REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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DATE SIGNATURE

CASE NO: A101/2014

In the matter between:

PATEL USMAN ISMAIL **APPELLANT**

and

STATE **RESPONDENT**

J U D G M E N T

COPPIN J:

1. The United States of America ("the USA") has requested the extradition of the appellant, its citizen who is presently in the Republic of South Africa ("the RSA"), with the expressed intent to prosecute him for offences he is alleged to have committed in that country.

2. Pursuant to that extradition request, the appellant was arrested and he appeared in the magistrate's court in Randburg in terms of the provisions of the Extradition Act, No. 67 of 1962 ("the Act"). Having found, in effect, that the appellant is liable to be surrendered to the USA, the magistrate, on 15 February 2013, issued a committal order in terms of section 10(1)[1] of the Act, committing the appellant to prison to await the decision of the Minister of Justice and Constitutional Development ('the Minister') regarding his surrender to the USA.

3. This is an appeal against the committal order with the leave of the court a quo. The appellant, who is out on bail pending the outcome of this appeal, was legally represented throughout the proceedings in the magistrate's court.

4. Briefly, as an appellant alleges on appeal that the magistrate erred in several respects, more particularly:

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[1] Section 10 (1) provides: *"(1) If upon consideration of the evidence adduced at the enquiry referred to in section9 (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 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*".

4.1 Firstly, in finding that the offences in respect of which the USA has requested his extradition, are extraditable offences. In short, the argument raised by the appellant, which will be dealt with in detail later, is that the requirement of double criminality has not been satisfied. According to this argument, it has not been established that the alleged conduct of the appellant, which constituted offences in the USA, also constituted offences in this country at the time of their commission in the USA;

4.2 Secondly, that the certificate furnished by the Prosecuting Authority in the USA, in support of the appellant's extradition, does not comply with the prescriptive requirements of section 10(*2*)[2] of the Act.

5. In response thereto, Counsel for the State contended that the double criminality rule had been satisfied and even though, both, the extradition treaty between the USA (the Requesting State) and the RSA (the Requested State), and the Act, appeared silent on whether double criminality should be determined with reference to the time of the alleged commission of the offences, or the time of the extradition request, the requirement was met if the alleged conduct constituted an offence in both the Requesting and Requested States, at least, at the time of the extradition request.

6. It was the State's argument that the certificate issued by the Prosecuting Authority in the USA met the statutory requirements and that the magistrate

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[2] The section provides: *"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."*

correctly accepted it as conclusive proof of the fact that there was sufficient evidence to warrant the prosecution of the appellant in the USA.

BACKGROUND

7. On 7 March 2011, the USA Embassy in Pretoria addressed a diplomatic note to the relevant authorities in the RSA, requesting the appellant's extradition to the USA for offences mentioned in the warrant of arrest issued on 26 March 2011 by the Northern District Court of California in the USA. Attached to the note are, inter alia, the following documents, namely:

    i. A certificate issued and signed on 17 June 2011 by Mr David Warner, in his ex officio capacity as the associate director of the office of International Affairs, Criminal Division, and the Department of Justice of the USA.

    ii. A certificate issued and signed on 16 June 2011 by Mr Peter B. Axelrod (" Mr Axelrod"), in his capacity as assistant in the United States' Attorney' Office, in the Northern District of California. This is a certificate issued, purportedly in compliance with the provisions of s 10(2) of the Act. It is further stated in this certificate that the Requesting State requests the extradition of the appellant from the Requested State in order to prosecute him for financial crimes associated with banking regulations e.g. structuring of bank deposits in violation of the law. The certificate indicates that Mr Axelrod is a duly appointed Assistant United States Attorney in the Northern District of California who is in charge of the prosecution of the appellant. Mr Axelrod

certifies that the prosecution of the appellant is justified in the light of evidence contained in the extradition documents and under the laws of the USA.

iii. An affidavit deposed to by Mr Axelrod on 16 June 2011 at San Francisco, California. In essence his affidavit contains a comprehensive summary of the facts and procedural history of the case.

iv. An indictment, dated 18 August 2010;

v. A tolling agreement between the appellant and the Requesting State entered into on 2 January 2011 and counter- signed by Mr Charles J Smith, the appellant's attorney.

vi. A copy of the United States Code, Title s2, title 22 of s4221, title 31 United States Code s5313 and s5324, relevant code of Federal Regulations and the USA's Federal rules of Criminal Procedure.

vii. An affidavit deposed to by Mr Scott Lee on 9 July 2011, in his capacity as the special agent of the USA's Immigration and Customs Enforcement Department.

8. The request for the extradition of the appellant was made pursuant to an Extradition Treaty between the RSA and the USA[3] ("the treaty").

[3] GNR 7100 of 29 June 2009.

9. On 28 April 2011 the appellant was arrested and he appeared in the Magistrates' court.

10. On 21 July 2011 the Minister issued a notice in terms of section 5*(1)(a)* the Act. In essence, it is a confirmation of the receipt of a request for the surrender of the appellant to the Requesting State.

11. On 15 January 2013, the magistrate issued a committal order in terms of the Act. It was the magistrate's finding that the alleged offences, for which the appellant's extradition is being sought, are extraditable offences and the magistrate took, inter alia, the following factors into account:

    11.1 That the appellant is alleged to have committed banking related structuring offences in the USA, which offences are punishable by a sentence of imprisonment of more than 1 (one) year. The equivalent charges in the RSA would have been charges of contravening s28 and s29 of the Financial Intelligence Act 38 of 2001 ("FICA");

    11.2 The structuring offences were allegedly committed (as per the indictment issued by the prosecuting authority of the Requesting State) between 2005 to October 2007.

    11.3 The FICA law of the RSA came into operation in 2010.

12. The magistrate concluded that the appellant's defence that the offences were not extraditable, because the requirement of double criminality was not met, could not hold. The magistrate was of the view that even if the Act was silent on whether the offence in respect of which extradition is sought had to be a crime in the requested State, either, at the time the alleged offence was

committed in the requesting State, or at the time of the extradition request, the relevant date was the date of the extradition request.

13. The magistrate relied on section 3(1) of the Act[4] and interpreted it to cover offences committed prior to the operation of the Act, or offences committed prior to the conclusion of the treaty.

14. It was the finding of the magistrate that the conduct of the appellant was adequately described in the indictment and the magistrate relied on section 10(1) of the Act which, provides, *inter alia*, that if there is sufficient evidence to warrant the prosecution, the magistrate shall issue an order committing the person in question to prison. The magistrate concluded that the certificate furnished by Mr Axelrod was not fatally defective for not using the exact wording of section 10(2) and accepted it as conclusive proof that there was sufficient evidence to warrant the appellant's prosecution in the USA.

THE ISSUES ON APPEAL

15. As stated at the onset, there are, essentially, two core issues for resolution. The core issues are whether:

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[4] The section provides: *"Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence."*

i. The offences in respect of which the appellant is sought are "extraditable offences"; and

ii. The certificate furnished by the Prosecuting Authority of USA in support of the appellant's extradition, which stated that his prosecution is justified on the basis of evidence contained in the extradition documents and under the laws of the Requesting State, complies with the requirements of the Act, in particular, those in section 10(2).

I shall deal with each in turn.

EXTRADITION AND "DOUBLE CRIMINALITY"

16. The treaty, which was ratified on 9 November 2000 and published in the Government Gazette[5] , does not deal expressly with the time issue.

17. In its Preamble the treaty expresses the need for more effective cooperation between the two States in the fight against crime, and for that purpose, to conclude a new treaty for the extradition of offenders. Article 2(1) then provides that an offence shall be an extraditable offence if it is punishable under the laws in both States by deprivation of liberty for a period of at least one year, or by means of a more severe penalty. Article 2(3) of the treaty provides that an offence is extraditable, irrespective of whether the laws of the Requesting and Requested States place the offence within the same category of offences, or describe the offences by the same terminology.

18. The Act also does not deal expressly with timing. In section 1 of the Act an "extraditable offence" is defined as *"...any offence which in terms of the law of*

[5] No. 7100 of 29 June 2001

the Republic of South Africa and 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 such foreign State."

19. Section 2 of the Act ,inter alia, provides that the President may enter into an agreement with a foreign State for the surrender, on a reciprocal basis, of persons accused, or convicted of the commission in that State or in the RSA, of an "extraditable offence or offences" specified in the agreement.

20. In terms of section 3(1) of the Act: "*Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement...".*

21. In order to determine whether the person brought before him is liable to be surrendered to the Requesting State, and where the request for extradition is made on the basis of an extradition agreement, the magistrate, of necessity, must find that the offence, which the person is accused of committing in the foreign State, is an 'extraditable offence' as defined in the Act. The definition of such an offence in the Act, clearly requires that it must be an offence in both, the Requesting and the Requested States. The critical question, however, is at what stage?

22. The submission made on behalf of the appellant is that the offences, in respect of which the extradition of the appellant is being sought, are not

extraditable offences, because the double criminality principle has not been satisfied. According to this argument, the principle is fundamental. It rests in part on the principle of reciprocity and in part on the principle expressed in the maxim, *null poena sine lege .* It serves to ensure that a person's freedom is not curtailed because of offences which are not recognised as criminal by the requested State[6].

23. According to this argument, the principle is satisfied when the alleged offence was an offence in the Requested State at the same time it was allegedly committed in the Requesting State. In this case the alleged offences, which the Requesting State seeks to have the appellant extradited for, were not offences in the RSA when they were allegedly committed in the USA. They are alleged to have been committed in the USA in the period May 2005 to 25 October 2007.

24. The RSA's FICA legislation, which*, inter alia,* regulates cash transactions above a prescribed limit involving certain defined institutions and in terms of section 28, requires reporting by those institutions of such transactions[7], and in terms of section 64, criminalises conduct purposed to avoid the reporting[8], was passed in 2001. However, section 64 only came into operation on 3

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[6] See Shearer "Extradition in International Law" (1971), p 137.

[7] Section 28 of the Financial Intelligence Centre Act,, No. 38 of 2001 ("FICA") provides: *"An accountable institution and a reporting institution must, within the prescribed period, report to the Centre the prescribed particulars concerning a transaction concluded with a client if in terms of the transaction an amount of cash in excess of the prescribed amount-(a) is paid by the accountable institution or reporting institution to the client , or to a person acting on behalf of the client, or to a person on whose behalf the client is acting; or (b) is received by the accountable institution or reporting institution from the client, or from a person on whose behalf the client is acting."*

[8] Section 64 of FICA provides: "*Any person who conducts, or causes to be conducted, two or more transactions with the purpose, in whole or in part, of avoiding giving rise to a reporting duty under this Act, is guilty of an offence*."

February 2003 and section 28 only came into operation on 4 October 2010. Furthermore, the relevant FICA regulations, namely, Regulation 22B, which prescribes the amount and Regulation 22C, which prescribes the the information to be reported on, were only inserted in the regulations published under FICA on 1 October 2010. It was submitted further, that FICA, including the relevant sections and regulations, did not apply retrospectively. The main argument being that when the offences were allegedly committed by the appellant in the Requesting State they were not yet offences in the RSA.

25. The offences which are alleged to have been committed by the appellant, according to the extradition request of the USA authorities, involves conduct purposed at evading the reporting requirements of section 5315*(a)* of Title 31, of the United States Code, and the regulations promulgated under it, and causing and attempting to cause a domestic financial institution to fail to file a report required under section 5313(a) of Title 31 and the regulations prescribed under that section, as part of a pattern of illegal activity involving more than $100 000 in a 12-month period (12 counts). These crimes were allegedly committed by the appellant in the USA from 23 May 2005 to 23 July 2007.

26. In support of his submission concerning the meaning of the principle of double criminality, counsel for the appellant relied on the views expressed by academic writers, and also relied on various decisions, particularly, the decisions in *R v Bow St Magistrate, Ex Parte Pinochet (No 3)*[9]*, Bell v State*[10]*,* and *VR Palazollo v The Minister of Justice and Constitutional Development*[11]*.*

[9] 1999 2 WLR 824 (H).

27. *Bell v State* concerned a request by Australia for the extradition of Bell , who was in the RSA, for various offences he allegedly committed in Australia. The charges against Bell referred to incidents that had taken place more than 20 years earlier and included alleged acts of indecency, indecent assaults, all allegedly committed in February 1977 with young boys between the ages of 11 and 18. The Eastern Cape Division held that while there was no provision in the Australian law which provided that the right to institute a prosecution for any offence shall lapse after the expiration of 20 years from the date when the offences were allegedly committed, in terms of our law offences that were committed more than 20 years ago were not punishable and therefore the offences in respect of which Australia requested Bell's extradition were not extraditable offences. The court further held that if a person could not be prosecuted for an offence in terms of our law, he could not at that stage be punished for that offence. At the time when the extradition enquiry was conducted, no treaty existed between Australia and South Africa.

28. Relying on that decision, counsel for the appellant submitted that Bell was not liable to be surrendered because he could not be prosecuted in the RSA for the alleged offences, and that similarly, the appellant is not liable for surrender, because he cannot be prosecuted in the RSA for the equivalent offences, because they were not offences in the RSA at the time of their alleged commission in the USA.

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[10] [1997] 2 ALLSA 692 (EC).
[11] An unreported decision of the Western Cape High Court; Case no. 4731/2010; 14 June 2010.

29. Counsel for the appellant, however, mainly relied on the decision of the House of Lords in *R v Bow St Magistrate, Ex Parte Pinochet (No 3),* which was also referred to in *Palazollo.* That case concerned a request by Spain to the United Kingdom ("UK") for the extradition of Pinochet for crimes of torture, alleged to have been committed in Chile before the UK incorporated the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment into its laws. At the time *Pinochet* was alleged to have committed the acts of torture it was not an offence in the UK. The House of Lords found it necessary to determine the meaning of the principle of double criminality as contained in the Extradition Act of the UK, and more particularly, whether the crimes, in respect of which *Pinochet's* extradition was being sought, constituted crimes in the UK at the time when they were allegedly committed, or at the time of the extradition request. The House of Lords held that they should have been offences in the UK at the time of their commission.

30. In *Palazzolo* the extradition of P was sought by Italy from the RSA in terms of The European Convention on Extradition (1957). The court held that domestically the Act prescribes the manner in which the extradition request is to be dealt with by our government and the courts. The court held that article 2 of that Convention constituted its double criminality requirement. The article provides: "*Extradition shall be granted in respect of offences punishable under the laws of the requesting party and of the requested party by deprivation of liberty or under a detention order for a maximum period of at least one year or by more severe penalty..".* The court noted that the request did not refer to an applicable counterpart offence in this country and also noted that the reliance by the respondents in that case on the organised crime legislation in force in

this country at the time, was misplaced, because they did not provide for offences that were substantially similar to those provided for in the Italian Criminal Code, namely, the joining of a 'Mafia' type of organisation. However, more importantly, in respect of the meaning of double criminality, the court relied on the decision in the *Pinochet*[12] case. It held that the date for determining the double criminality is the date of the commission of the offence.

31. Counsel for the State argued that the logic of taking the time of the extradition request as decisive for determining double criminality is specifically relevant in the case of statutory offences, because the legislative programmes of the different States do not follow the same time schedule. He disputed the correctness of the decisions in *Pinochet* and *Palazzolo.,* and relied on the views expressed by Prof. J Dugard[13] and the authors of *"The Commentary on the Criminal Procedure Act",* Du Toit *et al*[14]*,* namely, that it is correct to interpret s 1, read with s 3 of the Act, to mean that the *"critical date is that of the extradition request".* Du Toit*, et al,* express the view that the court in *Palazzolo* was wrong in concluding that the principle of double criminality requires that the conduct for which extradition is sought, is an offence in both the requesting and requested countries at the time of the commission of the offence*.* They, inter alia, comment that the interpretation of Prof.Dugard,

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[12] *R v Bow St Magistrate, Ex Parte Pinochet (No 3) (*supra).
[13] *See John* Dugard *"International Law- A South African Perspective"* 4 ed (2011) 220*.*
[14] See Du Toit, *et al* "*Commentary on the Criminal Procedure Act*" App B20-App B20A (Service 53, 2014).

which they support, "*supports the pragmatic and reciprocal rationales of modern international extradition law*"[15].

32. Counsel for the State further submitted that to assert, in the circumstances of this case, a double criminality principle based on the time of the commission of the alleged conduct, will create a safe haven here for offenders in other States; that the main objective in the Preamble of the treaty between the USA and the RSA is to provide far more effective co-operation between the two States in the fight against crime, and not to promote safe havens for offenders.

33. The State submitted that section 231 of the Constitution provides that an international agreement becomes law in this country when it is enacted into law by national legislation and that a self-executing provision of an agreement that has been approved by Parliament is law here, unless it is inconsistent with the Constitution or parliamentary legislation; that s 233 enjoins every court when interpreting any legislation to prefer any reasonable interpretation thereof that is consistent with international law. This means that courts must adopt an interpretation of the law and the treaty which is not obstructive to the implementation of the treaty. The only reasonable interpretation of the principle of double criminality, which is contained in the Act, in particular in the definition of 'extraditable offence', is that the conduct had to constitute an offence in both the Requesting and Requested State at the date of the extradition request. The State submitted that the requirement has been met in this case**.**

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[15] Ibid.

Discussion

34. The purpose of the enquiry before the magistrate is found in section 10(1) of the Act. The magistrate is required to determine, upon a consideration of the evidence adduced at the enquiry, which is referred to in section 9 (4) (a) and (b), whether: (i) the person is liable to be surrendered to the foreign State concerned; and (ii) in a case such as the present, where the person is accused of an offence, that there is sufficient evidence to warrant a prosecution of the person for the offence in the foreign State.

35. If the magistrate is satisfied in respect of those questions, he or she, is required to issue an order committing such a person to prison to await the Minister's decision with regard to that persons surrender.[16]

36. In considering whether the person brought before him is liable to be surrendered to the foreign State, in a case where there has been a request for that person's extradition in terms of a treaty and in order to prosecute that person for an offence alleged to have been committed in the foreign State, the magistrate must be satisfied that: (i) the person that has been brought before him is the person sought by the Requesting State; (ii) in terms of section 3 (1) of the Act, that the person is accused of an offence included in the treaty; and (iii) that there is sufficient evidence to warrant a prosecution of such a person for such offence in the foreign State[17].

37. In order to determine whether the offence is included in the treaty or agreement the magistrate would, of necessity, have to consider the treaty

[16] The magistrate must at the same time inform that person of his right to appeal such order.
[17] The last requirement will be dealt with in the discussion of the second main issue pertaining to the certificate contemplated in section 10 (2) of the Act.

itself. The procedure is somewhat different if there is no treaty in place. In such a case the magistrate would have to be satisfied that the person is accused of an "extraditable offence" within the jurisdiction of the foreign State. The definition in section 1 of the Act of the term "extraditable offence" would therefore be crucial[18]. In either case, sufficient detail of the offence has to be placed before the magistrate in order for the determination in question to be made.

38. In this case the treaty in article 1 provides that the party States "*agree 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"*.

39. Article 2 of the treaty, in essence, defines an "extraditable offence" as agreed upon. It provides:

"1. An offence shall be an extraditable offence if it is punishable under the laws of both States by deprivation of liberty for a period of at least one year or by a more severe penalty.

2. An offence shall also be an extraditable offence if it consists of attempting or conspiring to commit, or aiding, abetting, inducing, counselling or procuring the commission of, or being an accessory before or after the fact to, any offence described in sub-article 1.

3. For the purposes of this Article, an offence shall be an extraditable offence whether or not: (a) laws of the Requesting and Requested States placed the

[18] Compare *Geuking v. President of the Republic of South Africa and Others* 2003 (1) SACR 404 (CC) especially para [39].

offence within the same category of offences or describe the offence by the same terminology; or (b) [the] offence is one for which [the] United States Federal law requires the showing of such matters as interstate transportation or use of the mails or other facilities affecting interstate of foreign commerce, such matters being merely for the purpose of establishing jurisdiction in a United States Federal Court.

4. If an offence has been committed outside the territory of the Requesting State, extradition shall be granted where the laws in the Requested State provide for the punishment of an offence committed outside its territory in similar circumstances. Where the laws in the Requested State do not so provide, the executive authority of the Requested State may, in its discretion, grant extradition.

5. Extradition shall also be granted in respect of a person convicted of but not yet sentenced, or convicted of and sentenced for an offence as contemplated in this Article, for the purpose of sentence, or for enforcing such sentence or the remaining portion thereof, as the case may be.

6. Where extradition of a person is sought for an offence relating to taxation, customs duties, exchange control, or other revenue matters, extradition may not be refused on the ground that the law of the Requested State does not impose the same kind of tax or duty or does not contain a tax, customs duty, or exchange regulation of the same kind of the Requesting State.

7. If the request for extradition relates to more than one offence and extradition is granted for an extraditable offence, it shall also be granted for any other offence specified in the request even if the latter offence is

punishable by one year's deprivation of liberty or less, provided that all other requirements for extradition are met".

40. Article 23 of the treaty deals with application and provides: "*this treaty shall apply to any offence contemplated in Article 2, whether committed before, on, or after the date upon this treaty enters into force. Nothing in this treaty shall be deemed to require or authorize any action by the Requested State that is contrary to the Constitution of that State*." (emphasis added).

41. In my view the portion emphasised makes clear that the treaty must be construed in conformity with the laws of this country as the Constitution requires the State to comply with this country's laws.

42. The treaty does not define the term "extraditable offence", with any more precision than the Act. With reference to the issue being considered here, the magistrate would have to determine the meaning of that term, and in particular, would have to determine whether the offence in respect of which extradition was been sought was to be an offence in both, the Request and Requesting States at the time of its alleged commission or at the the time of the enquiry, or, at least, at the time the extradition request was received.

43. The definitions of "extraditable offence" in section 1 of the Act and sub- article 2.1 of the treaty, express the principle of double criminality. Their wording is similar and both are equally, *prima facie*, "silent" in respect of the temporal aspect. Therefore it is necessary to interpret those provisions.

44. In *Pinochet (3)* the House of Lords interpreted the definition of "extradition crime" in the English Extradition Act. Its conclusion in respect of the temporal

aspect, namely, that that law requires the conduct to be criminal under UK law at the date of the commission in the foreign State, has been criticised[19] as too restrictive, or strained or even wrong, and the interpretation of the other courts, dealing with Pinochet's extradition, of that provision, notably by Lord Bingham CJ and Lord Lloyd, have been lauded. They concluded that the correct time was the date of the extradition request and not the date of the commission in the foreign State. In the definition of the term "extradition crime" in the UK Extradition Act, the words "would constitute" in the phrase, "*in corresponding circumstances, equivalent conduct would constitute and extraterritorial offence*" have been considered as crucial to the interpretation.

45. In *Pinochet (3)* Lord Wilkinson-Browne quotes the Chief Justice, Lord Bingham C.J., as having stated:

"*I would however add on the retrospectivity point that the conduct alleged against the subject of the request need not in my judgment have been criminal here at the time the alleged crime was committed abroad. There is nothing in section 2 which so provides. What is necessary is that at the time of the extradition request the offence should be a criminal offence here and that it should then be punishable with 12 months' imprisonment or more. Otherwise section 2(1)(a) would have referred to conduct which would at the*

[19] See*, inter alia*, J Dugard "*International Law: A South African Perspective*" Fourth Edition p.220; John Dugard "*Dealing with Crimes of a Past Regime: Is amnesty still an option?*"(1999) 12 LJIL 1008-1009; Max Du Plessis "*The Pinochet cases and South African Extradition Law"* (2000) 16 SAJHR 680; Andreas O'Shea "*Pinochet and Beyond: The International Implications of Amnesty*" (2000) 16 SAJHR 653-656; Colin Warbrick "*Extradition Law Aspects of Pinochet 3*"(1999) 48 ICLQ 958 ; Du Toit et al "*Commentary on the Criminal Procedure Act*" (supra) .

relevant time 'have constituted' an offence and section 2(3)(c) would have said 'would have constituted'. I therefore reject this argument."[20]

46. Lord Wilkinson-Browne also quotes Lord Lloyd as having said:

"*But I agree with the Divisional Court that this argument is bad. It involves a misunderstanding of section 2 of the Extradition Act 1989. Section 2(1)(a) refers to conduct which would constitute an offence in the United Kingdom now. It does not refer to conduct which would have constituted an offence then.*"[21]

47. Lord Wilkinson-Browne disagreed with that interpretation and went on to interpret the definition as requiring that the offence had to be an offence in the United Kingdom at the time of its commission in the foreign State.

48. I am of the view, with respect, that there is merit in the criticism of the interpretation of the House of Lords in *Pinochet (3).* But even if that interpretation could be accepted as correct, it was an interpretation of the English Extradition Act, and, more particularly, of the definition of the term "extradition crime" within the context of that statute, against the unique background and history of that law and in terms of the principles of law of the United Kingdom. It would, accordingly, be inappropriate to merely follow it in the context of South African law as if it applied universally, or equally here. In my assessment there are significant differences between the UK definition, its context and the laws applicable to its interpretation and the definition in the Act, its context and the laws applicable to its interpretation. The court in

[20] See: *Pinochet (3)* (supra) at 44.
[21] Ibid.

Palazollo referred to the *Pinochet (3)* decision as authority for the temporal point of the principle of double criminality as if the meaning given there was universal. The court did not state the basis for such reliance and did not attempt to interpret the Act to arrive at a meaning on the temporal aspect.

49. I do not consider the 'decision' in *Palazollo* on that point to have any binding force. It was not part of the *ratio decidendi and* it also does not assist in deciding on the correct meaning of the principle of double criminality as expressed in the Act and the treaty[22].

50. In my view, properly construed, Article 2.1 of the treaty, which has to be interpreted consistently with the definition of "extraditable offence" in the Act, does not refer to conduct which would have constituted an offence in this country at the time of its commission in the foreign State, but refers to conduct which will constitute an offence in this country at least at the time of the extradition request, if not at the time when the enquiry is being conducted by the magistrate.

51. This is a reasonable interpretation[23] of the definition in the Act and of the said Article and is in line with the preferred interpretation of many of the States who are signatories to the European Convention on Extradition. Sub-article 2.1 op the Convention is very similar in wording to the definition of "extraditable offence" in our Act and to sub-article 2.1 of the treaty. It provides: "*extradition shall be granted in respect of offences punishable under the laws of the requesting Party and of the requested Party by deprivation of liberty or*

[22] See: the criticism of the *Palazollo* decision in Du Toit *et al* (*supra*).
[23] In terms of section 233 of the Constitution: "*When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law"*.

under a detention order for a maximum period of at least one year or by a more severe penalty ..."[24].

52. The wording of the definition of "extraditable offence" in section 1of the Act is clearly non-retrospective. In my view, it refers to conduct that must be an offence now in this country and not at a time of its commission in the foreign State. It is inappropriate to give the word "punishable", as it appears in the definition in the Act and Article 2.1 of the treaty, any meaning that would suggest that the offence alleged ought to have been such in this country at the time of the commission in the foreign State. Article 2 of the treaty is equally, clearly worded non-retrospectively and the Parties thereby cannot be said to have intended that the conduct (i.e. constituting an offence) had to be an offence in this country at the time of its commission in the USA. If this was not so, the definition of 'extraditable offence' in both the Act and the treaty could easily been worded differently, in order to, clearly and unambiguously, refer to conduct which would have constituted an offence in this country at the time of its commission in the foreign State.

53. The meaning arrived at does not result in a violation or undermining of the principle of legality which is expressed through the maxim *nullum crimen nulla poena sine lege*[25], because the person's conduct would have had to be an

[24] Council of Europe Secretarial Memorandum prepared by the Directorate General of Human Rights and Rule of Law, in particular the "*Note on dual criminality, in concreto or in abstracto" b*y the Committee of Experts on the Operation of European Conventions on Co-operation in Criminal Matters (Strasbourg; 11 May 2012); http://www.coe.int/tcj/ . Prof J Dugard also points out that the normal practice is to require the extraditable crime to be a crime in the requested state at the time of the extradition request and that it is supported by the Netherlands. See John Dugard "*Dealing With Crimes of a Past Regime. Is Amnesty still an Option*?" (1999) 12 LJIL at 1008.

[25] Coined by J P Anselm von Feuerbach and literally translated as "no crime, no punishment without law"- see: J Burchell and J Milton "*Principles of Criminal Law*" (1991) Juta p55.

offence in terms of the law of the requesting State at the time of its commission if he is to be convicted and punished for it there[26].

54. The decision in *Bell* is distinguishable on the facts. There was no treaty in place between Australia and South Africa. The court there did not expressly interpret and expressly seek to give meaning to the double criminality principle as given expression to in section 1 of the Act even though it came to the conclusion that offences in respect of which prosecution had become barred by lapse of time in this country were not extraditable offences. The court there was of the view that if a person cannot be prosecuted in this country, (i.e. due to the time bar) – "*it must follow that in terms of our law he cannot now be punished for that offence, and the offence is therefore not 'punishable'*"[27].

55. In the present matter, that aspect is not dealt with in the main clauses of the treaty dealing with "extraditable offences", but in a separate provision, namely, Article 8, which specifically provides that extradition shall not be granted where the prosecution has become barred by lapse of time according to the laws in the Requesting State.

56. In my view, even though that matter needs not decided here, the court in *Bell* possibly went too far. It, seemingly, and unwittingly, gave the definition of "extraditable offence" in the Act and, in particular, the word "punishable" in that definition, a meaning that is not consistent with the purpose of the Act, and more particularly, the purpose of the magistrate's enquiry in terms of the Act. The purpose is not to establish the requested person's culpability, or

[26] See: Colin Warbrick "*Extradition Law Aspects of Pinochet 3*" (1999) 48 ICLQ at 964.
[27] See: *S v. Bell* (supra) at 699 f-g.

whether he or she has any defence to the criminal charges in the foreign State[28], but whether the conduct constitutes an offence in this country, at least at the time of the request for extradition and whether the person, upon conviction, would be liable to a penalty as prescribed in the definition. "A request for extradition is not a request for transfer of jurisdiction, nor a request for a trial but a request to assist the appropriate jurisdiction (that of Requesting state) in rendering its justice".[29]

57. In conclusion on this point, the magistrate, in my view, was correct in finding that even though the offences for which extradition was sought were not offences in South Africa, because of the date on which the relevant provisions of FICA came into operation, at the time of their commission in the USA, they were, nevertheless, extraditable because they were offences in South Africa at least at the time of the request for extradition.

CERTI FICATE'S COMPLIANCE

58. Turning to the next issue, namely, whether the tendered certificate complied with section 10 (2) of the Act. I am of the view that there is no merit in the appellant's argument on this issue and the sub-issue, namely, that the offences had not been described sufficiently in the certificate and that this did not meet the requirements of the Act.

59. It was submitted on behalf of the appellant that the certificate was "ambiguous, ambivalent and wholly, unnecessarily vague"; that the affidavit of

[28] See *Geuking v. President of the RSA and Others* (supra).
[29] This is the argument of the European countries who are parties to the the European Convention on Extradition, who adopt an "*in abstracto*" interpretation of Article 2 of the Convention. See: The Note by the Committee of Experts referred to above.

Mr Axelrod, which was referred to earlier in this judgment, purports to speak of structuring of bank accounts, but the actual request, as reflected in the certificate, does not unambiguously and unequivocally request extradition for that purpose, because of how it reads. It reads: "*The United States requests the extradition of Usman Patel from South Africa for prosecution of financial crimes associated with banking regulations, e.g., structuring of bank deposits in violation of law*".

60. According to this argument, the extradition is not sought for the crimes described in the affidavit of Mr Axelrod since only an example of the crimes for which his extradition is sought is mentioned in the certificate. It was further submitted that the description was so vague that it provided no certainty with regard to the offences to which extradition was being sought and undermined the principle of speciality which requires that the extradited person may not be tried for an offence other than that for which he was extradited, unless the Requested State consented to such prosecution.

60. Developing this point, it was further submitted that before the magistrate could be satisfied in terms of section 10(1) of the Act that the appellant was liable to be surrendered to the USA, the magistrate had to be satisfied that the reason for which the appellant's extradition was being sought was to prosecute him for an extraditable offence(s). It was submitted that the certificate was too vague to satisfy the magistrate and merely giving an example of the offence for which he was to be tried, was inadequate.

62. It was further submitted on behalf of the appellant, with reference to the certificate, that it did not comply with the prescripts of section 10(2) of the Act,

because it used different wording to that found in the section. Instead of stating that the evidence was sufficient “to warrant” the prosecution of the appellant, it stated that the evidence was sufficient “to justify” his prosecution. The submission is that failure to use the word “warrant” in the certificate was crucial. It is the appellant’s contention that there is “a significant difference between the meaning of the word ‘warrant’ and the word ‘justify’”.

63. On this point it was submitted by counsel that a debate on the difference was not that relevant, but what was important was that section 10 (2) of the Act required the use of the word “warrant” and the certificate did not use that word. Accordingly, so it was submitted on behalf of the appellant, the certificate did not comply with section 10 (2) of the Act and could not have been relied upon by the magistrate as conclusive proof that there is sufficient evidence to warrant the prosecution of the appellant.

64. It was further submitted that there was a deliberate avoidance on the part of Mr Axelrod to use the word “warrant”, because he could not “guarantee” that there was sufficient evidence for the prosecution. According to this argument section 10 (2) effectively required a guarantee by the foreign State that there was sufficient evidence for the prosecution.

65. In support of the argument that the certificate had to use the exact wording of section 10 (2) in order to be valid, counsel for the appellant referred to examples of certifications found in sections 212 (4), 212 (5) and various subsections of section 212 of the Criminal Procedure Act[30] as well as to

[30] The Criminal Procedure Act No 51 of 1977.

decisions where it was held that in order for such certification to be admissible it must contain all the necessary allegations[31].

66. It was submitted on behalf of the appellant on the point that in our law where proof is permitted by means of an affidavit or certificate, such document would only be admissible if it complies with "the required wording of the empowering section"[32] and that Mr Axelrod's affidavit was not admissible as conclusive proof because it did not follow the wording of section 10(2) of the Act.

67. The State's counsel submitted that section 10(2) which, *inter alia*, provides that the magistrate could accept a certificate as conclusive proof of the fact that there is sufficient evidence at the disposal of the appropriate authority in charge of the prosecution in the foreign State to warrant the prosecution of the requested person for the offences in the foreign State, was held to be constitutionally valid in *Geuking*[33]*;* that there was nothing sinister in the use of the word "justify", instead of "warrant"; that it was merely a matter of semantics and that the Act did not strictly require the word "warrant" to be used. It was enough if the certificate conveyed the same meaning as is intended in section 10 (2) and the certificate in question was valid.

68. With regard to the description of the offences in the certificate, it was submitted for the State that the offences were adequately described in the certificate. The certificate makes clear that there is more than one offence and

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[31] In particular *R v. Rantsane* 1979 (4) SA 864 (O); *S v. Hlongwa* 2002 (2) SACR 37 (T); *S v. Mavhungu* 1988 (3) SA 67 (V); *S v. Dlamini* 2004 (1) SACR 178 (NC) and *S v. Kwezi* 2007 (2) SACR 61 (E) par [5].
[32] Relying on the decision in *S v. Kwezi* (supra).
[33] *Geuking v President of the RSA* (supra).

that they all pertain to banking, in particular, the structuring of bank deposits in violation of the law.

69. The State further submitted that even if the certificate was found not to be in compliance with the Act, there was enough other evidence placed before the magistrate that there was sufficient evidence available to the Prosecuting Authorities in the USA to warrant the prosecution of the appellant for the offences he is alleged to have committed in that country.

70. In conclusion, the State counsel submitted that the magistrate correctly found that the appellant was liable to be surrendered to the USA and that there was sufficient evidence available to the USA authorities to warrant his prosecution in that country for the offences described in the request for his extradition, including the indictment that was also provided. Further, that the magistrate, in the result, correctly issued an order committing the appellant to await the Minister's decision, as contemplated in section 10(1) of the Act.

71. In my view there is merit in the submissions made on behalf of the State. The certificate is not invalid because it used the word "justify", instead of "warrant". Properly construed within its context the word "warrant" could reasonably be interpreted to mean "justify", or "justifies".

72. The foreign State is not obliged in terms of the Act to furnish a certificate as contemplated. It is merely a mechanism to facilitate proof. There is nothing else in the Act which requires the foreign State to guarantee the prosecution of the requested person. In those circumstances the contention, that the foreign State must 'guarantee' the prosecution in the certificate, rings hollow. In the absence of a certificate the magistrate must, nevertheless, satisfy

himself or herself that there is sufficient evidence to "warrant" a prosecution in the foreign State. Clearly the magistrate is not required to find that there is sufficient evidence to "guarantee" the prosecution, but merely that there is sufficient evidence available to "warrant", in the sense of "justifying", the prosecution. The certificate's wording is in compliance with the Act.

73. The allegation that Mr Axelrod deliberately avoided using the word "warrant" because he could not give a "guarantee", is not supported by any evidence, is purely speculative and based on a wrong interpretation of section 10(2) of the Act.

74. The cases which the appellant's counsel referred to in respect of the wording of certificates are distinguishable. In any event, there is enough evidence, *aliunde* the certificate, that there is sufficient evidence available to the prosecuting authorities in the USA to justify the prosecution of the appellant in respect of the offences for which his extradition is being sought.

75. In my view the certificate adequately described the offences for which the appellant's extradition is being sought. Beside the certificate, there is ample other evidence of the nature of the actual offences he is to be prosecuted for, including the indictment that was included in the request and affidavits by Mr Axelrod, Mr Scott Lee and various exhibits.

76. In conclusion, the magistrate's findings regarding the appellant's extradition are unassailable and the appeal falls to be dismissed.

77. In the result;

The appeal is dismissed and the order of the magistrate, made in terms of section 10 (1) of the Extradition Act, No. 67 of 1962, is confirmed.

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P COPPIN

JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

I AGREE _____

T D VILAKAZI

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

ON BEHALF OF THE		
APPELLANT	:	MR HELLENS SC
INSTRUCTED BY	:	DAVID H BOTHA, DU PLESSIS & KRUGER INC.
ON BEHALF OF THE STATE	:	D BARNARD
INSTRUCTED BY	:	OFFICE OF THE DIRECTOR OF PUBLIC PROSECUTIONS

DATE IF HEARING : 30 APRIL 2015

DATE OF JUDGEMENT : ..... AUGUST 2015