



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Reportable

Case no: 76/2023

In the matter between:

JOHNATHAN RICHARD SCHULTZ

APPELLANT

and

**MINISTER OF JUSTICE AND
CORRECTIONAL SERVICES**

FIRST RESPONDENT

**DIRECTOR GENERAL: DEPARTMENT
OF JUSTICE AND CORRECTIONAL
SERVICES**

SECOND RESPONDENT

**DIRECTOR OF PUBLIC PROSECUTIONS,
GAUTENG LOCAL DIVISION,
JOHANNESBURG**

THIRD RESPONDENT

**NATIONAL DIRECTOR OF
PUBLIC PROSECUTIONS**

FOURTH RESPONDENT

Neutral citation: *Schultz v Minister of Justice and Correctional Services and Others* (76/2023) [2024] ZASCA 77 (23 May 2024)

Coram: MOTHLE, HUGHES and MABINDLA-BOQWANA JJA and SEEGOBIN and KEIGHTLEY AJJA

Heard: 15 March 2024

Delivered: 23 May 2024

Summary: International law – extradition – Constitution – Extradition Act 67 of 1962 – whether power to make extradition request to a foreign State vests with the Minister of Justice or National Prosecution Authority.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Janse van Nieuwenhuizen J, sitting as court of first instance):

- 1 The appeal is upheld with costs, including the costs of two counsel, where so employed.
- 2 The order of the high court is set aside and replaced with the following:
‘It is declared that only the first respondent in his capacity as a member of the national executive of the Republic of South Africa, has the power to make an extradition request for the extradition of the applicant from the United States of America.’

JUDGMENT

Mabindla-Boqwana JA and Keightley AJA (Mothle and Hughes JJA and Seegobin AJA concurring):

Introduction

[1] The crisp issue in this appeal is whether the power to request the extradition of a person from the United States of America (the US) to stand trial in the Republic of South Africa (the Republic/ South Africa) vests in the executive authority of the Minister of Justice and Constitutional Development (the Minister), or whether it vests in the National Prosecuting Authority (the NPA). The question was considered by the Gauteng Division of the High Court, Pretoria (the high court). The high court

held that the authority to make an extradition request from the US vested in the NPA and not in the Minister. The decision comes to this Court on appeal with leave of the high court.

Background facts

[2] The appellant, who was the applicant in the high court, is Johnathan Richard Schultz. He is a South African citizen who has resided in the US since 2019. In November of that year the South African Police Service (the SAPS) made several arrests of persons accused of offences related to the alleged theft and sale of unwrought precious metals. The SAPS also obtained and executed six search warrants. The affidavit supporting the application for the warrants mentioned the appellant as an active member of one of the companies alleged to have been involved in the commission of the offences. In March 2022, when the arrested accused appeared in court, the prosecution sought a postponement on the ground, among others, that the NPA intended to request the appellant's extradition from the US.

[3] Having been alerted to this fact, the appellant instructed his South African attorneys to communicate with, among other authorities, the Minister, the National Director of Public Prosecutions (the NDPP), the NPA and the Director of Public Prosecutions, Johannesburg (the DPP). In their letter, dated 14 April 2022, the appellant's attorneys made the following submissions and request:

'It is our view that an extradition request by South Africa to the US in respect of our client may be unconstitutional, unlawful and invalid on various different bases.

In particular, the State official who makes the extradition request must indeed be authorised under the Constitution or legislation to do so. In this respect, we hereby request you to advise us as to which official you may be of the view is empowered and authorized to submit an extradition request on behalf of South Africa to the US.'

[4] On 21 April 2022 the Minister's spokesperson, Mr Phiri, responded by way of an email. He advised that as the spokesperson it is 'unlikely that [he] would be involved in all the administrative processes that pertain to extraditions or any other administrative issue generally'. He suggested that the appellant's attorneys should contact the relevant officials dealing with the administration of extradition requests, namely Ms Lujiza and Mr Botes. The DPP's response, also by way of email, was terse. It read: 'Kindly keep the NDPP and the ministry out of this matter'. The NPA responded later, saying that 'pertaining to the extradition proceedings that are envisaged, this office can assure you that due process will be followed, and your client will be able to exhaust his rights in this regard'.

In the high court

[5] On the premise that extradition proceedings against him were envisaged by the NPA, the appellant approached the high court for urgent relief. His first substantive prayer was for an order declaring that he had a right to submit representations to the Minister, and the DPP in relation to any extradition request that may be sought. The appellant's second substantive prayer was for an order: 'Declaring that only the Minister, in his capacity as a member of the national executive of the Republic of South Africa, has the power to submit a request for the extradition of the applicant from the United States of America.'

[6] It is this second declarator, which was refused by the high court, which forms the subject matter of this appeal. The appellant did not pursue an appeal against the high court's refusal of the first declaratory prayer,¹ which consequently falls outside the scope of this judgment.

¹ That he has the right to submit representations to the Minister and the DPP.

[7] It is relevant also to highlight at this stage that the declarator is specific *to the power to submit a request* for extradition from the US. On 16 September 1999, the Government of South Africa entered into an Extradition Treaty with the Government of the US (the Treaty) in terms of the Extradition Act. The Treaty was signed by the then Minister of Justice and Constitutional Development, Dr Penuel Maduna, on behalf of the Government of South Africa. In terms of Article 1 of the Treaty, the parties agreed to extradite to each other, pursuant to the provisions of the Treaty, persons whom the authorities in the requesting State have charged with or convicted of an extraditable offence. It is the exercise of power in terms of this Treaty which the appellant says vests in the Minister.

[8] As is evident from the citation of this appeal, the appellant cited several respondents in his application. The first respondent and second respondent, being the Minister, and the Director General: Department of Justice and Correctional Services (the DG) opposed the application. Mr Botes, who was referred to in Mr Phiri's email, deposed to the answering affidavit on their behalf. The DPP and the NDPP, being the third and fourth respondents, also opposed the application. The deponent to the affidavit filed on their behalf, was Ms le Roux, a senior State advocate in the office of the DPP. She is the prosecutor in the criminal case relevant to the appellant's possible extradition. The respondents made joint submissions to both the high court and to this Court on appeal.

[9] In their respective affidavits both Mr Botes and Ms le Roux explained the current procedure that is followed in giving effect to an extradition request from the Republic to foreign States, including the US. They described substantially the same process. It is the individual prosecutor who *initiates* the request by identifying the

need for extradition and preparing the relevant documentation. This includes, as part of the Treaty, a warrant of arrest and a charge sheet. These preparatory documents are forwarded to the Deputy Director in the DPP's office in charge of extraditions. If he is satisfied that the documentation is correct, it is forwarded to the DPP, who signs off on the final document. It then goes to the NDPP for her perusal and, if she is satisfied, it is forwarded to the DG. Mr Botes and Ms le Roux described the DG as being the designated Central Authority for extradition requests.

[10] Crucially, Mr Botes and Ms le Roux were at pains to explain that the Department of Justice and Correctional Services' (the Department) role in an extradition request is simply to function as a conduit to channel the request to the Department of International Relations and Co-operation (the DIRCO) from where it is dispatched to the US. According to Ms le Roux, the role of the Department is 'to go through the documents to satisfy themselves as to the authority of the magistrate that authorised the warrant of arrest, etc'. According to the respondents' evidence, the entire process is prosecution-driven, with the Ministry playing no more than an administrative role. What is more, as Mr Botes explained, 'it is not the Minister in person who deals with the extradition or considers the extradition'.

[11] The appellant argued before the high court that the process described by the respondents was unlawful in that it is the Minister, and not the NPA, who has the authority to deal with extradition requests to the US. The high court dismissed the appellant's submission. It drew a distinction between the treatment of extradition requests *to* the Republic (incoming requests) in the Extradition Act 67 of 1962 (the Extradition Act), and those made *by* the Republic (outgoing requests) to a foreign State. While the Minister has a range of express powers in respect of incoming

requests, the Extradition Act is silent as regards the Minister's powers in respect of outgoing requests. The high court agreed with the respondents that while the Minister, through the Department, has some role to play in requests for extradition to the Republic, this is a limited administrative function.

[12] In essence, the high court found that s 179 of the Constitution, read with ss 20 and 33 of the National Prosecuting Authority Act 32 of 1998 (the NPA Act), vests the NPA with the power to institute and conduct criminal proceedings on behalf of the State. Section 179(2) also empowers the NPA to 'carry out any necessary functions incidental to instituting criminal proceedings'. Under this statutory scheme, prosecutions fall within the exclusive domain of the NPA. This includes the power to decide whether an extradition request to the US should be made. To find in favour of the appellant would be contrary to this scheme. It would permit the Minister to enter the exclusive terrain of the NPA by giving him the power to overrule its prosecutorial decisions. Consequently, the high court refused to grant the declaratory relief sought by the appellant.

In this Court

[13] For purposes of the appeal, it is important to clarify the precise substance of the appellant's declarator. Both the appellant and the respondents agree that the Department, 'submits' the extradition request to the US via the DIRCO. To this extent, at face value, the declarator may seem to be uncontentious. However, the wording of the declarator masks the real issues at stake. The point of contention is which authority, the NPA or the executive, has the power to decide whether, how and when an extradition request should be submitted. Inherent in this, is the question of the role and power of the Minister.

[14] The appellant submits that the source of this power is derived from the Constitution, the Extradition Act and customary international law. All three sources vest the power in the Minister alone. The Treaty confirms that the power lies with the Minister. According to the appellant, the high court erred in finding that s 179(2) of the Constitution empowers the NPA to make extradition requests to the US on behalf of the Republic. It is not a power necessarily implied by the NPA's power to prosecute. Were it so implied, it would give the NPA the power to act on behalf of the Republic in the international sphere, which function lies exclusively within the realm of the executive.

[15] The respondents contend that the high court was correct in identifying the source of the power as the NPA Act, and the NPA as the repository of the power. To hold otherwise, they submit, would be to accord to the Minister the power to thwart a request for the extradition of a person to stand trial in the Republic. This would constitute an impermissible transgression into the exclusive prosecutorial authority of the NPA recognised under the Constitution.

Declaratory relief

[16] We are satisfied that this Court's jurisdiction to consider the declaratory relief sought by the appellant is properly engaged. Although no extradition request has yet been submitted in respect of the appellant, it is common cause that the NPA intends on charging him and that it will have to seek his extradition to the Republic if he is to stand trial. His right to liberty is accordingly clearly threatened by the real prospect of a request for his extradition. Once this is so, the declaratory relief he seeks on

appeal is not abstract or academic.² Further, the appeal raises an important legal issue which will affect extradition requests in the future. Finally, the decision of the high court which is on appeal before this Court is inconsistent with the judgment of the Western Cape Division of the High Court in *Spagni v Acting Director of Public Prosecutions, Western Cape*.³ Although *Spagni* came before this Court on appeal,⁴ that appeal was dismissed on the basis that it was moot. This Court expressly noted that it made no pronouncement on the appeal's merits. It is important, therefore, that this Court now considers the merits of the issues in dispute.

Who has the power to make the extradition request to the US?

[17] To answer this question, we discuss conferral of powers in the Constitution, the application of international law and the Extradition Act. The starting point for considering the parties' competing submissions on the merits of the appeal is the doctrine of legality, an incident of the rule of law, which entails that no power may be exercised beyond that which is conferred by law. Power should therefore be sourced in law. It is thus necessary 'first, to identify the source of power . . . and, second, to determine to whom that power accrues'.⁵

[18] To identify the source of power requires an exploration of what extradition is about. 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

² *West Coast Rock Lobster Association v The Minister of Environmental Affairs and Tourism* [2010] ZASCA 114; [2011] 1 All SA 487 (SCA) para 45. See also *Association for Voluntary Sterilization of South Africa v Standard Trust Limited and Others* [2023] ZASCA 87 para 12.

³ *Spagni v Acting Director of Public Prosecutions, WC and Others*, unreported (Case No. 17224/2021, delivered on 6 April 2022).

⁴ *Spagni v The Director of Public Prosecutions, Western Cape and Others* [2023] ZASCA 24 para 27.

⁵ *Minister for Justice and Constitutional Development v Chonco and Others* [2009] ZACC 25; 2010 (2) BCLR 140 (CC); 2010 (4) SA 82 (CC) paras 27 and 28.

within the jurisdiction of the other State'.⁶ There are three fundamental elements involved. These are: acts of sovereignty between 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 or sentence in the territory of the requesting State.⁷

[19] The procedure governing extradition operates at both the international and domestic level. Internationally, 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, including customary international law. Domestically, States are regulated by their own domestic laws, which they are free to prescribe, before extraditing an individual.⁸ We should add that the same would apply in respect of outgoing requests for extradition, the regulation of which, to the extent that this concerns internal matters, may be regulated by domestic law. A further point to note is that if a State has entered into extradition treaties with other States, both internal and external requests will also be governed by those treaties in respect of requests from or to the reciprocal States.

[20] In terms of our domestic law, extraditions are regulated by the Extradition Act. Section 2 gives the President the power to enter into agreements with foreign States for the surrender on a reciprocal basis of persons accused or convicted of the

⁶ *President of the Republic of South Africa and Others v Quagliani, and two similar cases (Quagliani)* [2009] ZACC 1; 2009 (4) BCLR 345 (CC); 2009 (2) SA 466 (CC) para 1.

⁷ *Mohamed and Another v President of the Republic of South Africa and Others (Society for the Abolition of the Death Penalty in South Africa and Another Intervening)* [2001] ZACC 18; 2001 (7) BCLR 685 (CC); 2001 (3) SA 893 (CC) para 29.

⁸ *Harksen v President of the Republic of South Africa and Others* 2000 (2) SA 825 (CC); 2000 (1) SACR 300 (CC) para 4.

commission of an extraditable offence⁹ within the jurisdiction of the Republic. Section 3 provides that a person accused or guilty of an offence included in the extradition agreement and committed within the jurisdiction of a foreign State shall be liable to be surrendered to such State in accordance with the terms of such an agreement.

[21] The Extradition Act includes several provisions expressly giving the Minister powers in respect of extraditions from the Republic to a foreign State. These include s 4 which provides:

‘(1) Subject to the terms of any extradition agreement any request for the surrender of any person to a foreign State *shall be made to the Minister by a person recognized by the Minister as a diplomatic or consular representative of that State or by any Minister of that State communicating with the Minister through diplomatic channels existing between the Republic and such State.*

(2) Any such request received in terms of an extradition agreement by any person other than the Minister *shall be handed to the Minister.*

...’ (Emphasis added.)

As far as requests to the Republic are concerned, these are dealt with on a ministerial level. Similarly, s 5 provides that upon receipt of a notification from the Minister, concerning receipt of an extradition request, any magistrate may issue a warrant of arrest. This is consistent with other legislation dealing with international matters.¹⁰

[22] Crucially, for purposes of the current dispute, the Extradition Act has only two provisions expressly dealing with extradition requests made by the Republic to

⁹ In terms of s 1 of the Extradition Act, ‘**Extraditable offence** means any offence which in terms of the law of the Republic and of the foreign State concerned is punishable with a sentence of imprisonment or other form of deprivation of liberty for a period of six months or more, but excluding any offence under military law which is not also an offence under the ordinary criminal law of the Republic and of such foreign State’.

¹⁰ See also reference to the role of the Minister or Cabinet Member responsible for Justice, in *International Co-operation in Criminal Matters* Act 75 of 1996 and *Implementation of the Rome Statute of The International Criminal Court* Act 27 of 2002.

a foreign State for purposes of prosecution in our courts. These are sections 19 and 20 which, respectively, provide:

‘19. No person *surrendered to the Republic* by any foreign State in terms of an extradition agreement or by any designated State shall, until he or she has been returned or had an opportunity of returning to such foreign or designated State, be detained or tried in the Republic for any offence committed prior to his or her surrender other than the offence in respect of which extradition was sought or an offence of which he or she may lawfully be convicted on a charge of the offence in respect of which extradition was sought, unless such foreign or designated State or such person consents thereto: Provided that any such person may at the request of another foreign or designated State and with a view to his or her surrender to such State, be detained in the Republic for an extraditable offence which was so committed, provided such detention is not contrary to the laws of the State which surrendered him or her to the Republic.

20. The Minister may at the request of any person *surrendered to the Republic* return such person to the foreign State in or on his way to which he was arrested, if –

- (a) in the case of a person accused of an offence, criminal proceedings against him are not instituted within six months after his arrival in the Republic; or
- (b) he is acquitted of the offence for which his surrender was sought.’ (Emphasis added.)

[23] As to the authority in whom the power vests in relation to incoming extradition requests from a foreign State, the Extradition Act is clear. In that instance, the Minister would receive the request. Section 11(a) expressly gives the Minister the power to determine whether the person sought by the foreign State will be extradited to that requesting State. In addition, ss 8, 11 and 15 describe other far-reaching powers for the Minister to, for example, direct a magistrate to cancel a warrant of arrest issued under the Act;¹¹ direct that a person arrested under a warrant be discharged forthwith;¹² order that the person concerned shall not be surrendered to

¹¹ Section 8(2)(a).

¹² Section 8(2)(b).

the foreign State seeking their extradition;¹³ and to cancel a warrant and order the release of a person where the Minister is satisfied that the offence in respect of which surrender is sought is political in character.¹⁴

[24] There are no equivalent provisions in the Extradition Act in respect of outgoing extradition requests. The respondents submit that this absence underlines the fact that, unlike in the case of incoming extradition requests, the Minister does not have any decision-making powers in respect of outgoing requests.

[25] What the respondents' submission overlooks is that extradition operates at the international level as well as the domestic level. Further that, as noted earlier, one of the essential elements of extradition is that it involves an act of sovereignty between two States. As such, it necessarily implicates foreign relations, in respect of which powers are bestowed on the executive.

[26] This was affirmed by the Constitutional Court in *Kaunda and Others v President of the Republic of South Africa*.¹⁵ Although there were three judgments by the court in the matter, all three were unanimous that the conduct of foreign relations is a matter for the executive. *Kaunda* concerned South African citizens who were held in Zimbabwe on various charges. They feared that they might be extradited from Zimbabwe to Equatorial Guinea at the risk of being accused as mercenaries and plotting a *coup* against the President of Equatorial Guinea. They contended that if this were to happen, they would not get a fair trial and if convicted, may face the risk of being sentenced to death. They, accordingly, sought an order compelling the

¹³ Section 11(b).

¹⁴ Section 15.

¹⁵ *Kaunda and Others v President of the Republic of South Africa* [2004] ZACC 5; 2004 (10) BCLR 1009 (CC); 2005 (4) SA 235 (CC).

Government to make certain representations to the Governments of Zimbabwe and Equatorial Guinea to take steps to ensure their rights to dignity, freedom and security of their person and fair conditions of detention, among other things.

[27] In his minority judgment, Ngcobo J stated:

‘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. It is therefore generally accepted that this is a province of the executive. . .’¹⁶

[28] In another minority judgment, O’Regan J observed:

‘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 national executive is responsible for negotiating and signing international agreements. 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.’¹⁷

[29] Although *Kuanda* does not deal directly with extradition powers, it confirms that State conduct implicating foreign relations falls within the ambit of executive authority. This is consistent with customary international law, which recognises that foreign functions of State are conducted by the executive. It is presumed in

¹⁶ Ibid para 172.

¹⁷ Ibid para 243.

international law that where the State acts, it does so through its executive officials. This is so because when an official makes undertakings on behalf of the State or performs such acts, he or she must have authority to do so, as such acts have binding consequences for the State.¹⁸ Article 7(2) of the Vienna Convention on the Law of Treaties, codifies this international norm:

‘In virtue of their functions and *without having to produce full powers*, the following are considered as representing their State: (a) Heads of State, Heads of Government and Ministers for Foreign Affairs, *for purposes of performing all acts relating to the conclusion of a treaty*.’¹⁹ (Emphasis added.)

[30] The Constitution is consistent with this international customary law principle. Section 231(1) of the Constitution provides that ‘the negotiating and signing of all international agreements is the responsibility of the national executive’. While s 2 of the Extradition Act confers the power on the President, it was held in *President of the Republic of South Africa and Others v Quagliani, and Two Similar Cases (Quagliani)*,²⁰ that the President was empowered to delegate the power to enter into extradition agreements to the Minister, and that this is entirely consistent with the conferral of the power to the national executive by s 231(1) of the Constitution.²¹

[31] The force of customary international law in our legal systems is underlined in two further provisions of the Constitution. In terms of s 232, customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of

¹⁸ *Nuclear Tests (Australia v. France; New Zealand v. France)*, Judgment, 1974 I.C.J. para 46. See also ILC, Guiding Principles applicable in unilateral declarations of States capable of creating legal obligations, Principle I, U.N. Doc. A.

¹⁹ United Nations (1969), “Vienna Convention on the Law of Treaties” Treaty Series 1155, 331, article 7(2). See also *Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, Judgment, I.C.J. Reports 2002, at 21-22, para 53.

²⁰ *Quagliani* fn 6 above.

²¹ *Ibid* para 25.

Parliament. In addition, courts are enjoined by s 233, when interpreting legislation to prefer any reasonable interpretation consistent with international law over any alternative interpretation that is inconsistent with it.

[32] A request for extradition by one State to another necessarily operates at the international level. This must apply in respect of both incoming and outgoing requests. Implicitly, and consistent with international customary law and the Constitution, both forms of request engage the executive sphere of power. To hold, as the respondents argue, that it is the NPA and not the executive that has decision-making power in respect of outgoing extradition requests would be contrary to established international law principles: it would accord to a non-executive domestic organ of state, an executive function at a State-to-State level. An intention so to depart from established international law principles would require clear expression in the Extradition Act. It cannot be implied simply from the absence of express provisions according to the Minister's decision-making powers in outgoing extradition requests.

[33] The respondents' submission is also unsustainable given what the Constitutional Court said in *Quagliani* in relation to this issue:

'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, s 19 expressly envisages extradition being requested in terms of an extradition treaty.

...

To the extent that Mr Goodwin's appeal is based on similar challenges, it also cannot succeed. Mr Goodwin contended further that the Act gave no power to anybody within this country to request an extradition of someone who is in the United States. *The answer is that the Act by implication does confer authority to make the request by reason of the provisions concerning reciprocity, as well as sections 19 and 20.* Mr Goodwin's appeal accordingly fails.'²² (Emphasis added.)

[34] *Quagliani* thus confirms that under the Extradition Act it is the executive that is empowered not only to respond to an incoming request for extradition but also to make an outgoing request. Importantly, the judgment recognises that the absence, in the Extradition Act, of an express power on the part of the executive to make an outgoing extradition request does not signify an absence of that power. The executive power to make an outgoing request is to be implied from the principle of reciprocity, which lies at the very heart of extradition.

[35] The respondent's contention that bestowing that power on the Minister would permit executive interference with the NPA's constitutionally guaranteed prosecutorial independence does not withstand scrutiny. The respondents' interpretation of s 179(2) is tantamount to suggesting that the NPA has the power to conduct foreign relations and to bind the Republic on a State-to-State level. This is inconsistent with the principles articulated in *Kaunda* and of customary international law. It is also inconsistent with the separation of powers and the constitutional recognition of matters involving foreign relations as falling within the preserve of the executive.

[36] A further difficulty for the respondents is that for their contention to succeed, they would have to show that the decision-making power in respect of outgoing

²² Ibid paras 44 and 55.

extradition requests is a power necessarily implied from their authority to prosecute. In *GNH Office Automation CC and Another v Provincial Tender Board, Eastern Cape*,²³ this Court outlined the test for whether a power is ‘necessarily implied’ as follows:

‘Powers may be presumed to have been *impliedly* conferred because they constitute a *logical and necessary consequence of powers* which have been *expressly conferred*, because they are reasonably required in order to exercise the powers expressly conferred, or because they are ancillary or incidental to those *expressly conferred*.’ (Emphasis added.)

[37] As we have noted, the express power relied on by the respondents is the authority to prosecute. However, extradition necessarily involves an international act, invoking executive authority. In these circumstances, there can be no necessity that requires s 179(2) to be construed as logically entrusting the NPA with the exercise of the power to make outgoing extradition requests. In fact, it would be constitutionally untenable to have both the executive authority and the NPA exercise the power. This would lead to South Africa speaking with two voices in the conduct of its foreign affairs²⁴ in relation to extradition, which is an undesirable consequence.

[38] The real nub of the issue is the demarcation of functions between the NPA and the Minister. In other words, where the line is drawn between the NPA’s power to prosecute and to do things necessarily incidental thereto, on the one hand, and the power of the executive to act in matters involving foreign affairs, on the other. The NPA clearly has the power to enter into a plea and sentence agreement with an

²³ *GNH Office Automation CC and Another v Provincial Tender Board, Eastern Cape* 1998 (3) SA 45 (SCA) at 51G-H.

²⁴ *Harksen v President of the Republic of South Africa and Others* 1998 (2) SA 1011 (C) para 13.

accused.²⁵ In contrast, a clear example of a demarcated power, is that involved in issuing a warrant of arrest. That power is incidental to the criminal proceedings, but the function and decision-making power that goes with it vests in the judicial officer and not the prosecutor. By analogy, the fact that extradition is sought for criminal proceedings to take place, does not necessarily imply a decision-making power for the NPA to engage with other States internationally. It is thus important to distinguish between a decision to prosecute, which can only be made by the NPA, and a decision to request the extradition, from another State, of the person who is to be prosecuted. Those are two distinct powers.

[39] The importance of distinguishing between functions in the extradition context (albeit in relation to incoming requests) was highlighted in *Khama v Director of Public Prosecutions, Gauteng Local Division, Johannesburg and Others*²⁶ as follows:

‘An extradition inquiry and criminal proceedings are not the same in all respects. Extradition proceedings are aimed at determining whether there is a reason to remove the person to foreign state – not to determine whether the person concerned is or is not extraditable. The hearing before the magistrate is but a step in the proceedings:

“extradition is deemed a sovereign act, its legal proceeding 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”.²⁷

[40] In its role as the prosecuting authority, the NPA has the important function of determining who is to be prosecuted and what the charges are to be. The Minister

²⁵ It was held in *Wickham v Magistrate, Stellenbosch and Others* 2016 (1) SACR 273 (WCC) para 81, that ‘[w]here the prosecution enters into a plea and sentence agreement with an accused person it fulfils a function incidental to the institution of criminal proceedings in terms of s 179(2) of the Constitution, on behalf of the State. . .’

²⁶ *Khama v Director of Public Prosecutions, Gauteng Local Division, Johannesburg and Others* [2023] 3 All SA 193 (GJ); 2023 (2) SACR 588 (GJ).

²⁷ *Ibid* para 20.

has no role or power in the exercise of this prosecutorial function. However, if an identified accused is in a foreign State, this triggers the engagement of executive authority, as the NPA must seek assistance from the executive to make the extradition request to the foreign State.

[41] Under the Treaty, a request to the US must be in writing, supported by prescribed documents, including, 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.²⁸ This information all falls within the knowledge and preserve of the NPA, which must compile and provide the documents to the executive for inclusion in the extradition request. However, no matter how necessary this role of the NPA is, it does not imply a power to make the extradition request, and to decide when and whether to do so.

[42] The respondents acknowledge that there is some role for the Department to play in making a request for extradition. Their contention, however, is that it is a limited role, does not involve the Minister, nor the exercise of any decision-making power by the Department. As noted earlier, the current process involved in making outgoing extradition requests is described in the affidavits filed on behalf of the respondents. Significantly, the Minister does not consider the request.

[43] In addition, it seems that the Minister of International Relations and Co-operation also does not consider the request. The involvement of the DIRCO in the process does not take the matter any further. It really talks to nothing more than the administrative process involved.

²⁸ Article 9.

[44] The described process does not satisfy the principle of legality, which requires the identification of the source of power and the functionary responsible for the exercise of that power. As things currently stand, there is no identified functionary, even within the NPA, who exercises the decision-making power to make the extradition request. Is it the prosecutor, or the DPP, or a functionary within the NDPP's office or the NDPP herself who does so? The respondents do not tell us, nor does the NPA Act.

[45] To the extent it is suggested that this role might be fulfilled by the DG as the Central Authority, this contention is not helpful. We were not directed to any law that designates the DG as the Central Authority for extradition purposes. In any event, it is clear from the respondents' description of the role played by the Department that it involves no decision-making power. As we have already stated, the question of who has the power to make outgoing extradition requests and the process involved should not be conflated.

[46] The Minister is the executive authority who represented the government of the Republic in concluding the Treaty. Accordingly, he has the power to represent the State in requests made under it. Moreover, under the Treaty, it is the executive authority who acts on the part of a requested State.

[47] The role of the NPA in the outgoing extradition process does not stretch to dictating to the Minister how to exercise this power, as this would be destructive of the separation of powers. Contrary to the respondents' submissions, this demarcation of powers and functions between the NPA and the Minister does not impinge on the NPA's prosecutorial powers. This is because the principle of legality defines the

ambit of the Minister's lawful powers. While he has the power to decide whether and when to make an outgoing extradition request, he cannot do so in a manner that undermines prosecutorial independence. Whether he has acted within the realms of his authority will depend on the circumstances of the extradition request in question in any given case.

[48] We conclude that it is clear that the Minister is central to the administration and implementation of the Extradition Act. Critically, the decision-making power in respect of all extradition requests vests in him. The reciprocal obligations that arise with extradition are to be dealt with by the Minister on behalf of the Republic. This not only applies to incoming extradition requests, as expressly provided for in the Extradition Act, but also, by implication, to outgoing requests to the US. This conclusion is reinforced by international law and by the Constitution.

[49] Accordingly, the finding by the high court that an extradition request is incidental to the functions of the NPA cannot be sustained. The appeal must therefore be upheld as the appellant was entitled to the declarator sought.

[50] In the result, the following order issues:

- 1 The appeal is upheld with costs, including the costs of two counsel, where so employed.
- 2 The order of the high court is set aside and replaced with the following:
'It is declared that only the first respondent in his capacity as a member of the national executive of the Republic of South Africa, has the power to make an extradition request for the extradition of the applicant from the United States of America.'

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

R M KEIGHTLEY
ACTING JUDGE OF APPEAL

Appearances

For the appellant:	A Katz SC and K Perumalsamy
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For the respondents:	C F J Brand SC
Instructed by:	The State Attorney, Pretoria The State Attorney, Bloemfontein.