THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no:888/2020

In the matter between:

AUGUSTINUS PETRUS MARIA KOUWENHOVEN **APPELLANT**

and

THE MINISTER OF POLICE **FIRST RESPONDENT**

THE DIRECTOR OF PUBLIC PROSECUTIONS (WESTERN CAPE) **SECOND RESPONDENT**

THE MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **THIRD RESPONDENT**

THE MAGISTRATE: PRETORIA **FOURTH RESPONDENT**

THE MAGISTRATE: CAPE TOWN **FIFTH RESPONDENT**

Neutral citation: *Kouwenhoven v Minister of Police and Others* (888/2020) [2021] ZASCA 119 (22 September 2021)

Coram: PONNAN, WALLIS, SCHIPPERS and HUGHES JJA and KGOELE AJA

Heard: 27 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09h45 on 22 September 2021

Summary: Extradition Act 67 of 1962 – validity of arrest in terms of s 5(1)(*b*) of the Act – whether officials gave an undertaking not to arrest the appellant – whether any such undertaking was capable of binding the State – whether undertaking invalidates an arrest pursuant to an otherwise valid warrant.

Affidavit in support of application for issue of a warrant of arrest in terms of s 5(1)(*b*) of Act – attested before another policeman employed in the same bureau – Regulation 7 of Regulation governing the administering of an oath or affirmation under the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 – whether oath properly administered.

Whether magistrate applied her mind to issue of warrant or 'rubber-stamped' it – failure to notify the Minister of Justice of issue of warrant in terms of s 8(1) of the Act – effect.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Cloete J, Fortuin J concurring, sitting as court of first instance):

The appeal is dismissed with costs, such costs to include the costs of two counsel in respect of both the first respondent and the second and third respondents.

Judgment reported *sub nom Kouwenhoven v Minister of Police and Others* [2019] 4 All SA 768 (WCC); 2021 (1) SACR 167 (WCC).

JUDGMENT

Wallis JA (Ponnan, Schippers and Hughes JJA and Kgoele AJA concurring)

[1] Mr Kouwenhoven, the appellant, is a Dutch citizen, at present resident in Cape Town and a businessman who formerly had significant business interests in Liberia. On 21 April 2017 he was convicted by the Court of Appeal of 's-Hertogenbosch of repeatedly committing the offence of complicity in war crimes, and repeatedly violating the Dutch Sanctions Act, arising out of his involvement in the civil war in Liberia that raged between 1997 and 2003 and led to the downfall of the then President of Liberia, Charles Taylor.[1] Mr Kouwenhoven was sentenced to serve a term of imprisonment of 19 years and his conviction and sentence have been upheld by the Supreme Court of the Netherlands.[2] The present

[1] His conviction was on the basis that he was a confidante of Mr Taylor and aided and abetted Mr Taylor's own crimes during the course of that war. Mr Taylor was subsequently convicted by the Special Court for Sierra Leone of 11 counts of aiding and abetting war crimes and crimes against humanity involving acts of terrorism, murder, rape, enslavement and pillage and is serving a term of 50 years imprisonment.

[2] He has lodged an appeal to the European Court of Human Rights, which it appears is still pending. The core legal question in the appeal is:

litigation arises from his endeavours to resist the attempts of the Dutch government to secure his extradition from this country to serve his sentence in the Netherlands. This appeal was heard simultaneously with a related appeal in a case flowing from events occurring subsequent to and in consequence of the high court's decision in the present case.[3] Judgment in that matter will be delivered at the same time as this judgment.[4]

[2] On 8 December 2017, Mr Kouwenhoven was arrested pursuant to a warrant of arrest issued, in terms of s 5(1)(*b*) of the Extradition Act 67 of 1962 (the Act), by an unidentified magistrate in Pretoria. He was brought before a magistrate in Cape Town and released on bail on 19 December 2017. On 31 January 2018 he launched the present review proceedings against the Minister of Police as first respondent; the Director of Public Prosecutions (Western Cape)(the DPP), as second respondent; the Minister of Justice and Correctional Services (the Minister of Justice), as third respondent; the Pretoria magistrate as the fourth respondent; and an unidentified magistrate in Cape Town who was appointed to conduct an extradition enquiry in terms of s 9 of the Act, as fifth respondent.

[3] The aim of the review was to obtain declaratory orders that the decision to arrest him and the arrest itself had been unlawful and that the conduct of the extradition enquiry was unlawful and invalid. The relief underwent some minor amendment in the course of proceedings and in its final form read as follows:

'Did the Court of Appeal err in rejecting the defence's submission that the amnesty scheme approved by Charles Taylor on 7 August 2003 prevented the prosecution of the defendant in the Netherlands for the crimes with which he had been charged?' (See: http://www.internationalcrimesdatabase.org/Case/3309/The-Public-Prosecutor-v-Guus-Kouwenhoven/)

[3] *Director of Public Prosecutions, Western Cape v Kouwenhoven; Kouwenhoven v Director of Public Prosecutions, Western Cape and Others* [2021] 1 All SA 843 (WCC); 2021 (1) SACR 579 (WCC).

[4] *Kouwenhoven v Director of Public Prosecutions, Western Cape and Others* [2021] ZASCA 120.

'1. Declaring that the Applicant has been brought unlawfully before the Fifth Respondent, and that any future appearance before the Fifth Respondent and any consequences thereof in relation to the proceedings arising from his arrest of 8 December 2017 are unlawful and invalid.

2.

2.1. Declaring that the decision to issue the warrant for the arrest of the Applicant . . . issued by the Fourth Respondent on 6 December 2017 in terms of section 5(1)(*b*) of the Extradition Act . . . was unlawful and invalid;

2.2. Declaring that the warrant is unlawful and invalid;

2.3. The warrant is reviewed and set aside.

3. Declaring that the decision to arrest and the arrest of the Applicant on 8 December 2017 was:

3.1. Inconsistent with the Constitution . . .;

3.2. Unlawful and invalid.

4. The arrest and/or detention of the Applicant during the following periods is declared to be unlawful and unconstitutional;

4.1. From 8 December 2017 until 18 January 2018; and

4.2. From 18 January 2018 until the date of judgment in this application.

5. . . .

6.

6.1. Declaring that the Third Respondent's decision to issue the '*notification* by the Minister of Justice and Correctional Services under Section 5(1)(*a*) of the Extradition Act . . . in relation to the Applicant, dated 22 February 2018 . . . was unlawful and invalid.'

[4] The review was opposed jointly by the two Ministers and the DPP, but the magistrates abided the decision of the court. It was heard by a full bench consisting of Fortuin and Cloete JJ and dismissed on 19 September 2019 in a judgment by Cloete J. Leave to appeal was refused, but it was subsequently granted by this court.

The background

[5] The relationship between South Africa and the Kingdom of the Netherlands in regard to extradition is governed by the European Convention on Extradition (the Convention). Under Article 12 it provides for requests for extradition and under Article 16(1) for requests for the provisional arrest of the person sought to be extradited. Article 16 provides that:

'In case of urgency the competent authorities of the requesting Party may request the provisional arrest of the person sought. The competent authorities of the requested Party shall decide the matter in accordance with its law.'

A provisional arrest, if sought and granted, is sufficient to set the stage for an extradition enquiry in terms of s 9(1) of the Act, but the arrest falls away if a request for extradition is not forthcoming within time limits specified in Article 16. However, once the request for extradition is received, no further arrest is necessary and the extradition enquiry proceeds to determine whether the person in question qualifies for extradition.

[6] The warrant of arrest issued by the fourth respondent was issued after receipt of a request for Mr Kouwenhoven's provisional arrest on 22 August 2017. An earlier request for his extradition received on 7 July 2017 and a request for his provisional arrest received on 21 July 2017, had been returned as not being in accordance with the requirements of the Convention and the Act. The warrant was issued on the basis of an affidavit sworn by Warrant Officer van der Heever of the Pretoria National Central Bureau of Interpol (Bureau). He is one of two police officers stationed at the Bureau dealing with extradition matters. Other desks deal with drugs, fraud and general matters.

[7] The issues have undergone some refinement and four grounds for invalidity of the warrant and the arrest remain and were pursued in this court. Chronologically they were that:

(a) In May 2017 Mr Kouwenhoven's attorney, Mr Eisenberg, spoke separately to W.O. van der Heever and Mr van Heerden, the Principal State Law Advisor, International Legal Relations in the Department of Justice and Constitutional Development. It was contended that in these telephone conversations the relevant authorities separately and independently undertook that Mr Kouwenhoven would not be arrested pursuant to a provisional request under Article 16(1) and would be afforded prior notice before action was taken against him. It was alleged that these undertakings created a right, or at least a legitimate expectation, that the authorities were obliged in law to honour. Their breach rendered his arrest and all proceedings consequent thereupon invalid and unlawful.

(b) The affidavit of W.O. van der Heever was improperly attested before a colleague of his at the Bureau, Sergeant von Hagen, and was therefore invalid. This rendered the issue of the warrant invalid as it was not based on any evidence.

(c) The magistrate who issued the warrant did not apply her mind to whether the warrant should properly be issued, but instead 'rubber-stamped' it and this rendered it invalid.

(d) After issuing the warrant the magistrate did not comply with her obligation in terms of s 8 of the Act to furnish the Minister of Justice with particulars relating to the warrant and this rendered it invalid.

On the basis that the issue of the warrant and Mr Kouwenhoven's arrest were unlawful on one or more of these grounds, it was contended that the entire process was invalid and he could not properly have been brought

before the fifth respondent for the purpose of an extradition enquiry in terms of the Act.[5]

[8] An entirely separate issue arose from the then Minister of Justice issuing a notification under s 5(1)(*a*) of the Act on 22 February 2018. That section provided that the magistrate to whom such a notification was sent was obliged to issue a warrant for the arrest of the person whose extradition was sought in order for them to be brought before a magistrate under s 9 of the Act. A number of factual and legal arguments were advanced in relation to the validity of this notification. However, whatever the relevance of the point at an earlier stage of these proceedings, by the time it reached this court it was entirely academic. Not only had no warrant been issued in terms of the notification, but the Constitutional Court had declared s 5(1)(*a*) invalid with immediate effect.[6]

[9] In his supplementary founding affidavit Mr Kouwenhoven said that the issuing of this notice 'makes no sense whatsoever'. That was plainly correct. Nonetheless, he persisted with the argument that the notice should be declared invalid on two grounds. The first was that if the arrest in issue in this case were set aside the Minister might seek to trigger a further arrest by sending his notification to an appropriate magistrate. That contention was far-fetched, given that the section, and therefore the power of the magistrate to act on the notification, has been declared to be unconstitutional. No magistrate would issue a warrant in the face of that decision. The second ground was a contention that Mr Kouwenhoven was entitled to know whether the Minister's actions were

[5] Reliance was placed on *Ebrahim v S* 1991 (2) SA 553 (A).
[6] *Smit v Minister of Justice and Correctional Services and Others* [2020] ZACC 29; 2021 (1) SACR 482 (CC); 2021 (3) BCLR 219 (CC).

unconstitutional. Two judgments were cited in support of this proposition.[7] Neither was in point. The first, *Pheko* in the Constitutional Court, required a decision on the merits in order to determine whether the applicants were entitled to appropriate restitutionary relief. The second, *Buthelezi* in this court, was concerned with the issue of undue delay in the issue of visas and was a matter likely to arise again in the future. The arguments arising from the Minister's actions under s 5(1)(a) were plainly moot and it is unnecessary to say any more about them.

[10] Before turning to the separate grounds upon which Mr Kouwenhoven challenged the validity of his arrest it is necessary to say something about the onus of proof and the approach the court must take to disputes of fact on the papers. It is trite that an arrest without a warrant is an interference with liberty and that the onus rests on the arrestor to justify it.[8] Where an arrest takes place in terms of a warrant a judicial act has intervened and unless the validity of that judicial act can be assailed the existence of the warrant justifies the lawfulness of the arrest. The police officer in possession of a warrant of arrest is not obliged, over and above producing the warrant and showing that they acted in terms of it, to prove that the warrant was validly issued. It is for the party challenging the warrant to show why it should be set aside. That is why these proceedings were brought by way of judicial review. Contrary to Mr Kouwenhoven's heads of argument, they are not proceedings by way of *habeas corpus*. The analogy counsel sought to draw between these proceedings and an arrest in admiralty is also not apt. In admiralty the onus of justifying the arrest remains throughout on the

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[7] Relying on *Pheko and Others v Ekurhuleni Municipality (Socio-Economic Rights Institute of South Africa as Amicus Curiae)* [2011] ZACC 34; 2012 (2) SA 598 (CC) *(Pheko*) para 34 and *Buthelezi v Minister of Home Affairs and Others* [2012] ZASCA 174; 2013 (3) SA 325 (SCA) (*Buthelezi*) para 4.
[8] *Minister of Law and Order and Others v Hurley and Another* 1986 (3) SA 568 (A) at 589D-H.

applicant for the arrest, irrespective of the form of the proceedings in which the arrest is challenged. The Plascon-Evans rule is applied to determine whether the undisputed evidence on behalf of the applicant for arrest, when taken together with the respondent's evidence, discharges the onus. If it does not it is always open to the applicant to seek a reference to oral evidence, but given the nature of admiralty proceedings it is unusual for courts to accede to such a request. Here the justification for the arrest lies in the existence of the warrant and it is the challenge to the warrant that is relevant. On that the onus rested on Mr Kouwenhoven. Even had the onus rested on the respondents that would not have affected matters, because the case would still have had to be decided on the basis of the undisputed evidence of Mr Kouwenhoven, read together with the respondents' version.[9]

The undertaking issue

[11] On 2 May 2017, Mr Eisenberg spoke on the telephone to W.O. van der Heever. The following day he spoke to Mr van Heerden. After these conversations he wrote to W.O. van der Heever and Mr van Heerden. The founding affidavit relied on these letters in support of an allegation that each of Mr van Heerden and W.O. van der Heever had given 'a clear and unequivocal undertaking' that Mr Kouwenhoven 'would not be arrested on the basis of any provisional arrest warrant or without notice'. The heads of argument characterised this as a binding agreement between him and the South African authorities, alternatively a non-binding undertaking by the authorities that had to be observed in accordance with Constitutional norms.

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[9] *Ngqumba en ń Ander v Staatspresident en Andere; Damons NO en Andere v Staatspresident en Andere; Jooste v Staatspresident en Andere* 1988 (4) SA 224 (A) at 259H-263D; *President of the Republic of South Africa and Others v M & G Media Ltd* 2011 (2) SA 1 (SCA) paras 13 and 14.

[12] The underlying premise of these contentions was that, if such an undertaking was given, its breach invalidated the warrant and Mr Kouwenhoven's arrest pursuant thereto. The heads of argument were drafted on the footing that an undertaking had been given and breached. They examined whether the claim that Mr Kouwenhoven had become a flight risk was a legitimate reason for the breach. A separate argument that the issue of the warrant was invalidated by non-disclosure of the undertakings to the Pretoria magistrate was not pursued. My prima facie view is that the premise is faulty. The issue of a warrant is a judicial act authorising an arrest. The magistrate was not party to any undertakings and if the magistrate concluded on the papers that a proper case was made for the issue of a warrant, I do not see why that decision would be invalidated by the fact that the two officials were acting in breach of an undertaking. They would not be acting in good faith, but 'the worst motive does not render an otherwise lawful arrest unlawful'.[10] Given the conclusion to which I come on the factual basis for these contentions it is, however, unnecessary to say more on this aspect of the case.

[13] To place these conversations and the correspondence that followed in context, they occurred less than two weeks after Mr Kouwenhoven's conviction and sentence. No request for his extradition, or provisional arrest, had been received from the Netherlands, although the Bureau had received an Interpol Red Notice for assistance in securing his arrest. That indicated that the Dutch authorities intended to apply for Mr Kouwenhoven's extradition and would be seeking a provisional arrest in conformity with national laws and applicable treaties. The conversations involved different people and were entirely separate from

[10] *Tsose v Minister of Justice* 1951 (3) SA 10 (A) at 17G-H; *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA) para 37

one another. Any agreements reached or undertakings given were reached or given separately. They cannot be treated cumulatively

[14] Mr Eisenberg had not previously met or communicated with W.O. van der Heever when he spoke to him on 2 May 2017. Later that day he wrote as follows:

'If I may, let me confirm your advices of this morning:

(i) An INTERPOL "Red Notice" has already been posted for our client, Mr Gus Kouwenhoven;

(ii) Our client has no intention whatsoever of departing the Republic of South Africa until the present matter is fully resolved;

(iii) You have already received a Provisional Request from the authorities of The Netherlands for the arrest of our client;

(iv) You have advised the Dutch authorities that the South African prosecutorial and police authorities will not be acting on their Provisional Request but a formal request for our client's extradition to The Netherlands has been made and is expected within the next number of months;

(v) Our client shall not be arrested pursuant to the Provisional Request or in the normal course but proper and dignified arrangements for handing our client over for our client's first appearance on the basis of such formal request will be made between us.'

In oral argument counsel submitted that the undertaking was contained in the final paragraph of this letter.

[15] Did this letter on its terms embody an agreement or undertaking as alleged? In my view it did not. It made no reference to an agreement or undertaking. Nor did it ask for confirmation that an agreement had been reached or an undertaking given. The first item confirmed a matter of fact and the second involved a statement by Mr Eisenberg of his client's alleged attitude. It is common cause that the third paragraph was incorrect as a matter of fact, because no such request had been received. There appears to have been some miscommunication between Mr Eisenberg and W.O. van der Heever in this regard. The Interpol Red Notice under a

heading 'Action to be Taken' recorded that the Dutch authorities wanted Mr Kouwenhoven to be arrested as his extradition was to be sought. The notice went on to say that:

'This request is to be treated as a formal request for provisional arrest, in conformity with national laws and/or the applicable bilateral and multilateral treaties.'

If Mr Eisenberg thought that Interpol in the Netherlands represented the Dutch authorities, then from the perspective of a possible extradition this was mistaken. It seems probable that he construed W.O. van der Heever's reference to the Interpol notice as a request from the Dutch authorities, possibly via Interpol. As W.O. van der Heever had not been in touch with the Dutch authorities in regard to a request for extradition and such requests are routed through the Department of International Relations and Co-operation via the Department of Justice and Correctional Services he could not have been referring to a request from the Dutch authorities in relation to extradition.

[16] The following paragraph built upon this. There had been no direct communication between W.O. van der Heever and the Dutch authorities. He explained in his affidavit that he had told Interpol in The Hague that it would be best to wait for the Netherlands request for extradition rather than seek Mr Kouwenhoven's arrest on a provisional basis, because that would facilitate the extradition and there did not appear to be any evidence of urgency at the time. This was not challenged in Mr Kouwenhoven's replying affidavit. In those circumstances it was undoubtedly the case that at that time W.O. van der Heever was not intending to seek Mr Kouwenhoven's immediate arrest on the basis of the Interpol Red Notice and he said that this was what he told Mr Eisenberg.

[17] The fact that W.O. van der Heever told Mr Eisenberg that this was the factual position at the time of their conversation did not translate into an agreement or undertaking not to arrest Mr Kouwenhoven if a proper request for his provisional arrest in terms of Article 16 of the Convention was received. Nor could it be construed as an undertaking that he would not be arrested if such a request was received.

[18] Mr Eisenberg's affidavit in support of the application took the matter no further. Concerning his conversation with W.O. van der Heever, he gave no evidence that would have put a different gloss on the conversation and the letter. All he did was assert that an undertaking was given, but that was a conclusion that could be drawn only if a full description of the purpose, nature and contents of their discussion had been given. None was. He filed a further affidavit together with Mr Kouwenhoven's replying affidavit and at a time when he knew what W.O. van der Heever had to say. Even then he did not deny the accuracy of the latter's recollection of their conversation. The furthest he was willing to go was to say that his approach 'was serious and formal in nature' and that it 'should have been apparent to W.O. van der Heever that I sought to conclude a binding arrangement with him'. It is not good enough to say that someone should have realised that a binding arrangement – one enforceable in a court of law – was being sought. That had to be stated in the conversation and then confirmed expressly in the letter. That was not done.

[19] There can be little doubt that if Mr Eisenberg had told W.O. van der Heever that he was not merely in search of information, but was seeking to conclude an agreement, or extract an undertaking, that his client would not be arrested if the Dutch extradition authorities asked for

his provisional arrest, the entire tenor of the conversation would have been different. Both parties were aware that an application for extradition was likely to be made. Both knew that in order to commence an extradition enquiry Mr Kouwenhoven would have to be arrested in terms of s 5 of the Act. A request by Mr Eisenberg that W.O. van der Heever would not act upon a proper request by the Dutch extradition authorities for Mr Kouwenhoven's provisional arrest in terms of the Convention would have been extremely far-reaching. It is impossible to conceive of an experienced police officer agreeing to it in a telephone conversation with an attorney who was unknown to him. At the very least a court would require convincing and direct evidence of the contents of the conversation before accepting that the police officer had concluded such an agreement or furnished such an undertaking. There is no such evidence, because Mr Eisenberg did not provide it.

[20] Strictly speaking that conclusion renders it unnecessary to consider whether such an agreement or undertaking could ever be treated as binding. However, it is appropriate to express my reservations concerning the proposition that an official such as W.O. van der Heever had authority to conclude such an agreement, or give such an undertaking. Extradition between the Netherlands and South Africa is a matter of diplomatic relations between the two states governed by a formal convention. There can be no doubt that the Convention has 'become law' in South Africa.[11] No authority was cited for the proposition that a police officer, charged with the responsibility of implementing requests in terms of the Convention, is entitled to conclude agreements or give undertakings that would bind the South African government to disregard a valid request for

[11] *President of the Republic of South Africa v Quagliani*; *President of the Republic of South Africa and Others v Van Rooyen and Another*; *Goodwin v Director-General, Department of Justice and Constitutional Development and Others* [2009] ZACC 1; 2009 (2) SA 466 (CC) (*Quagliani*) para 46.

a person's provisional arrest under the Convention. I am not here speaking of the exercise of a discretion in the exercise of his lawful duties in relation to a request under the Convention, such as determining precisely when and how an arrest is to be effected, but of an agreement or undertaking that would preclude him and the State from acting in terms of the Convention. At the end of the argument, I remained unconvinced that any such authority vested in W.O. van der Heever.

[21] I turn then to the alleged agreement with, or undertaking furnished by, Mr van Heerden. On the same day as Mr Eisenberg's conversation with W.O. van der Heever, Mr Kouwenhoven's senior counsel, Mr Katz SC, spoke to Mr van Heerden. The founding affidavit placed no reliance on this conversation, no doubt because it was apparent that Mr Katz would thereby be rendered a potential witness. In terms of the rules governing the advocates' profession that would have required him to withdraw and not act in the litigation. In an endeavour to circumvent the problem, Mr Eisenberg, spoke to Mr van Heerden on the following day.[12] After he had done so he sent the following letter:

'Let me confirm your advices of this morning, and as you have conveyed this to advocate Anton Katz SC:

(i) It is correct that an INTERPOL 'Red Notice' has been issued and posted for our client, Mr Guus Kouwenhoven;

(ii) While you have not (contrary to the advices of Warrant Officer Wimpie van der Heever, INTERPOL) received a Provisional Request for our client's arrest for extradition, you have received an email from the Dutch Police Liaison Officer for

[12] This did not dispose of the fact that Mr Katz was a material witness and merely exacerbated the problem because Mr Eisenberg was then the only the witness to the conversations with both W.O. van der Heever and Mr van Heerden. That he should have withdrawn and ceased to act, at least once it was apparent that there were disputes over the tenor and effect of those conversations, is clear. *Hendricks v Davidoff* 1955 (2) SA 369 (C); *Elgin Engineering Co (Pty) ltd v Hillview Motor Transport* 1961 (4) SA 450 (N) at 454F-H.

Southern Africa advising you that our client was sentenced to 19 years in Holland (in absentia);

(iii) You have consulted with INTERPOL and have reached an agreement that our client will not be arrested should you receive a Request for Provisional arrest'

(iv) You understand that the Dutch authorities are busy with the drafting of an Extradition Request and you will advise either advocate Katz or myself once you have received such a request;

(v) I reiterate that if you receive a compliant Extradition Request from the Dutch authorities arrangements for handing our client over for his first appearance on the basis of such Request will first be made between us, especially in light of our client's age and medical condition.'

In oral argument counsel relied on the third and fifth paragraphs of this letter in support of the alleged agreement or undertaking.

[22] Reliance was also placed on an email Mr van Heerden sent on 29 June 2017 to Mr Eisenberg, informing him that an electronic copy of an extradition request and request for the provisional arrest of Mr Kouwenhoven had been received and the original would be forwarded through diplomatic channels. Mr Eisenberg responded the same day as follows:

'On the basis of our communications let me confirm with you the following:

(i) A decision has been made by the South African authorities, including the Department of Justice and SAPS, that a Provisional Request for the arrest of our client Mr Guus Kouwenhoven, will not be entertained.

(ii) . . .

(iii) Based on my brief discussion with yourself this afternoon, it is unlikely that an Extradition Request, fully compliant with the formalities, will be received from the Dutch authorities prior to 27 July 2017.'

Manifestly this letter added nothing to the enquiry. If an agreement had been concluded, or an undertaking given, on 3 May 2017 this letter did not alter it. If no agreement was concluded and no undertaking given, this

letter did not create one. It referred to a decision taken by the South African authorities, not to an agreement with, or an undertaking given to, Mr Kouwenhoven. Even assuming in the latter's favour that such a decision had been taken – something that was disputed – there was nothing to stop the South African authorities from changing their minds. No right or expectation by Mr Kouwenhoven would be affected thereby.

[23] Whether the letters of 2 and 3 May 2017 could serve as proof of either an agreement or the furnishing of an undertaking by either W.O. van der Heever or Mr van Heerden is doubtful. Mr Kouwenhoven deposed to the founding affidavit, but he had not been a party to either conversation. Mr Eisenberg deposed to a supporting affidavit (which we were told in the practice note need not be read) in which he gave no details of the conversations he had with either W.O. van der Heever or Mr van Heerden. He purported to confirm that he received undertakings that Mr Kouwenhoven would not be arrested pursuant to any provisional request for his arrest and would not be arrested without notice to his legal representatives. This took the matter no further. When Mr Eisenberg delivered an affidavit together with the replying affidavit, he said that he was confirming the replying affidavit and the descriptions in that affidavit of the telephone discussions that he had with the two officials But those 'descriptions' added nothing to the founding affidavit. Mr Kouwenhoven said in regard to the conversation with Mr van Heerden that the letter made it plain that it was confirming the conversation in question. But that merely throws one back on the letter as the only evidence proffered in support of the alleged agreement or undertaking. It is entirely lacking in any detail as to the terms of the two conversations or how they were said to give rise to an agreement or undertaking.

[24] Like the letter to W.O. van der Heever the letter to Mr van Heerden does not refer to an agreement or an undertaking. Nor did it seek confirmation of an agreement or undertaking. It referred to the earlier conversation between Mr Katz and Mr van Heerden, but neither Mr Katz nor Mr Eisenberg deposed to an affidavit saying that they asked Mr van Heerden to enter into an agreement or give an undertaking. Mr Eisenberg's affidavit was silent on the point. On the face of it these conversations were merely seeking information on behalf of their client and were not directed at concluding agreements or obtaining undertakings. Had those been proffered the letters would have been couched in markedly different terms.

[25] The two passages on which counsel relied were even less indicative of an agreement having been reached between Mr Eisenberg and Mr van Heerden, or an undertaking having been given, than the passage relied on in the other letter. The statement that Mr van Heerden had consulted 'with INTERPOL' – a reference to W.O. van der Heever – and that the two of them had agreed not to arrest Mr Kouwenhoven if they received a request for a provisional arrest, even if correct, would not amount to an agreement with Mr Kouwenhoven, or an undertaking to him. It would merely reflect the current thinking of the two officials without any indication that, when, and if, a request for a provisional arrest was made, they would decline to act upon it. There appears to have been an assumption at the time that a formal request for Mr Kouwenhoven's extradition was imminent and that matters would then proceed on the basis of that application. As it happened, that is what occurred because a request for extradition was received on 7 July 2017, but returned because it did not comply with the provisions of the Act. It was only thereafter that a request was made for a provisional arrest on 21 July and that too

was returned as non-compliant with the requirements for a provisional arrest. A compliant request was only received on 22 August 2017.

[26] The dispute over a provisional arrest under Article 16 of the Convention, as opposed to an arrest pursuant to an extradition request under Article 12, was largely academic. As pointed out earlier, provided a formal request for extradition is timeously received, there is no need in order to hold an extradition enquiry under s 9 of the Act, for a person arrested under Article 16 to be re-arrested. The enquiry proceeds on the basis of the initial arrest. Provided a request for extradition was forthcoming Mr Kouwenhoven's arrest was inevitable. At most the enquiries to W.O. van der Heever and Mr van Heerden could have been directed at forestalling the need to prepare a bail application as a matter of urgency. Reference to the papers in the bail application reveal that it was in fact prepared well in advance, probably around 12 June 2017, which was the date on a report about prison conditions, commissioned especially for the purpose of the bail application. The founding affidavit in the bail application was signed four and a half hours after Mr Kouwenhoven's arrest and ran to 37 pages and 135 paragraphs, with a number of medical reports and the report on prison conditions annexed.

[27] There is no need to repeat what was said in para 19 about the reaction of W.O. van der Heever to any direct request to agree not to arrest Mr Kouwenhoven, or to give an undertaking not to do so. The same improbability of an agreement being concluded or an undertaking given, applied equally in the case of Mr van Heerden. So do my reservations about the authority to conclude an agreement, or give an undertaking. In my view, as with the earlier letter the one addressed to Mr van Heerden does not on its terms support the claim of an agreement or an undertaking

not to arrest Mr Kouwenhoven pursuant to a proper request for his provisional arrest. For those reasons, which differ somewhat from those of the high court, the first ground of attack on the validity of Mr Kouwenhoven's arrest was correctly rejected by the high court.

The attack on the warrant of arrest

[28] An initial application to strike out all the answering affidavits on behalf of the respondents, save that filed by Mr Burke of the DPP's office, on the grounds that they were deposed to before police officers was not pursued. Instead, the attack was limited to one on the attestation of W.O. van der Heever's affidavit by Sergeant van Hagen. The complaint was that, as she was a police officer employed in the same office as the deponent, she had an interest in the litigation that disqualified her from acting as commissioner of oaths. The basis for this was regulation 7(1) of the regulations governing the administration of oaths and affirmations (the regulations),[13] which provides in terms that a commissioner of oaths shall not administer an oath or affirmation relating to a matter in which they have an interest. Under regulation 7(2) that provision does not apply to an affidavit or declaration mentioned in the schedule to the regulations. Item 2 of the Schedule provides:

A declaration taken by a commissioner of oaths who is not an attorney and whose only interest therein arises out of his employment and in the course of his duty.'

Provisions in these terms have been included in the relevant regulations for many years, both under the present statute and its predecessor.[14]

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[13] Regulations Governing the Administering of an Oath or Affirmation published in terms of s 10 of the Justices of the Peace and Commissioner of Oaths Act 16 of 1963 under GN R1258 of 21 July 1972, as amended published in GG 3619 of that date.

[14] The Justices of the Peace and Commissioner of Oaths Act 16 of 1914. See *Royal Hotel, Dundee and Others v Liquor Licencing Board, Area No 26; Durnacol Recreation Club v Liquor Licencing Board, Area No 26* 1966 (2) SA 661 (N) (*Royal Hotel, Dundee*).

[29] Regulation 7(1) and its predecessors have been the subject of judicial interpretation. The cases hold that the regulation requires commissioners to be independent in the exercise of their duties.[15] An interest has been held to be a pecuniary interest, or some interest by which the legal rights or liabilities of the commissioner are affected.[16] In *Benjamin*[17] affidavits attested before the Deputy Master in litigation involving the Master and his staff were held to be inadmissible as contravening the regulation, but the judgment relied heavily on the decision in *Brummer*[18] for this conclusion. The judge's attention had been drawn to the fact that *Brummer* had been overruled by this court,[19] but he did not mention this. The decision cannot be taken as expanding the scope of what is meant by an 'interest' under the regulation.

[30] The usual instances in which the commissioner has been held to have an interest are cases where an affidavit has been attested before an attorney acting in the litigation or proceedings for which the affidavit is tendered, or before that attorney's partner or agent. These cases overlap with a rule of evidence derived from English law that an affidavit deposed to before such an attorney is inadmissible.[20] In *Papenfus*[21] the court extended the exclusionary rule of evidence to an in-house legal adviser for a board in regard to affidavits deposed to by staff of the board in litigation to which the board was party.

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[15] Ibid at 667A.
[16] *Tambay v Hawa* 1946 CPD 866; *Louw v Riekert* 1957 (3) SA 106 (T) at 111.
[17] *The Master v Benjamin NO* 1955 (4) SA 14 (T)
[18] *R v Brummer* 1952 (4) SA 437 (T) at 439. See also *R v Du Pont* 1954 (3) SA 79 (T).
[19] *R v Rajah* 1955 (3) SA 276 (A) at 282 and 283.
[20] See the cases collected in *Royal Hotel, Dundee* at 665H-668C and *Radue Weir Holdings Ltd t/a Weirs Cash & Carry v Galleus Investments CC t/a Bargain Wholesalers* 1998 (3) SA 677 (E) at 669H-681E.
[21] *Papenfus v Transvaal Board for the Development of Peri-Urban Areas* 1969 (2) SA 66 (T) at 69H-70A

[31] Counsel for Mr Kouwenhoven relied strongly on *Papenfus* so it is desirable to examine what it decided and the reasoning of the judge. He first considered the provisions of the regulations governing the administration of an oath. Those applicable at the time were the same in all material respects as the ones at present applicable. His conclusion was that the regulation did not preclude the legal adviser from acting as commissioner of oaths because she did not have an interest in the matter as provided in regulation 7(1). The judge said:[22]

'The commissioner of oaths in the present case, being a legal adviser to the respondent Board, has, on the ascertained facts, no 'personal' interest whatever in the fate of these proceedings, even if it were to be assumed against the respondent that she advised her employer to resist the applicant's motion, drew the several affidavits now in question and was therefore 'interested' in the course advised and pursued by her on behalf of the respondent. Her 'interest' would only arise from the fact of her employment. The information disclosed justifies the inference that, if she had not been so employed, she would have had no interest whatever in the outcome of this litigation. …

The regulations should in my view be so interpreted as not to preclude a legal adviser from acting as a commissioner of oaths in litigation in which his employer is concerned. The 'interest' arising is too remote to fall within the general prohibition of reg. 3, and it is moreover rendered permissible by item 3 of the schedule.'

The approach to the regulations was therefore consistent with other decisions holding that the regulations did not preclude a salaried employee of an attorney from acting as a commissioner of oaths in relation to affidavits deposed to by witnesses in proceedings in which their employer was the attorney of record for a party.[23]

[32] In the case of police officers investigating crimes two judgments holding that they had a disqualifying interest in relation to affidavits

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[22] *Papenfus*, ibid,

[23] *Tambay v Hawa*, op cit, fn 15; *Royal Hotel, Dundee*, op cit, fn 13; *S v Van Schalkwyk* 1966 (1) SA 172 (T) at 174H-176F.

signed by witnesses in the course of their investigations,[24] were overruled by this court.[25] In *Royal Hotel Dundee* it was said that item 2 in the schedule to the regulations appeared to cover the case of a police officer.[26] Despite that, in *Dyani*,[27] three affidavits deposed to by police officers were held to be inadmissible because they had been attested before commissioners of oaths who were themselves police officers. Another affidavit was excluded because the commissioner of oaths was a police officer and employee of the respondent. In excluding them Jafta J said:

' In this matter the affidavits by Mnyakaza, Mgodeli and Jooste were deposed to by colleagues of the commissioners of oath who, by virtue of their relations to the deponents, do not meet the requirement of an independent, unbiased and impartial commissioner. Botoman's affidavit is also tainted by the fact that the commissioner of oaths is the employee of the first respondent and that other respondents were also colleagues of the commissioner. It is quite clear that all those commissioners could be regarded as having interest in the subject matter of these proceedings.

It is unclear from the report how closely linked the deponents were to the commissioners of oaths, or whether the decision was based solely on the fact that both the deponents and the commissioners were police officers. The quoted passage suggests that it was a general rule that police officers could not act as commissioners of oaths in respect of affidavits deposed to by other police officers or other witnesses in any proceedings where the Minister of Police was involved. It is also unclear whether the judge was saying that the attestation was improper, or applying the rule of evidence in regard to their admissibility, which would have involved a substantial extension of that rule. There was no reference in the judgment to regulation 7(2) or to item 2 of the Schedule to the regulations.

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[24] *R v Brummer* and *R v Du Pont* op cit fn 17.
[25] *R v Rajah*, op cit, fn 18.
[26] *Royal Hotel, Dundee*, op cit, fn 13 at 668H.
[27] *Dyani v Minister of Safety and Security and others* [2001] 3 All SA 310 (Tk) para 21.

[33] In *Sihlobo*,[28] after a careful consideration of the regulations, and in particular regulation 7(2), Pakade J held that *Dyani* was clearly wrong insofar as it held that a policeman could not act as a commissioner in relation to the affidavit of another police officer. That decision was followed in *Van Rooyen*.[29] It is necessary to resolve the uncertainty in this regard.

[34] Commissioners of oaths are persons designated by the Minister of Justice as such by virtue of their office. The current designation[30] includes no fewer than 77 categories of officers, ranging from members of the National Executive and a number of persons holding office in the administration of justice (but curiously not judges, although their secretaries are designated), to the chairperson of management of a children's home in Pretoria. In terms of s 7 of the statute all of these are authorised to administer an oath or affirmation or take a solemn or attested declaration within the area for which they are a commissioner. Regulation 7(1) precludes a commissioner from performing these functions 'relating to a matter in which they have an interest'. The authorities already cited say that this must be a pecuniary interest or an interest whereby the rights and obligations of the commissioner would be affected.

[35] The mere fact of employment by a person having an interest in the matter has not been regarded as constituting a disqualifying interest, save in the two cases involving police officers that were overruled in *Rajah*,

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[28] *S v Sihlobo* [2004] JOL 12831 (Tk) paras 10-21.

[29] *Van Rooyen and Another v The Minister of Police and Others* 2019 (1) SACR 349 (NCK) paras 29-37. It was also followed in an unreported decision of the Gauteng division in *Grammaticus (Pty) Ltd v Minister of Police and Others* 50538/2017 dated 12 December 2017, a copy of which was made available to us by counsel.

[30] Designation of Commissioners of Oaths in terms of section 6 of the Justices of the Peace and Commissioners of Oaths Act 1963 published under GN 903 of 10 July 1998 in GG 19033 of that date.

and now possibly in *Dyani*. The implications of extending the concept of an interest in the matter under the regulations to employees would be far-reaching. Could a judge depose to an affidavit before their secretary, or the secretary of a colleague, or the registrar of the court? Could they depose to an affidavit before a magistrate? One merely has to peruse the list of persons who are appointed as commissioners of oaths to realise the complexities that would potentially arise if that approach to an interest were to be adopted. Fortunately it is not the approach adopted by our courts and Regulation 7(2), read with Item 2 of the Schedule, puts the matter beyond doubt. If the only interest arises out of the commissioner's employment and in the course of their duty it does not fall under regulation 7(1). In that sense regulation 7(2) may not embody an exception in the usual sense of a provision that cuts down what would otherwise be the scope of regulation 7(1). Its purpose is rather more to operate *ex abundante cautela* by making it clear that the performance of a commissioner's functions arising out of their employment and in the course of their duties is not prohibited. To the extent that *Dyani* decided otherwise it was incorrect and is overruled.

[36] The facts in this case fall squarely within item 2 of the schedule to the regulations. Sergeant van Hagen is stationed at the General Desk of the Interpol bureau in Pretoria and has no involvement in extradition matters. She had not been involved in the proceedings against Mr Kouwenhoven and said that she was unaware of the matter and had not even heard her colleagues discussing it. She commissioned W.O. van der Heever's affidavit because she is a police officer and was readily available to do so. The argument that she had an interest in the matter disqualifying her from doing so had no merit.

[37] Given the reliance placed on *Papenfus* it is as well to address the decision in that case. Contrary to the submissions before us, the court accepted that the affidavits had been properly commissioned, but then turned to their admissibility in terms of the rule of evidence already mentioned. In holding them to be inadmissible it said:[31]

'The fact that the commissioner is a partner of the deponent, or his servant, or a co-official, or a junior officer must, in some cases at least, militate against the proper discharge by the commissioner of his duty. That is the reason for excluding clerks and partners of an attorney as commissioners of oaths for affidavits drawn by the attorney for a party or witness. The reason becomes even more cogent where the attorney himself happens to be the deponent.

That is closely similar to the situation where officials of an organisation like the respondent Board have to swear to depositions before a commissioner of oaths who, as the legal adviser, is their colleague and conceivably their junior colleague. The risk of the procedure in administering the oath being something less than ideal becomes too great to be countenanced by the Court. The rule excluding attorneys should be extended to include legal advisers. If the respondent Board wishes to have affidavits by its officials attested for court purposes, the attestation should preferably be by a commissioner unconnected with its organisation, certainly not by its legal adviser.

In my view the attestation by the legal adviser of the affidavits filed by the respondent is insufficient to render them admissible in evidence. They are struck out.'

[38] There is a fundamental problem with this line of reasoning. Once it was accepted, as the court did, that the affidavits had been properly commissioned by the legal adviser, on what basis was it entitled to say that they were inadmissible? In application proceedings evidence is presented by way of affidavits. The manner in which affidavits are to be sworn or affirmed is prescribed under the regulations. An affidavit sworn in accordance with those regulations is an affidavit for whatever purpose it is tendered. If it contains inadmissible evidence, such as hearsay, or

[31] *Papenfus* op cit fn 20.

irrelevant matter, it can be struck out, either in whole or in part, but if the evidence is relevant and otherwise admissible, I fail to see on what legal basis it can be excluded.

[39] The basis has been said to be a rule of evidence derived from English law and made applicable in the Transvaal by s 55 of the Transvaal Evidence Proclamation 1902.[32] In turn its foundation lay in two very specific statutory rules of court. The one said specifically that no affidavit would be sufficient that was sworn before a solicitor acting for a party, or an agent or correspondent of the solicitor, or the party themselves. The second said that if an affidavit would have been insufficient if sworn before the solicitor, it would be insufficient if sworn before the solicitor's clerk or partner.[33] There are no equivalent provisions in our law and the limitations on commissioners of oaths acting as such are those set out in the regulations.

[40] In *Royal Hotel, Dundee*[34] Caney J traced the history of the matter in Natal and said that from 1937, when the earlier regulations came into effect, the evidential rule and the regulations had operated side by side, the one in relation to litigious matters and the other in relation to other matters. However, the cases he discussed where affidavits were excluded were all cases where the attorney before whom they had been sworn had an interest in the matter. Accordingly, there was no need for an evidential rule to exclude them as they had been sworn before commissioners who were disqualified. I have not found any reference to such a rule in the texts on evidence that I have consulted. *Papenfus* appears to be the first

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[32] *Louw v Riekert* 1957 (1) SA 106 (T) at 110H-112B. The researches of Caney J in *Royal Hotel, Dundee* suggest that there was a similar rule in Natal under a similar statute.
[33] This rule was upheld in *Louw v Riekert*, ibid, but had been rejected in *Geldenhuis Deep Ltd v Superior Trading Co (Pty) Ltd* 1934 WLD 117.
[34] Op cit, fn 13 at 666F-670A

case to apply the rule to affidavits properly executed before a competent commissioner of oaths in accordance with the regulations.

[41] It seems to me that what was once a rule of evidence is now dealt with by the detailed provisions of the regulations governing the commissioning of affidavits. There is nothing in those regulations to suggest a bifurcation between affidavits in litigious matters and those prepared for non-litigious purposes. Nor can I discern anything in the regulations that supports an evidential rule such as that which formerly applied by virtue of English statutory provisions. So far as I can ascertain the position in England is simply that solicitors may not act as commissioners of oaths where they represent a party in proceedings or where they have an interest in the matter that is the subject of the affidavit. That is also the situation in South Africa as a result of the regulations. In my view there was no justification in *Papenfus* for the invocation and extension of the old evidentiary rule. There is even less justification for extending it further to the facts of this case. The challenge to the commissioning of W.O. van der Heever's affidavit must fail.

Rubber stamping

[42] On a proper consideration of the material placed before the Pretoria magistrate in support of the application for the warrant the issue of the warrant was justified. Any argument based upon the non-disclosure of the alleged agreement or undertaking falls away with my rejection of the contention that there was such an agreement or undertaking. On what factual basis, then, does the argument depend that the magistrate did not apply her mind to that material and the provisions of the Act? The answer is none at all.

[43] The point first emerged in Mr Kouwenhoven's first supplementary founding affidavit at a stage when the record delivered in response to the review application did not include W.O. van der Heever's affidavit. The contention was that there was no affidavit and no oral evidence and therefore, where the order said that the magistrate acted on 'information under oath', that was incorrect. For that reason, it was said that the magistrate simply rubber-stamped the request for a warrant without applying his or her mind to the matter. This rationale disappeared once the record was filed thereafter and it was apparent that there was an affidavit in support of the application. Undeterred, in his second supplementary founding affidavit Mr Kouwenhoven attacked the issue of the warrant on the basis of a variety of alleged non-disclosures, the only one of which pursued in this court being the non-disclosure of the alleged agreement or undertaking.

[44] The allegation of rubber-stamping was not repeated on this occasion. It resurfaced in the replying affidavit in response to a statement by W.O. van der Heever that the magistrate issued the warrant 'after considering the application'. This provoked Mr Kouwenhoven to say the following:

'All the indications are that, in fact, the Pretoria magistrate did not consider the application and simply "rubber-stamped' the draft warrant.

In this regard the absence of any affidavit from the Pretoria Magistrate is telling.

The Pretoria Magistrate clearly rubber-stamped what W.O. van der Heever placed in front of her without bothering to read the application. Her rubber-stamping occurred on the same day.'

[45] No factual foundation existed for any of these allegations. The heads of argument sought to elide the original allegation of rubber-

stamping, based on the incorrect belief that there was no affidavit before the magistrate, with an allegation based on the fact that the magistrate abided the decision of the court in the application and did not deliver an affidavit. But there was no reason for the magistrate to file an affidavit, because there was no factual matter for her to deal with.

[46] The heads of argument suggested that the magistrate 'did not notice the errors in the commissioning of the affidavit'. The 'errors' to which this referred were that Sergeant van Hagen did not print her full name below the declaration. She gave her name and rank, which demonstrated that she was *ex officio* a commissioner of oaths, as required by regulation 4(2)(*b*).[35] The failure to give her full names was irrelevant and, as the papers in this case show, occurs frequently in the attestation of affidavits. The addition of 'Estie' before 'Van Hagen' would not have made the slightest difference and substantial compliance was all that was necessary.[36] Whether the magistrate noticed the omission was neither here nor there. An oversight in that regard would not have affected the validity of the decision to issue the warrant. The other fact advanced in the heads of argument as evidence of 'rubber-stamping' was the failure by the magistrate to give notice to the Minister of Justice in terms of s 8(1) of the Act. How, a failure to attend to an administrative task after issuing a writ was evidence of a failure to consider the issues relevant to the issue of the writ was not explained.

[47] The decision to issue a warrant is a judicial decision and there is no reason to think that it was taken other than properly. There was no

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[35] The regulation requires the commissioner to 'state his designation and the area for which he holds his appointment *or* the office held by him if he holds his appointment *ex officio*.' Saying that she was a sergeant in the South African Police Service satisfied this requirement.

[36] *Noordkaaplandse Ko-op Lewendehawe Agentskap Bpk v Van Rooyen and Others* 1977 (1) SA 403 (NC) at 408H.

reason for the magistrate to deliver an affidavit justifying her decision and saying that she applied her mind to the matter before issuing the warrant. A failure to deliver an affidavit when there is nothing to respond to was not a basis for this argument. There was no merit in the 'rubber-stamping' point.

Section 8 of the Act

[48] Section 8(1) of the Act provides that

'8 **Magistrate to furnish Minister with particulars relating to issue of certain warrants**

(1) Any magistrate who, under paragraph (*b*) of subsection (1) of section 5 or under section 7, issued a warrant for the arrest or further detention of any person other than a person alleged to have committed an offence in an associated state, shall forthwith furnish the Minister with particulars relating to the issue of such warrant.'

The need for the magistrate to do this arises, because in terms of s 8(2) the Minister is entitled, if the warrant has not yet been executed, to direct that it be cancelled, or, if it has been executed, to direct the discharge of the person concerned. That may be done either because the Minister is of the view that the request for extradition is being delayed unreasonably or for any other reason the Minister may deem fit.

[49] It is common cause that the magistrate did not furnish the Minister with particulars of the issue of the warrant and the Minister did not consider whether to exercise his powers under s 8(2). The submission was that depriving the Minister of the opportunity to set aside the warrant invalidated the warrant itself. However, once it was accepted that the initial issue of the warrant was lawful, counsel found himself in difficulties in explaining when and how invalidity would occur. The Act does not provide that the warrant is stayed until after the Minister has been given notice under s 8(1), nor does it provide that the warrant lapses

if the Minister is not notified within a specified time period. Section 8(2) expressly contemplates that the person concerned may already have been arrested pursuant to the warrant by the time the Minister considers their situation.

[50] Although s 8(1) contemplates that the particulars will be given 'forthwith' it is inevitable that some time will elapse between the issue of the warrant and furnishing the Minister with particulars of the issue of the warrant. What period of delay is permissible before the validity of the warrant expires? Counsel was unable to say. Various factual scenarios were posed with a view to securing clarity on the issue. How long a delay would matter? In this case the warrant was issued on 6 December and executed on 8 December. Was that invalid because no notification to the Minister had been sent? What if the magistrate had prepared a letter immediately, but it required to be typed and there was a holdup with the typist, or the magistrate was called away for a couple of days to attend to a family emergency? What if the magistrate was involved in a serious motor accident that evening and was hospitalised for a lengthy period or even killed? When would the validity of the warrant expire and how would anybody know?

[51] The inability to provide an answer indicated that there was a serious flaw in the argument. It lay in the proposition that a failure to perform the duty imposed under s 8(1) operated retrospectively to invalidate the warrant. While the obligation to furnish particulars relating to the issue of the warrant arose from the issue of a warrant, the propriety of the decision to issue the warrant was not affected thereby. That decision required the magistrate to bring an independent mind to bear on the issues relevant to a determination that the person concerned was

subject to extradition.[37] Having done so the magistrate would have performed her proper function in regard to the issue of the warrant and her subsequent conduct would not affect that. The purpose of s 8(2) is to enable the Minister to consider whether there are reasons why the warrant should remain in force. Although the magistrate is obliged to furnish particulars of the issue of the warrant forthwith upon issuing the warrant, there is no time limit on the Minister's consideration of whether it should remain in force. The Minister's powers may be exercised 'at any time' after having been notified that a warrant has been issued. It would be a curious construction of these provisions that the magistrate's failure to furnish particulars to the Minister 'forthwith' would cause the warrant to lapse but, if she did furnish them, the Minister could take a lengthy period before taking any decision. Given the nature of the circumstances in which the Minister may set the warrant aside it is even conceivable that the initial decision may be to sustain the arrest, but with the passage of time the Minister might conclude that the request for extradition is being unreasonably delayed and direct that the arrested person be discharged forthwith.

[52] Were a consequence as drastic as the invalidity and lapsing of the warrant intended, one would have expected s 8(2) to be specific as to the period that would constitute furnishing particulars 'forthwith'. and to state expressly the consequences flowing from non-compliance. Furthermore, there is nothing to prevent the Minister from exercising the powers conferred by s 8(2) when the issue of the warrant comes to the Minister's attention, albeit not as a result of the magistrate's actions. That was the situation in the present case.

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[37] *Smit* op cit, fn 5 para 111.

[53] For those reasons, I am satisfied that the magistrate's failure to comply with s 8(1) did not invalidate the warrant. This point must also be rejected.

The circumstances of the arrest

[54] As a last-ditch contention, counsel sought to argue as an additional point that the circumstances of Mr Kouwenhoven's arrest were not in accordance with the 'proper and dignified' arrangements that were referred to in the closing paragraph of Mr Eisenberg's letter to W.O. van de Heever. Quite why this would invalidate the arrest was not explained, but it is unnecessary to dwell on it. The point had not been raised as a ground for invalidating the arrest in the founding affidavit and there was no evidence to support it. The police arrived at Mr Kouwenhoven's home at 7.50 am on 8 December 2017, which in a fit of hyperbole counsel described as a 'dawn raid', and at around 8.30 am he was taken in an unmarked police vehicle (not a police van) from the house to the Sea Point police station. During the period between 7.50 am and 8.30 am he took the police on a tour of all five stories of his house. He deposed to his affidavit in support of his bail application four hours later. This was hardly the 'perp walk' of American journalism and the proper response to the submission is to echo the words of Sachs J in *Quagliani* that:[38]

‘Legal representatives are entitled, even obliged to defend the interests of their clients with vigour and panache. Yet there must be limits to their ingenuity. Stretching the bounds of appropriate forensic procedure beyond breaking point is not permissible.

[38] *President of the Republic of South Africa v Quagliani*; *President of the Republic of South Africa and Others v Van Rooyen and Another*; *Goodwin v Director-General, Department of Justice and Constitutional Development and Others* [2009] ZACC 1; 2009 (2) SA 466 (CC) para 73.

The raising in the affidavits of a number of points and their subsequent abandonment indicated that Mr Kouwenhoven's legal representatives exercised their ingenuity to its limits.

[55] There was no merit in the point.

General

[56] None of the arguments advanced in support of the contention that the arrest of Mr Kouwenhoven was invalid had any merit. It is accordingly unnecessary to address the contention, based on the decision of this court in *Ebrahim*[39] that, if the grounds advanced had any legal merit, they necessarily meant that the magistrate charged with conducting an extradition enquiry under ss 9 and 10 of the Act had no jurisdiction to do so. Other than noting that Mr Ebrahim had been unlawfully abducted from Swaziland and brought into South Africa, which is fundamentally different from Mr Kouwenhoven's situation, it is unnecessary to discuss the case. It is also unnecessary to consider the cases where courts have discussed, in the context of civil proceedings, whether the fact that a person has been brought before a magistrate and thereafter remanded in custody interrupts the chain of causation between a prior unlawful arrest and the further detention of the arrested individual.[40]

Result

[57] The appeal is dismissed with costs, such costs to include the costs of two counsel in respect of both the first respondent and the second and third respondents.

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[39] *Ebrahim v S* 1991 (2) SA 553 (A).
[40] *De Klerk v Minister of Police* [2019] ZACC 32; 2021 (4) SA 585 (CC) paras 36 to 45.

M J D WALLIS

JUDGE OF APPEAL

Appearances

For appellant: A Katz SC (with him D Cooke)
Instructed by: Eisenberg & Associates, Cape Town;
Webbers Attorneys, Bloemfontein
For first respondent: A M Breitenbach SC (with him A G Christians)
Instructed by: State Attorney, Cape Town and Bloemfontein.
For second and third respondents: F Petersen (with him M Mokhoaetsi)
Instructed by: State Attorney, Cape Town and Bloemfontein