and obligations. It was not an agreement at all: neither an international agreement as maintained by the appellant nor an "informal agreement" as suggested by the High Court.[20]

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19 *Oppenheim's International Law*, 9 ed by Jennings and Watts (Addison Wesley Longman Ltd, London and New York 1996) 1202.

20 The High Court found that the President, by granting his consent was -

[22] That the President's consent did not give rise to an international agreement is borne out by the communications between the FRG and South Africa. In response to the diplomatic notes from the FRG requesting extradition of the appellant, South Africa's only formal response was to inform the FRG that its request had "been forwarded to the relevant authority" and that "further correspondence will be addressed to the embassy in due course." It is evident that this diplomatic note was not intended to be a response to the substance of the request from the FRG for the extradition of the appellant. The exchange of diplomatic notes, therefore, does not provide support for the conclusion that the President's consent under section 3(2) was anything more than a domestic act.

[23] It was also submitted on behalf of the appellant that notification of the President's consent must have been given to the FRG, even if informally, in the light of the assistance given

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> ". . . simply giving his country's co-operation in what may be called an informal arrangement. It may indeed, in loose terminology, also be termed an informal agreement, subject thereto, however, that it was not internationally enforceable and did not create reciprocal rights and duties."

See *Harksen v The State and Others,* judgment delivered on 29 September 1999 (as yet unreported) at para 59.

by officials of the FRG in placing relevant evidence before the magistrate. However, this notification might well have amounted to no more than a call on the FRG for evidence which would facilitate South Africa's domestic judicial processes. A requesting State would probably render that assistance as a matter of course as the success of the application for surrender will depend on the cogency and sufficiency of the evidence furnished by the foreign State. In this case there is no evidence to suggest that any formal response was conveyed on behalf of South Africa to the FRG. It is thus not necessary to consider whether, if there had been such a response, an international agreement would thereby have been concluded. This submission of the appellant, that the presidential consent resulted in an international agreement, must therefore be rejected.

[24] I turn to the second argument based on estoppel which was made for the first time by appellant's counsel during argument. It begins with the assumption that the President by his consent, represented that he was entering into an international agreement as contemplated by section 231(2) of the Constitution with the FRG; the FRG was entitled to rely on the President's consent because it was informed of it; the fact that the agreement was not binding in terms of the Constitution is of no matter to the FRG and it may nevertheless enforce the agreement. This submission sought to derive its force from article 46(1) of the 1969 Vienna Convention on the Law of Treaties (the Vienna Convention) which reads as follows:

> "A State may not invoke the fact that its consent to be bound by a treaty has been expressed in violation of a provision of its internal law regarding competence to conclude treaties as invalidating its consent unless that violation was manifest and

concerned a rule of its internal law of fundamental importance."[21]

[25] The appellant's argument proceeds on the following basis:

(a) the purpose of section 231 of the Constitution is to ensure that when the executive binds the Republic internationally, Parliament must be engaged;[22]

(b) it would defeat the object of section 231 of the Constitution were international agreements subject to these procedures but undertakings by the President having the same binding effect were not subject thereto.

In sum, the appellant concludes that under the doctrine of estoppel, section 3(2) unconstitutionally allows the President to bypass the legislative engagement mandated by section 231 of the Constitution.

21 "Treaty" is defined in article 2(1)(a) of the Vienna Convention as meaning:

> "an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation".

22 Either by having to give its approval if the agreement falls within the provisions of section 231(2) or if it falls within section 231(3), by the agreement being tabled in Parliament within a reasonable time.

[26] Although the extent to which the Vienna Convention reflects customary international law is by no means settled,[23] I shall assume in favour of the appellant that the provisions of article 46(1) do reflect customary international law and that accordingly these form part of our law.[24] Yet, however favourably this argument is considered, it fails.

[27] The Vienna Convention provides that a State may not rely on a violation of its domestic law to invalidate its apparent consent to be bound by a treaty. However this does not apply where the domestic violation is "manifest" and concerns "a rule of its internal law of

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23 In the 9th edition of *Oppenheim's International Law*, above n 19 at 1199, the following observation is made:

> "It must be noted that many provisions of the Vienna Convention reflect rules of customary international law which are binding as such quite apart from the Convention; and that other provisions of the Convention may themselves be expected in time to acquire the force of rules of customary law." (footnotes omitted)

And, in Brownlie *Principles of Public International Law* 5 ed (Clarendon Press, Oxford 1998) at 608, the author states:

> "The Convention is not as a whole declaratory of general international law: it does not express itself so to be (see the preamble). Various provisions clearly involve progressive development of the law; and the preamble affirms that questions not regulated by its provisions will continue to be governed by the rules of customary international law. Nonetheless, a good number of articles are essentially declaratory of existing law and certainly those provisions which are not constitute presumptive evidence of emergent rules of general international law. The provisions of the Convention are normally regarded as a primary source: as, for example, in the oral proceedings before the International Court in the *Namibia* case. In its Advisory Opinion in that case the Court observed: 'The rules laid down by the Vienna Convention . . . concerning termination of a treaty relationship on account of breach (adopted without a dissenting vote) may in many respects be considered as a codification of existing customary law on the subject'." (footnotes omitted)

24 Whilst appreciating that South Africa is not a party to the Vienna Convention, it was contended that the treaty reflects customary international law which is made binding by section 232 of the Constitution which provides: "Customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

fundamental importance."[25] It is unlikely that an international agreement entered into in breach of the provisions of a national constitution that govern international agreements would constitute anything but a "manifest" violation concerning a law of "fundamental importance". The appellant's argument on this ground seems tenuous. However, I prefer to dispose of this submission of the appellant on other grounds and leave open the interpretation and binding effect in our law of article 46 of the Vienna Convention.

25 See Vienna Convention article 46; above para 24.

[28] I have already held that the domestic nature of the Act, the exchange of notes and the furnishing of evidence by the FRG do not individually or collectively support the appellant's underlying premise that the President's consent under section 3(2) constituted conduct on the international plane.[26] The FRG is thus not entitled to rely on the President's consent to establish any enforceable obligation against South Africa. Both of the appellant's challenges to the validity of the presidential consent must thus be rejected.

[29] In the circumstances the appeal must fail on the merits and it becomes unnecessary to consider the correctness or otherwise of the reliance placed by the respondents upon the doctrine of res judicata.

Costs

[30] In this Court costs orders are not generally made in criminal proceedings. Extradition is in substance a criminal proceeding. As stated by Howie JA in *S v McCarthy*:

> "The arrest, detention and committal provisions of the [Extradition] Act carry obvious implications adverse to the right to liberty, to the presumption of innocence which is basic to the criminal law and to any such right which the accused may have to be in this country and to remain here."[27]

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26 See above paras 14 - 17.

27 1995 (3) SA 731 (A) at 741G-H. This was a minority judgment and on this point the majority did not

In *Sanderson v Attorney-General, Eastern Cape,* also a criminal proceeding where no costs were ordered against the unsuccessful appellant, Kriegler J said:

disagree.

> "It [the claim] is not a suit between private individuals; it relates directly to criminal proceedings, which are instituted by the State and in which costs orders are not competent; and the cause of action is that the State allegedly breached an accused's constitutional right to a fair trial. Although the appellant failed to establish the constitutional claim he advanced, it was a genuine complaint on a point of substance and should therefore not have been visited with the sanction of a costs order."[28]

In the present case the appellant relied on the non-compliance with the constitutional requirements relating to international agreements. He has failed on the merits but his reliance on those provisions cannot be regarded either as frivolous or as not having been genuinely advanced. There should consequently be no order as to the costs of the appeal.

The Order

The appeal is dismissed. There is no order as to costs.

Chaskalson P, Langa DP, Kriegler J, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Sachs J, Yacoob J and Cameron AJ concur in the judgment of Goldstone J.

28 1998 (2) SA 38 (CC); 1997 (12) BCLR 1675 (CC) at para 44.