SACHS J ABRIDGED JUDGMENT

President of the Republic of South Africa and Others v Quagliani, President of the Republic of South Africa and Others v Van Rooyen and Another; Goodwin v Director-General, Department of Justice and Constitutional Development and Others

Introduction

1. Extradition "is the surrender by one 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 state." It involves three elements: acts of sovereignty on the part of two states; a request by one state to another state for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial and sentencing in the territory of the requesting state. Extradition law thus straddles the divide between state sovereignty and comity between states and functions at the intersection of domestic law and international law.
2. It is within this context that the applications before this Court raise questions about the prerequisites under our Constitution for making extradition treaties binding on South Africa in international law, and for rendering their provisions enforceable in our domestic law. More specifically, the applications concern the validity and enforceability of the Extradition Agreement (the Agreement) between the United States of America (the United States) and the Republic of South Africa (South Africa).

Issues before this Court

11. The parties were directed by the Chief Justice to present argument on whether—

    1. the delegation by the President of his powers contained in section 2 of the Extradition Act (the Act) was lawful;
    2. the Agreement was validly approved in terms of section 231(2) of the Constitution; and

3. the Agreement had been incorporated into South African law in terms of section 231(4) of the Constitution.

During argument the following three issues crystallised:

1. Was the Agreement with the United States validly negotiated and entered into (the "validity of the Agreement issue")?
2. Was the Agreement validly approved in the NCOP (the "mandates issue")?
3. Were the provisions of the Agreement enforceable in our law (the "enforceability issue")?

I shall deal with each in turn.

The validity of the Agreement issue

12. The applicants submitted that the Agreement with the United States had not been validly entered into because the President had delegated his own responsibilities in this regard to members of his Cabinet.
13. The uncontested facts follow. Preparatory negotiations between representatives of South Africa and the United States began in May 1998. Further discussions held in April 1999 led to two agreements being finalised, the Agreement and the Mutual Legal Assistance in Criminal Matters Treaty. At a later stage a memorandum was sent to the President from the Minister, expressing his intention to "submit a Presidential Minute in which [he] would seek approval from [the President] to sign the Treaties on behalf of the Government of the Republic of South Africa." Drafts of the agreements were submitted to the state law advisers to determine if the contents were in accordance with South African law and international law. Compliance was reported.

18. ...[I] turn to the validity of the Agreement issue. The Act gives the President, in terms, the power to enter into extradition agreements. Section 2(1)(a) states:

"The President may, on such conditions as he or she may deem fit, but subject to the provisions of this Act concerning extradition—

(a) enter into an agreement with any foreign State".

This provision has to be understood in the context of the Constitution which provides in section 231(1) that:

"The negotiating and signing of all international agreements is the responsibility of the national executive."

The validity of the Agreement issue requires the determination of the relationship between these two provisions.

21. When, as in the present matter, the President is exercising authority as head of the national executive under section 85 of the Constitution, the President is obliged to act in a collaborative manner. Section 85(2)(e) provides:

"The President exercises the executive authority, together with the other members of the Cabinet, by—

(e) performing any other executive function provided for in the Constitution or in national legislation."

The need for collective exercise of executive power in relation to treaties is reflected in the manner in which the Constitution expressly confers treaty-making power on the national executive.

22. It should be remembered that the Act was last amended at a time when the interim Constitution was in force. Under section 82(1) of that Constitution, the negotiating and signing of international agreements was designated as an exclusive executive function of the President. When the Act was amended in 1996, before the 1996 Constitution came into force, the drafters would have been aware of this provision. The power to enter into extradition agreements in the pre-constitutional era had been that of the State President, so it was not necessary for the Act to be amended substantively in that regard. As mentioned above, sections 231(1) and 85(2) of the 1996 Constitution removed the treaty-making power from the exclusive domain of the President and placed it expressly within the responsibility of the national executive authority functioning as a collective unit. The result was that when the 1996 Constitution came into force, what changed was not the responsibility entrusted to the President under section 2 of the Act, but the collective manner in which the President is now required to exercise this responsibility.
23. It is accordingly impossible to read the Act as requiring the President personally to prepare the documents, to see the details through at each stage, and eventually to sign the final text. On the contrary, what the Act and the Constitution require is that, as head of the national executive and functioning in conjunction with the national executive, the President make a final decision in writing to enter into an extradition agreement.
24. The power conferred upon the President in section 2 of the Act must now be read with section 231 of the Constitution which provides that the national executive bears the constitutional responsibility to negotiate and sign treaties. When the President decides to enter into an extradition agreement in terms of section 2 of the Act, he does so as head of the national executive. Given the provisions of section 231 of the Constitution, it is not improper for the President, once the decision to enter into the treaty has been made by the President, to confer other formal aspects relating to the accession to the treaty on other members of the national executive. It is important that these provisions should not be applied in a formalistic manner that will impair the ability of the national executive to function. The facts that I have set out above make it plain that the President did decide that the Agreement should be entered into in terms of section 231 of the Constitution as Presidential Minute No. 428 expressly states. The fact that in the same minute the President empowered the Minister (who is a member of the national executive) to sign the Agreement and take the necessary

steps to ensure that the Agreement was formally concluded is entirely consistent with the power conferred upon the national executive by section 231 of the Constitution. Similarly, the fact that the Acting Minister of Foreign Affairs signed the instruments of ratification is also consistent with the conferral of the power upon the executive.

25. I conclude therefore that the Agreement between South Africa and the United States was validly entered into.

The mandates issue

26. Section 231(2) of the Constitution provides that—

> "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".

It was submitted by the applicants that the provincial delegates who voted to approve the Agreement in the NCOP did so without the mandates of their provincial legislatures. The result, they claimed, was that the approval of the Agreement was invalid, and the Agreement was therefore not binding on the Republic.

27. Three interrelated preliminary questions arise. The first is whether it is appropriate for the applicants to raise the issue of lack of mandates without joining parties that would have a direct interest in the matter. In the present case these would be the appropriate representatives of the provinces, who, if called upon, would be the persons best qualified to inform the Court how mandates were or should have been given in each case. Absent special circumstances, this non-joinder in itself would be fatal to the applicants' claim in this area.
28. Equally serious is the extraordinary delay in raising the mandates question, which must constitute a further impediment to the Court being seized of the matter. One of the issues in *Doctors for Life* was whether a challenge could be made by applicants who had not made diligent and timeous attempts to bring a legal challenge to procedural failures by the legislature. In that matter the question was whether the NCOP had failed in its duty to facilitate public involvement under section 72 of the Constitution. That matter was not one of standing to assert a violation of rights under the Bill of Rights. Ngcobo J observed that

applicants who have not pursued their legal course timeously may well be denied relief, and added that:

> "Rules of standing of this sort will prevent legislation being challenged on the ground of non-compliance . . . many years after the event by those who had no interest in making representations to Parliament at the time the legislation was enacted. It will thus discourage opportunist reliance by those who cannot show any interest in the duty to facilitate public involvement on that duty . . . . [T]his restricted form of standing further reflects this Court's concern to protect the institutional integrity of Parliament, while at the same time seeking to ensure that the duty to facilitate public involvement is given adequate protection."

29. Thus, save in very exceptional circumstances, late challenges to the validity of legislative processes should not be permitted. Legislatures should be allowed a margin of appreciation in deciding on and implementing their procedures, provided the basic prescriptions of the Constitution are adhered to. In addition, there is a strong need for procedural finality, which should not be confused with the ever-present right to challenge the constitutional consistency of the resultant law.
30. This brings me to the third preliminary hurdle standing in the way of the mandates matter being determined by this Court. Unless there is evidence of procedural irregularities in the legislative process, it would not ordinarily be appropriate for a court to interrogate the procedures used. Thus, if there is merely a bald allegation of irregularity without more, a court is ordinarily restrained by considerations of separation of powers and good government from interrogating the legislative process. The regular functioning of government would be unduly disrupted if courts could be called upon (on a purely speculative basis) to enquire at any stage into the regularity of completed legislative processes. Absent evidence to the contrary, a strong presumption must accordingly exist that the legislature followed constitutionally-mandated procedures in performing its functions. In the present case there is no evidence properly placed before this Court of any irregularity, a further bar to the applicants' argument.
31. Each of these preliminary factors on its own could have justified barring the applicants from pursuing the issue of there being a lack of mandates. The

cumulative weight is fatal to the applicants in respect of the question of the mandates. The argument that the resolution was not validly adopted because the delegates were not properly mandated must therefore be rejected.

The enforceability of the Agreement in South African domestic law

32. It is common cause that the Agreement has not been formally enacted as an Act of Parliament. The applicants argued that it is accordingly not law in the Republic, with the consequence that extradition to and from the United States could not be undertaken. Their argument was based on sections 231(2) and 231(4) of the Constitution. These sections provide:

> "(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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> . . . .
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> (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."

33. The applicants contended that the Agreement had not become law in the Republic because it had not been enacted into national legislation, that its provisions were not self-executing, and that its provisions were also not consistent with the Act. The applicants accordingly submitted that their arrest and subsequent detention in terms of the Agreement had been unlawful because the Agreement had not been enforceable as part of law in the Republic.
34. Their arguments in favour of non-enforceability were based on five interrelated propositions:

    1. It is necessary to ensure that freedom rights of the individual are protected in our constitutional democracy;

2. because liberty was affected, the onus was on the government to establish that the Agreement was enforceable as part of South African law;
3. there is a strong presumption that treaties on their own do not become part of domestic law unless expressly incorporated through legislation;
4. the very term 'self-executing' requires that the provisions in question be capable of enforcement on their own without further legislative action; and
5. even if the provisions of the Agreement were to be regarded as self-executing, they were inconsistent with the Act and therefore unenforceable.

36. In my view, the starting point for the analysis must be the relationship between the Act and section 231(4) of the Constitution. As its name indicates, the Act deals with extradition, a species of law with its own special qualities. By its very nature extradition has both a domestic law and an international law dimension. And although the two operate in different legal spheres, they are inextricably linked ─ you cannot extradite someone in your own country to your own country. The entering into of agreements with other countries on the basis of reciprocity therefore lies at the very heart of extradition law.
37. In keeping with this, the Act expressly anticipates that treaties would be made with other countries, and, as I set out more fully below, provides the framework for giving domestic effect to the content of those treaties. For reasons which will become apparent, I have concluded that it is unnecessary to consider the question whether the Agreement should be regarded as self-executing.
38. My reasons for coming to the above conclusion are set out below. They are based on an examination of the manner in which the intrinsic character and purposes of extradition are reflected in the operative provisions of the Act.

Purposes of extradition

39. Historically extradition law "was designed to make systems of reciprocal surrender orderly and principled, and to make abduction, military incursions, and fraudulent deportations unnecessary and illegal." In many jurisdictions it has provided a judicially protected guarantee of freedom and fairness for individuals. It would be

unduly limited to see extradition as an aspect of international relations in which ordinarily only states have an interest. An overly state-oriented approach may ignore the rights of individuals to freedom and fairness in the extradition process. And, as will be seen, in keeping with these principles, the Act contains provisions aimed at protecting the rights of individuals guaranteed in the Constitution.

40. Yet, important though individual rights are, extradition proceedings cannot be looked at purely from the point of view of protecting individuals facing extradition. Transnational mobility of people, goods and services, as well as new technological means, have contributed to increased mobility of criminals. La Forest states that—

> "[the extradition process] strengthens the law enforcement agencies within the state requesting the surrender by reducing the possibility of its criminals escaping. And it is to the advantage of the state to which a criminal has escaped, for no country desires to become a haven for malefactors."

41. The Act furthers the criminal justice objectives of ensuring that people accused of crime are brought to trial and that those who have been convicted are duly punished. The need for effective extradition procedures becomes particularly acute as the mobility of those accused or convicted of national crimes increases. Indeed, one of the purposes of the Act in these circumstances is to reduce the temptation of law enforcement agencies to establish informal and unfair procedures for rendition. However, even if abuses need to be prevented, inherent in any extradition arrangement is the potential for reciprocity. In my view, it is this core element of extradition that explains why and how the Act served as a mechanism through which the Agreement can be enforced.

The Extradition Act

42. Section 2(1)(a) of the Act provides that the President may, subject to the provisions of the Act, enter into agreements with foreign states to provide "for the surrender on a reciprocal basis of persons accused or convicted" of the commission of extraditable offences. Section 2(3)(a) of the Act then provides that any such agreement will be of no force until agreed to by Parliament. I have already held that

the Agreement was formally entered into by the President and the national executive. Later it was agreed to by Parliament. In the circumstances, the corollary of section 2(3)(a) must be that from that moment on the Agreement had appropriate force and effect as a binding obligation of international law.

43. The remaining provisions of the Act then provide a comprehensive process, amongst other things, to give effect to the provisions of extradition agreements. So, for example, section 3(1) of the Act provides that a person accused or convicted of an offence included in an extradition agreement is liable to be surrendered to the foreign state in accordance with the extradition agreement. The Act continues by providing for warrants of arrest to be issued by magistrates upon receipt of a notification by the Minister that a request for the surrender of a person has been received by the Minister. It also provides for the holding of an enquiry by a magistrate to determine whether the person is liable to be surrendered to the foreign state. Finally, section 11 of the Act regulates the power of the Minister to order the surrender of the person.

44. The Act, read with other legislation such as the Criminal Procedure Act, thus gives the executive branch all the required statutory powers to be able to respond to a request for extradition from a foreign state and for the executive branch to be able to request the extradition of individuals who are in foreign states. It should be added that although the power to request extradition to the Republic from a foreign country is not expressly provided for in the Act, it is necessarily implicit in sections 19 and 20. Both deal with requests for surrender, and indeed, section 19 expressly envisages extradition being requested in terms of an extradition treaty.

45. The Act, then, deals with a specific class of international agreements, namely, extradition agreements. It provides that all these agreements will be implemented in accordance with its provisions. Given the nature of these agreements and the fact that there will be many which would be entered into with different countries, it is desirable that there should be a single piece of legislation which deals with all of them and provides for their effective implementation. Were it to be otherwise, it would mean that each time an extradition agreement was entered into, it would be necessary to enact additional legislation which, in all probability, would be identical to all the other implementing legislation.

46. It is clear that if the procedure stipulated in sections 2 and 3 of the Act, as well as section 231(1) and (2) of the Constitution is followed, an extradition agreement creates a binding international law obligation on South Africa. The question then is whether the Agreement "becomes law" in South Africa as contemplated by section 231(4) of the Constitution. There are two ways in which this question can be answered. The first is to say that the Agreement itself does not become binding in domestic law, but the international obligation the Agreement encapsulates is given effect to by the provisions of the Act. The second approach is that once the Agreement has been entered into as specified in sections 2 and 3 of the Act, it becomes law in South Africa as contemplated by section 231(4) of the Constitution without further legislation by Parliament.

47. It is not necessary for the purposes of this case to decide which of these approaches is correct, for their effect in this case is the same. Either the Agreement has "become law" in South Africa as a result of the prior existence of the Act which constitutes the anticipatory enactment of the Agreement for the purposes of section 231(4) of the Constitution. Or the Agreement has not "become law" in the Republic as contemplated by section 231(4) but the provisions of the Act are all that is required to give domestic effect to the international obligation that the Agreement creates.

48. I conclude, therefore, that on either of the approaches identified above, no further enactment by Parliament is required to make extradition between South Africa and the United States permissible in South African law.

49. The last question that needs to be considered is whether the provisions of the Agreement are consistent with the Act.

Are the provisions of the Extradition Agreement in conflict with the Extradition Act?

50. On either of the approaches mentioned above, it is not necessary to decide the question whether there is a conflict between the provisions of the Act and the provisions of the Agreement as I shall explain. If the first approach mentioned above is correct – that is that the provisions of the Act do not become law domestically but

merely give rise to an international law obligation to which effect is given by the provisions of the Act – then this question does not arise. For on this approach, if there is an inconsistency between the Act and the Agreement then clearly the provisions of the Act will be the legally operative provisions in our domestic law. If the result of such inconsistency is that South Africa cannot give full effect to its international obligations, then that is a matter that will have to be resolved in the international sphere, not domestically.

51. If the second approach is correct – that is that the provisions of the Agreement do become law, because they have been deemed to have been enacted by the anticipatory provisions of the Act – it is clear that they can only have become law to the extent that they are consistent with the Act. In the case of a conflict between a provision of the Agreement and a provision of the Act (or the Constitution), therefore, the conflicting provision of the Agreement will not have become law as contemplated by section 231(4).

52. As the case raised here is not based on any specific example of alleged conflict affecting the potential extradition of the applicants, it is not necessary for us to decide in this case whether there is a conflict between the Agreement and the Act, even on the assumption that the Agreement has become law. This is because if there is such a conflict, the provisions of the Act will clearly override the conflicting provisions in the Agreement.

53. The result is that whichever of the two approaches is adopted in relation to the legal status of the Agreement in our law, its provisions cannot override the provisions of the Act. If there is repugnancy, the terms of the Act will prevail. Only a duly enacted amendment to the Act, which would have to be consistent with the Constitution, could permit the repugnancy to be resolved in favour of the Agreement.

Conclusion

54. In the result, the three challenges to the validity and enforceability of the Agreement between South Africa and the United States fail.