IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No: 141/2025

In the matter between:

NANDIPHA MAGUDUMANA Applicant

and

THE DIRECTOR OF PUBLIC First Respondent

PROSECUTIONS, FREE STATE AND 5

OTHERS

THE APPLICANT'S WRITTEN SUBMISSIONS

TABLE OF CONTENTS

I. INTRODUCTION

1 This application for leave to appeal arises out of a 4 – 1 split decision of the SCA.[1] It concerns whether the applicant established a case for an unlawful disguised extradition between South Africa and Tanzania.

2 A disguised extradition occurs when States use the mechanism of deportation to achieve the objectives of extradition.[2] They do this by reaching an agreement that an individual wanted for criminal proceedings should be returned through the mechanism of deportation rather than extradition. The purpose is to evade the process for extradition, and to circumvent the rights that an extraditee has under extradition law.[3]

3 Extradition and deportation are distinct acts that serve different purposes. As this Court explained in *Mohamed* –

> "[29] In principle there is a clear distinction between extradition and deportation. Extradition involves basically three elements: acts of sovereignty on the part of two States; a request by one State to another State for the delivery to it of an alleged criminal; and the delivery of the person requested for the purpose of trial or sentence in the territory of the requesting state. Deportation is essentially a unliteral act of the deporting state in order to get rid of an undesirable alien. The purpose of deportation is achieved when such alien leaves the deporting state's territory; the destination of the deportee is irrelevant to the purpose of deportation. One of the important distinguishing features between extradition and deportation is therefore the purpose of the state delivery act in question. Where deportation and extradition coincide in effect, difficulties can arise in practice in determining the true purpose and nature of the act of delivery. This will, to the

[1] SCA Judgment rec (4) pp 318 – 361.

[2] Dugard et al *Dugard's International Law* (Juta Publishers 2022, Cape Town) at 316.

[3] *R v Horseferry Road Magistrates' Court, Ex Parte Bennet* [1994] 1 AC 42 at 62C – E.

extent relevant to the present case, be dealt with in this judgment".[4] (emphasis underlined).

4 Since deportation is a unilateral act and destination neutral, States do not secure an agreement for purposes of deportation. Extradition, on the other hand, is concerned with an agreement to surrender a sought person for purposes of criminal proceedings in the receiving State.

5 The evidence of the sixth respondent in this matter (**the DHA** or the **Minister of Home Affairs**) is that the applicant was a wanted fugitive.[5] The DHA therefore took a decision to charter a plane to collect her from Tanzania after an "*agreement"* was reached between the South African and Tanzanian authorities for her deportation.[6] The DHA emphasises where the agreement was reached – it says that <u>because</u> the agreement was reached at the premises of the South African High Commission in Dar Es Salaam, the applicant was "*regarded to have been in the custody of the High Commission on South African soil"*[7]

6 And because the applicant was regarded as being on South African soil, the immigration officers who travelled to Tanzania on the chartered plane could arrest her under section 41 of the Immigration Act 13 of 2002.[8] The obvious flaw in this argument is that the applicant was not arrested at the premises of the South African High Commission in Tanzania. But more importantly the DHA misunderstood the applicable international law

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[4] *Mohamed and Another v President of the RSA and Others* 2001 (3) SA 893 (CC) para 29.

[5] DHA AA rec (2) p 146 para 35.1.

[6] Moroeng SA rec (2) p 182 para 13.

[7] Moroeng SA rec (2) p 182 para 13.

[8] DHA AA rec (2) p 144 para 30; 142 para 23.

principles because the premises of the High Commission in Tanzania is not South African soil.[9]

7 A majority of the SCA (per Zondi DP) recognised that if the applicant had been arrested by the SAPS in Tanzania, her arrest would be unlawful and would amount to a disguised extradition. She would thus be entitled to be released from custody.[10] The majority however concluded that the pleadings did not establish unlawfulness on the part of the SAPS. And since the applicant's notice of motion and founding affidavit alleged that it was the SAPS who arrested her (and not the DHA), there was never any onus on the DHA to justify the lawfulness of its conduct. Its evidence, therefore, need not be considered.

8 The minority (per Makgoka JA) disagreed. He concluded that the DHA's evidence clearly established a disguised extradition that is unlawful under the Constitution and international law. The applicant's founding affidavit made out a case for a disguised extradition, which case, DHA answered. It was not prejudiced in relation to the pleadings.[11] In was the DHA's answer that confirmed the unlawfulness of its conduct.

9 The applicant submits that the SCA's minority judgment is correct and should be upheld by this Court on appeal.

10 Against this backdrop, these submissions are structured as follows:

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[9] *Santos v Santos* 1987 (4) SA 150 (W) at 152 F – G. See also *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodriguez* 2001 (1) SA 1285 (W) at 1293E. See also Dugard above at 382.

[10] SCA Judgment rec (4) p 318 para 1.

[11] Minority Judgment rec (4) p 343 para 64.

10.1 **PART II** sets out the background and the judgments of the High Court and the SCA.

10.2 **PART III** explains why this Court has jurisdiction to hear the matter and why it is in the interests of justice to grant leave to appeal.

10.3 P**ART IV** explains why the approach of the SCA to the pleadings was incorrect.

10.4 **PART V** illustrates that the respondents engaged in an unlawful disguised extradition.

10.5 **PART VI** explains why the defence of consent is without merit.

10.6 **PART VII** concludes with remedy and costs

II. THE BACKGROUND

11 On 19 May 2023, the applicant instituted an urgent application before the Free State Division of the High Court, Bloemfontein seeking to declare her apprehension, arrest and abduction in Tanzania and subsequent transportation to South Africa unlawful.[12] As a consequence of her unlawful arrest and forced return to South Africa, she also sought an order declaring the proceedings before the fourth respondent (**the Magistrate**) a nullity, as well as an order discharging her from detention.[13]

[12] NoM rec (1) p 2 para 2.

[13] NoM rec (1) p 2 paras 3 and 5.

12 The basis for her application was straightforward. She was brought back to South Africa without an extradition process.[14] She was arrested by the SAPS in Tanzania and then forced to return to South Africa on 13 April 2023.[15] This was done by way of airplane chartered by South Africa for the purpose of securing her return.

13 Having alleged that she was unlawfully arrested and brought to South Africa, the respondents bore the onus to justify the lawfulness of their conduct. In *Zealand,* this Court held that it is sufficient for an applicant "***simply to plead*** *that he was unlawfully detained".* Once this is done, "*the respondents"* [will bear] *the burden to justify the depravation of freedom*".[16] In *Jeebhai,* the SCA held this principle is an exception to the general approach in motion proceedings that an applicant must disclose their case in their founding affidavit.[17] Once unlawfulness is alleged, the respondents bear the burden of justifying their conduct.

14 After the applicant launched her application, the DHA sought to intervene in the matter because it was not initially cited as a party in the proceedings. Both the SAPS and DHA alleged that the DHA had a direct and substantial interest in the relief sought by the applicant.[18] The DHA was accordingly joined by agreement between the parties, which was made an order of Court on 26 May 2023.[19]

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[14] FA rec (1) pp 10 – 11 paras 13 – 14.

[15] FA rec (1) 9 para 10.

[16] *Zealand v Minister of Justice and Constitutional Development and Another* 2008 (4) SA 458 (CC) para 24.

[17] *Jeebhai and Others v Minister of Home Affairs and Others* 2009 (5) SA 54 (SCA) para 63.

[18] SAPS AA rec (1) p 41 para 5; DHA Letter of 23 May 2023 rec (2) p 159 para 5.

[19] RA rec (3) p 237 para 59.

15 The SAPS and the DHA then filed answering affidavits in order to discharge the onus on them to justify the lawfulness of the applicant's return to South Africa. This they did, but without being able to discharge the onus. The facts set out below are based on the versions of the SAPS and the DHA placed before the Courts.

16 The SAPS respondents explain that they first acquired knowledge of the applicant's presence in Arusha, Tanzania on 8 April 2023 following a communication from the Tanzanian authorities.[20] On the same day, an urgent meeting was held at the SAPS Academy in Pretoria where it was decided that a multi – department team from South Africa should travel to Tanzania for the purpose of identifying the applicant.[21]

17 A seven – member team consisting of officials from the SAPS, NPA, DHA and Interpol travelled to Arusha on 9 April 2023. They had their first interaction with the Tanzanian authorities at the Kibo Palace Hotel the following day, 10 April 2023.[22] This meeting was also attended by an official from the South African High Commission in Tanzania.[23]

18 The South African delegation was requested by the Tanzanian authorities to indicate whether an extradition request had been prepared for the extradition of the applicant in the event that her identity is confirmed.[24] The delegation informed the Tanzanian officials that no extradition request had been prepared and that South Africa's actions would

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[20] SAPS AA rec (1) p 54 para 44.

[21] SAPS AA rec (1) p 54 paras 45 and 46.

[22] SAPS AA rec (1) p 56 para 49.

[23] SAPS AA rec (1)) p 57 para 52.

[24] SAPS AA rec (1) p 57 para 53.

depend on any decision taken by the Government of Tanzania.[25] It is unclear why South Africa's decision to seek the applicant's extradition would depend on a decision by Tanzania. This is a decision for South Africa alone.[26] The SAPS respondents do not provide any explanation as to why South Africa elected not to seek the applicant's extradition.

19 Of course, any urgent extradition action by South Africa would be covered by the provisional arrest procedure provided for in article 10 of the SADC Protocol on Extradition. Both South Africa and Tanzania are parties to the Protocol.[27] The respondents elected to forego the provisional arrest procedure contemplated by the Protocol.

20 The SAPS respondents explain that the applicant's identity was visually verified on 10 April 2023.[28] Confirmation of her identify was received on 11 April 2023, after her fingerprints were verified.[29]

21 On 12 April 2023, the South African delegation received information that the Tanzanian Government had taken a decision to declare the applicant a prohibited immigrant liable to deported within three days.[30] The third secretary for Consular and Immigration Services at the South African High Commission in Tanzania, Ms Neo Theresa Moroeng,

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[25] SAPS AA rec (1) p 57 para 53.

[26] A State acts alone in determining whether extradition should be sought and it must act in good faith. See *Kaunda and Others v President of RSA* 2005 (4) SA 235 (CC) paras 93 – 94.

[27] GN 405 of 25 May 2012: South African Development Community (Government Gazette No. 35368).

[28] SAPS AA rec (1) p 58 paras 57 – 58.

[29] SAPS AA rec (1) p 59 para 61.

[30] SAPS AA rec (1) p 59 para 62.

travelled from Dar Es Salaam to Arusha to attend to the applicant's return to South Africa.[31]

22 A South African chartered airplane landed in Arusha on the evening of 12 April 2023.[32] The airplane was staffed by SAPS and DHA officials.[33] The SAPS respondents emphasise that they only boarded the plane to "*escort"* the DHA officials.[34] They were not directly involved in the operation, and the plane chartered was secured by the DHA not the SAPS.[35] The Tanzanian officials then handed the applicant to Ms Moroeng for her return to South Africa.[36] The airplane landed in South Africa on 13 April 2023.[37]

23 Ms Moroeng sets out the process leading up to the applicant's deportation. She explains that South Africa had reached an **agreement** with Tanzania for the applicant's deportation. She further explains that the agreement was reached at the High Commission of South Africa but not disclose when the agreement was reached:

> "*The **agreement** between the Tanzanian authorities and the High Commission to deport Nandipha Magudumana and Thabo Bester back to South Africa was reached at the premises of the High Commission. I am advised that once that happened, Nandipha Magudumana and Thabo Bester, as a matter of international law, were regarded to have been in custody of the High Commission on South African soil".*[38](emphasis added)

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[31] SAPS AA rec (1) p 60 para 65.

[32] SAPS AA rec (1) p 61 para 70.

[33] SAPS AA rec (1) p 61 para 69.

[34] SAPS AA rec (1) p 61 para 69.

[35] SAPS AA rec (1) p 61 para 70.

[36] SAPS AA rec (1) p 61 para 70.

[37] SAPS AA rec (1) p 63 para 76.

[38] Moroeng AA rec (2) p 180 para 13.

24 And because the agreement was reached at the premises of the High Commission, the applicant was regarded as being on South Africa territory even though she was not present at the High Commission. Ms Moroeng explains that this is so as a matter of International law. But she is incorrect because South Africa's High Commission in Tanzania is not "*South African territory"*.[39] Contrary to Ms Moroeng's view, International law does not recognise it as such.

25 Mr Matthews also explains that the applicant's deportation was lawful because an **agreement** was reached between South Africa and Tanzania, in accordance with International Protocols. And once the applicant was handed over to DHA officials in Tanzania, they were entitled to arrest her in terms of section 41 of the South African Immigration Act:

> "*In fact, section 41 of the Immigration Act 13 of 2002 places the responsibility of performing statutory functions and powers on both immigration officers and members of the SAPS."*[40]
>
> *I am advised that as a matter of International law an agreement was reached between the Tanzanian authorities and the High Commission regarding the deportation of the applicant and Bester, in accordance with International Protocols."*[41]
>
> "*I am advised that, as a matter of international law, once the hand – over to me was completed the applicant and Bester were regarded as being "on South African soil". Contrary to what the applicant's attorney suggests in his letter of 23 May 2023, I could exercise statutory powers in terms of South African*

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[39] *Santos v Santos* 1987 (4) SA 150 (W) at 152 F – G.

[40] Matthews AA rec (2) p 142 para 23.

[41] Matthews AA rec (2) p 143 para 28.

immigration laws and in this regard legal argument will be advance when the matter is heard."[42] (sic)

In the High Court

26 The High Court heard the application on 1 June 2023 and handed down judgment on 5 June 2023. The The Court, relying on the Appellate Division's judgment in *Ebrahim,* and its application to disguised extradition by the House of Lords in *Horseferry Road Magistrate's Court,* held –

> "It is patently clear, on their own version, that the respondents willingly participated in the handing over event at the airport believing such handing over was done in terms of international law and in terms of the law in Tanzania. Moreover, the respondents were aware that the applicant was handed over for the purposes of prosecution in South Africa. What they did not realise was that such handing over of the applicant was in fact extradition without any process and not a deportation. This is what the law says, as we have seen hereinabove".[43]

27 The SAPS version that the there was a deportation at the instance of Tanzania was contradicted by the DHA's evidence that it had reached an agreement with Tanzania for the applicant's deportation. Unlike extradition, deportation is **not** a matter of agreement between two countries.[44] It is a unilateral act performed by one country.[45] Its purpose is not to return a fugitive to the country seeking their prosecution. Its objective is merely to cause a prohibited person to leave the territorial jurisdiction of a country where their

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[42] Matthews AA rec (2) p 143 para 30.

[43] High Court Judgment rec (3) 265 para 38.

[44] *Mohamed* para 29

[45] *Mohamed* para 29.

presence is unlawful. And it is entirely destination neutral. [46] The deportee is simply required to leave the country from which they are a prohibited person.

28 Yet despite concluding that South Africa had clearly engaged in a disguised extradition which evaded the SADC Protocol on Extradition, the High Court held that the applicant consented to her return, rendering the disguised extradition lawful. In doing so, the High Court purported to follow this Court's judgments in *Mahala*[47] and *December.*[48]

In the SCA

29 The SCA was split 4 -1.

30 A majority of the SCA did not consider whether there was a disguised extradition or whether the applicant consented – or could consent – to the disguised extradition. Both issues were presented to it for determination arising from the High Court's judgment. The minority judgment was critical of the majority's approach. It highlighted that this Court in *Jordan*[49] and *Spilhaus,*[50] required lower courts to determine all of the issues in constitutional challenges, so that this Court has the benefit of its views, in the event of an appeal to it.[51]

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[46] *Mohamed* para 29.

[47] *S v Mahala and Another* 1994 (1) SACR 510 (A).

[48] *S v December* 1995 (1) SACR 438 (A).

[49] *S v Jordan* 2002 (6) SA 642 (CC) para 21.

[50] *Spilhaus Property Holdings (Pty) Ltd and Others v Mobile Telephone Networks and Another* 2019 (4) SA 406 (CC) paras 44 and 45.

[51] Minority Judgment rec (4) p 345 paras 69 – 70.

31 The majority decided the matter on the basis of a narrow objection relating to the pleadings. It concluded that the applicant's case for a disguised extradition appeared for the first time in her replying affidavit. [52] And since the applicant did not amend her notice of motion to seek relief against the Minister of Home Affairs, her appeal must fail.[53]

32 The majority reached this conclusion in circumstances where there was no cross – appeal before it on this issue. The High Court dismissed a strike – out application, brought by the Minister of Home Affairs, that specifically concerned whether the applicant made out a new case in reply.[54] The High Court concluded that there was no new case in reply because –

> [22] I do not think there is much merit in the objection to the applicant's reliance on an unlawful disguised extradition in the form of deportation, which appears in her replying affidavit. This is so because she had already alleged in her founding affidavit that no document existed to show that there was an extradition. She mentioned there that none of the procedures for making an extradition request had been followed. It therefore appears that the reference to a disguised extradition in the replying affidavit was nothing more than the use of refined terminology to say the same thing that has already been intimated in her founding affidavit. The objection in this respect cannot succeed.[55] (emphasis underlined).

33 The minority judgment dealt with all of the issues in the appeal:

33.1 First, it concluded that there was no new case in reply. The case in the founding affidavit was that there was no extradition request for the applicant, and that her return to South Africa – absent extradition proceedings – was unlawful. The

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[52] Majority Judgment rec (4) p 332 para 32.

[53] Majority Judgment rec (4) p 332 para 33.

[54] High Court Judgment rec (4) p 371 paras 20 and 22.

[55] High Court Judgment rec (4) p 371 para 22.

Minister of Home Affairs sought to be joined to the proceedings in order to respond to this case. That the Minister did. The answering affidavits filed on behalf of the Minister confirm that there was no extradition request and that the process for the applicant's return was unlawful.

33.2 Second, the minority judgment concluded that it was unsurprising that the applicant did not have knowledge of the fact that she was arrested by DHA immigration officers. The DHA had perfect knowledge of these facts; the applicant did not.[56] The DHA recognised that it has an interest in the order granted by the High Court because it was in charge of the operation that resulted in the applicant's return to South Africa. It sought to be joined because of this. It filed an answering affidavit explaining its process.[57] There was no prejudice to the DHA from a pleadings point of view because it was joined to the proceedings, and it placed its version before the Court regarding *how* the applicant was returned to South Africa.

33.3 Third, it was not necessary for the applicant to amend her notice of motion to seek relief specifically against the DHA. The Court was confronted with a clear case of illegality. The unlawfulness is confirmed by the version of the Minister of Home Affairs in the proceedings. The Courts have a duty under section 172(1)(a) of the Constitution not to turn a blind eye to unlawfulness, where it is confronted with it. The Courts have a duty to declare conduct that is inconsistent with the Constitution invalid.[58]

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[56] Minority Judgment rec (4) p 338 para 49.

[57] Minority Judgment rec (4) p 338 para 49.

[58] Minority Judgment rec (4) p 360 paras 117 – 118.

33.4 Fourth, the Court considered the law relating to disguised extraditions. It considered South African authorities and the authorities of foreign Courts – largely inspired by South African law. The minority judgment concluded that disguised extraditions afront the rule of law and are inimical to the Constitution. Where there is a disguised extradition, the Courts will decline to exercise criminal jurisdiction over an accused.

33.5 The minority judgment recognised that there may be indignation by the public when this happens, "*but the State, as the repository of the rule of law, cannot be allowed to act unlawfully".*[59]

33.6 Fifth, in relation to the SAPS' defence of consent, the Court held that the SAPS failed to prove the requirement for informed consent.[60]

34 The minority judgment would have upheld the appeal; declare the respondents' conduct unlawful and order her release from the Bizzah Makhate Correctional Centre.[61]

III. JURISDICTION AND LEAVE TO APPEAL

Jurisdiction

35 This Court has jurisdiction over (i) constitutional matters, and (ii) any other matter that raises an arguable point of law that is of general public importance.[62]

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[59] Minority Judgment rec (4) p 359 para 115.

[60] Minority Judgment rec (4) p 358 para 112.

[61] Minority Judgment rec (4) p 361 para 120.

[62] Section 167(3)(b)(i) and (ii) of the Constitution.

36 The application is a undoubtably a constitutional matter:

36.1 It concerns the exercise of power by the DHA and SAPS. The lawfulness of their conduct is impugned in this application. This Court has repeatedly recognised that the lawful exercise of power is a constitutional matter because it concerns the principle of legality and the rule of law.[63]The conduct of the SAPS and the DHA implicate sections 1(c) and 7(2) of the Constitution.

36.2 The application implicates the right to freedom and security of the person protected by section 12 of the Constitution. In *Zealand,* this Court recognised that the unlawful depravation of liberty is a constitutional matter.[64]

36.3 A constitutional interpretation of the Immigration Act is an issue raised in the application. More specifically, whether section 41 of the Immigration Act allows immigration officers to exercise the arrest power extraterritorially. This Court has recognised that the interpretation and application of legalisation is a constitutional matter, where the interpretation implicates rights in the Bill of Rights.[65] The arrest power implicates section 12 of the Constitution.

36.4 The application also implicates sections 231 and 233 of the Constitution. It concerns whether South Africa may bypass a binding international agreement that regulates how sought persons are returned to its territorial jurisdiction. The binding agreement in this case, is the SADC Protocol on Extradition which regulates extradition between South Africa and Tanzania. The Treaty is binding in terms of

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[63] *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd* 2019 (4) SA 331 (CC) paras 35 – 36; *Steenkamp NO v Provincial Tender Board of the Eastern Cape* 2007 (3) SA 121 (CC) para 20.

[64] *Zealand* above para 22.

[65] *Links v MEC, Department of Health, Northern Cape Province* 2016 (4) SA 414 (CC) para 22; *Mtokonya v Minister of Police* 2018 (5) SA 22 (CC) para 9; *Fraser v Absa Bank Limited* 2007 (3) SA 484 (CC) para 47.

section 231(5) of the Constitution. Moreover, the application concerns the international law principles applicable to disguised extraditions and thus engages section 233 of the Constitution.

37 The application also raised two important questions of law, that are of general public importance:

37.1 The first question is whether it is possible to consent to an illegality. This Court has not decided the question but recognised the general importance of that question in constitutional law. In *Lufuno Mpaphuli,* a majority of the Court observed *that* to speak of waiver or consent "*may not be apt in relation to constitutional rights at all, but that is a topic for another day".*[66]

37.2 The second question of law concerns the relevance of the *Ebrahim* principle under the Constitution. Does the Constitution permit the Courts to decline exercising criminal jurisdiction over sought persons, where they are brought before it through deceptive acts?

37.3 *Ebrahim* established that the Courts will not exercise criminal jurisdiction over persons unlawfully brought before it, where the State engages in duplicitous and unlawful conduct in securing the presence of the sought person. *Ebrahim* was decided on the basis of Roman Dutch Law. It inspired foreign Courts in relation to disguised extraditions.[67] This Court has not considered the relevance of the principle under the Constitution.

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[66] *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) para 216. See also ft 29.

[67] See for example *Horseferry* above at 60B – H; *United States v Alvarez – Machain* 504 US 655 (1992) (Stevens J dissenting) at 687 – 688.

Leave to Appeal

38 The test for leave to appeal is whether it is in the interests of justice for this Court to decide the matter.[68] Prospects of success are important; so too the importance of the issues raised in the application.[69]

39 The applicant enjoys strong prospects of success. The High Court concluded that there was an unlawful disguised extradition; so too did the minority judgment of the SCA. A majority of the SCA did not express a view on this question and instead decided the case on a pleadings issue. There can be no suggestion of poor prospects considering the conclusions of the High Court; the SCA's minority judgment, and the manner in which the majority of the SCA resolved the matter.

40 There are several important constitutional questions raised in the application. Consent to an unlawful act, the lawfulness of circumventing a binding Treaty, and engaging in a parallel process to achieve what is provided for in the Treaty[70] are all important constitutional issues that warrant the consideration of this Court.

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[68] Section 167(6) of the Constitution.

[69] *Vodacom v Makate and Another* [2025] ZACC 13; 2025 (10) BCLR 1174 (CC) para 39.

[70] In *Law Society of South Africa v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) at para 56, this Court recognised that where a lawful mechanism under international law exists to achieve an objective, it is unlawful to circumvent the lawful mechanism by relating on a different process. There, the President sought to remove the jurisdiction of the SADC Tribunal by signing a Protocol to that effect. However, the SADC Treaty establishing the SADC Tribunal required three – quarters of its members to support an amendment of the Treaty. It was unlawful for the President to sign the Protocol when the Treaty provided the mechanism to amend its provisions. Similarly, it is unlawful to evade the SADC Protocol on Extradition by reliance on a deportation by agreement. As this Court recognised in Mahomed, deportation is a unilateral act – it requires no agreement.

IV. THE SCA'S MAJORITY APPROACHED THE PLEADINGS INCORRECTLY

41 The majority judgment is informed by two fundamental errors.

42 **First**, it concluded that the relief sought by the applicant in her notice motion was targeted against the SAPS and not Home Affairs. Her founding affidavit contended that she was arrested by the SAPS, and it made no mention of Home Affairs.

43 And since the case made out in the founding affidavit concerned the SAPS, the unlawfulness of Home Affairs – as established by the answering affidavits – may be overlooked.

44 The applicant's notice of motion was not specifically directed at the SAPS. It sought a general declarator that her arrest in Tanzania and return to South Africa was unlawful. However, her founding affidavit did specifically contend that the SAPS were responsible for the arrest. As the minority judgment explains "*it is safe to assume that she neither knew which department each of them represented, nor who played what role in her deportation. This was only clarified in the answering affidavit on behalf of the Justice cluster respondents".* The applicant did not have perfect knowledge – it was never disclosed to her who was effecting her arrest and return to South Africa.

45 Crucially, prior to launching the application before the High Court, the applicant's attorney addressed correspondence to the Director – General of DHA seeking to obtain information concerning the applicant's arrest and return to South Africa. DHA did not provide any information and instead referred the applicant to the Promotion of Access to Information Act.

46 The pleading requirements in an unlawful arrest and detention case is low precisely because the law recognises that an applicant may not have perfect knowledge, and that the facts are likely within the knowledge of the respondents. As this Court held in *Zealand,* all that must be pleaded is that the applicant was unlawfully arrested and detained.[71] This is so even in motion proceedings.[72] Once this is done, the onus shifts to the respondent to justify the alleged unlawful arrest and detention.

47 The majority of the SCA held that the onus never shifted to the Minister of Home Affairs because the unlawfulness was directed at the SAPS. This finding overlooks **why** DHA sought to join the suit, and **why** it was subsequently joined on **26 May 2023.**

48 DHA contended that it had a direct and substantial interest in the matter because the allegations of unlawfulness by the applicant were incorrect. Where a party claims that they have a direct and substantial interest in a matter, it means they accept that the order will affect them.[73] DHA responded to the applicant's affidavit on a paragraph – by – paragraph basis. In doing so, it denied that extradition procedures had to be followed. It contended that "*the applicant misconstrues the applicable laws, and, in this regard, proper legal argument will be advanced".* Indeed, DHA argued that deportation – through an agreement – was permissible under international law.

49 DHA made several averments concerning international law, which both the High Court and the minority SCA judgment found to be incorrect as a matter of both international law

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[71] *Zealand* para 25.

[72] *Jeebhai v Minister of Home Affairs* 2009 (5) SA 54 (SCA) para 22.

[73] *Lebea v Menye* 2023 (3) BCLR 257 (CC) para 30.

and domestic law. The majority of the SCA did not consider whether these arguments were incorrect.

50 Home Affairs sought to rely on the South African Immigration Act to effect an arrest in a foreign State – neither the Act nor International law permit the extraterritorial reach of South Africa's Immigration Act.

51 From a pleadings perspective there was no prejudice to Home Affairs (or for that matter the SAPS) at all. Home Affairs itself sought to address the prejudice occasioned by its non – joinder because it had a direct and substantial interest in the matter. It joined to explain why – in its view – the applicant's return to South Africa was lawful. It had a full opportunity to address the allegations of unlawfulness, **and it did so** by contending that extradition procedures did not apply. It was wrong.

52 *Zealand* recognises that the crucial test insofar as pleadings are concerned in unlawful arrest and detention cases, is whether there is prejudice:

> '[26] Even if the applicant can be said to have altered his cause of action (which I do not accept to be the case), **no prejudice will be suffered by the respondents if this court decides the case as it has now been presented.** That is so, because (i) the question of the lawfulness of the applicant's detention as a sentenced prisoner in a maximum-security facility was canvassed before both the High Court and the Supreme Court of Appeal, and (ii) there is sufficient evidence before this court properly to decide the case.'

53 The majority judgment could not – and did not – identify any prejudice to Home Affairs. It recognised as much when it concluded that "*there would be unfairness in the failure to extend audi alteram partem to the Minister of Home Affairs. This is one of the*

fundamental tenants of the Rule of Law. Although it is not possible to specify the prejudice which might result, some of the considerations set out above apply".

54 But there was no *audi* prejudice to the Minister of Home Affairs, because he joined the proceedings **so that he may be heard**. And the facts placed before the Court by DHA established that both the SAPS and Home Affairs acted unlawfully. The two requirements of *Zealand* were thus satisfied: (i) there has been full argument on the applicant's arrest and detention before both the High Court and the SCA; and (ii) there was full evidence before both Courts to determine whether a disguised extradition took place. The majority judgment does not suggest that the evidence was insufficient to reach this conclusion.

55 **Secondly**, the majority concluded that the applicant had made out a new case in reply for a disguised extradition. This was incorrect for the three reasons.

55.1 One: the applicant's founding affidavit explained that extradition procedures were not followed for her return to South Africa, and the lawful mechanism for her return was through extradition. She did not need to use the words "disguised extradition". Her averments sustained this cause of action in law.

55.2 Two: the High Court had already determined that there was no new case in reply when it dismissed the strike – out application brought by Home Affairs. This dismissal order was not cross – appealed by the SAPS or Home Affairs. The SCA had no jurisdiction to reverse this finding without a cross – appeal against dismissal of the strike – out application.

55.3 Three: even if there was a new case in reply, nothing precluded Home Affairs from filing a further affidavit. The replying affidavit explained why – on Home Affairs' version – their conduct was a breach of both the Immigration Act and International law. It called into question the lawfulness of the "*agreement"* for deportation, and it explained that the inconsistencies in the versions of SAPS and Home Affairs "*called for an answer".* The minority judgment correctly recognises that the principles of *Tantoush*[74]*, Pretoria Portland Cement*[75] and *Botha*[76] permitted, and indeed required, Home Affairs to file a further affidavit to address the allegations that called for an answer. It chose not to do so.

55.4 Indeed, even in its answering affidavit in the application for leave to appeal before this Court, DHA does not plead any facts to explain why there is no disguised extradition. It could easily do so to explain why the applicant is wrong to rely on the minority judgment. It could not do so.

56 But it was not only DHA that acted unlawfully – the SAPS did too. There was no lawful or rational basis for the SAPS to be in Tanzania, unless it sought to cause the arrest and return of the applicant. This much was recognised in the minority judgment.[77]

57 The majority judgment simply ignored the role played by the delegation in Tanzania. It did not consider what power the SAPS had to travel to Tanzania, and whether it was rational and lawful to do so in order to "identify" the applicant. In *Law Society,* this Court

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[74] *Tantoush v Refugee Appeal Board and Others* 2008 (1) SA 232 (T) paras 51 and 71.

[75] *Pretoria Portland Cement Co Ltd and Another v Competition Commission and Others* 2003 (2) SA 385 (SCA) para 63

[76] *Botha v Smuts and Another* 2025 (1) SA 581 (CC) para 56. Rogers J concurred in this paragraph see para 244(c), and Chaskalson concluded that there was no prejudice to the new matter in reply– see para 211.

[77] Minority Judgment rec (4) p 352 para 93.

held that there is an obligation on the State to act rationally both domestically and internationally.[78]

58 The failure to provide a lawful and rational basis for the presence of the delegation – which included senior SAPS officials – meant that the SAPS had not discharged the onus on them. As the minority judgment recognised:

> "The result is that the South African authorities had failed to discharge the onus resting on them to establish the lawfulness of them taking the applicant into custody and detaining her until she was arrested upon arrival in South Africa. Their conduct was therefore unlawful".[79]

V. THE RESPONDENTS ENGAGED IN AN UNLAWFUL DISGUISED EXTRADITION

59 The law recognises a single mechanism for the return of a fugitive to the jurisdiction where they are wanted for criminal prosecution.[80] This mechanism is extradition. And in the case of South Africa and Tanzania, extradition is governed by the SADC Protocol on Extradition.

60 The SAPS contend that the applicant's extradition was not necessary because Tanzania took the decision to deport her. But their own evidence, as well as the evidence of the DHA, demonstrate that there was collusion with Tanzania to secure the applicant's deportation to South Africa, and evade the procedures for extradition. This is known as a disguised extradition.

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[78] *Law Society of South Africa v President of the Republic of South Africa and Others* 2019 (3) SA 30 (CC) para 78.

[79] SCA Judgment para 94.

[80] See *Harksen v President of the Republic of South Africa* 2000 (2) SA 825 (CC) paras 4 – 5.

61 Dugard explains that a disguised extradition is achieved "*by deporting a fugitive to a state in which he is accused of a crime, in accordance with deportation procedures*".[81] And that "*the practice is widely condemned as it deprives the deportee of the rights to which he would be entitled if he were extradited*".[82] The consequence of a disguised extradition is that "*where a person has been irregularly deported to South Africa in a 'disguised extradition', a South African court should refuse to exercise jurisdiction*".[83]

62 This principle was first established in our law in *Ebrahim's* case. There the Appellate Division held that a South African court will not exercise criminal jurisdiction where the South African Police secures the presence of an accused person through their forced removal in another country (then Swaziland).[84] The AD reached this conclusion after extensive analysis of Roman and Roman Dutch law, but also noted that the principle is consistent with international law, human rights, and the rule of law:

> "Several fundamental legal principles are present in those rules, namely, those for the preservation of human rights, good inter – state relations and sound administration of justice. The individual must be protected from illegal detention and from abduction, the limits of legal competence must not be exceeded, political sovereignty must be respected, the legal process must be fair to those affected by it and its abuse must be avoided so as to protect and promote the dignity and integrity of the administration of justice. The State is also affected by it. When the State is a litigant, as for example in criminal cases, it must come to court with clean hands as it were. When the State itself is involved in a kidnapping across national borders as in the present case, its hands are not clean".[85] (our translation from the original in Afrikaans).

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[81] Dugard above at 316.

[82] Dugard above at 316.

[83] Dugard above at 318.

[84] *S v Ebrahim* 1991 (2) SA 553 (A).

[85] *Ebrahim* at 582.

63 The judgment in *Ebrahim* served as an example to the world and influenced the development and direction of international law in respect of disguised extraditions.[86]

64 In *Horseferry Road Magistrates' Court Ex Parte Bennet*[87]*,* the House of Lords relied on *Ebrahim's case* for its holding that English Courts will not exercise criminal jurisdiction over an accused person, where their presence was secured through a disguised extradition. Mr Bennet, a national of New Zealand was wanted in the UK for fraud offences. At the time, he was present in South Africa. A scheme was devised by the English and South African police that Mr Bennet would be deported to New Zealand via the UK. When he arrived in the UK, he was arrested by the English police.

65 The House of Lords held that the scheme was clearly a disguised extradition. In this instance, the English and South African police collaborated with each other to use deportation for the purpose of securing Mr Bennet's presence in England for prosecution. This, the House of Lords held, was unlawful. Relying on the judgment in *Ebrahim,* Lord Griffiths remarked:

> "Your Lordships are now invited to extend the concept of abuse of process a stage further. In the present case there is no suggestion that the applicant cannot have a fair trial, nor could it be suggested that it would have been unfair to try him if he had been returned to this country through extradition procedures. If the court is to have the power to interfere with the prosecution in the present circumstances it must be because the judiciary accept a responsibility for the maintenance of the rule of law that embraces a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.[88]

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[86] J Dugard 'Abduction: Does the Appellate Division Care about International Law – *S v December* 1995 (1) SACR 438 (A)' (1996) 12(2) *SAJHR* 324.

[87] *R v Horseferry Road Magistrates' Court, Ex Parte Bennet* [1994] 1 AC 42

[88] *Horseferry* at 61H.

> Let us consider the position in the context of extradition. Extradition procedures are designed not only to ensure that criminals are returned from one country to another but also to protect the rights of those who are accused of crimes by the requesting country. Thus, sufficient evidence has to be produced to show a prima facie case against the accused, and the rule of speciality protects the accused from being tried for any crime other than that for which he was extradited. If a practice developed in which the police or prosecuting authorities of this country ignored extradition procedures and secured the return of an accused by a mere request to police colleagues in another country, they would be flouting the extradition procedures and depriving the accused of the safeguards built into the extradition process for his benefit. It is to my mind unthinkable that in such circumstances the court should declare itself to be powerless and stand idly by.[89]

66 And in the speech of Lord Bridge of Harwich, he observed that:

> "There is, I think, no principle more basic to any proper system of law than the maintenance of the rule of law itself. When it is shown that the law enforcement agency responsible for bringing a prosecution has only been able to do so by participating in violations of international law and of the laws of another state in order to secure the presence of the accused within the territorial jurisdiction of the court, I think that respect for the rule of law demands that the court take cognisance of that circumstance… To hold that in these circumstances the court may decline to exercise jurisdiction on the ground that its process has been abused may be an extension of the doctrine of abuse of process but is, in my view a wholly proper and necessary one."[90]

67 *Ebrahim's* case also found approval in the dissenting judgment of Justice Stevens in the US Supreme Court decision of *Alvarez – Machain.* He recognised that the rule of law is eroded when courts authorise the exercise of criminal jurisdiction over persons brought before it through deceptive and unlawful means:

> "The significance of this Court's precedents is illustrated by a recent decision of the Court of Appeal of the Republic of South Africa. Based largely on its understanding of the import of this Court's cases – including our decision in Ker –

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[89] *Horseferry* at 62B.

[90] *Horseferry* at 67G.

> that court held that the prosecution of a defendant kidnapped by agents of South Africa in another country must be dismissed. *S v Ebrahim,* SALR (Apr – June 1991). The Court of Appeal of South Africa – indeed, I suspect most courts throughout the civilised world – will be deeply disturbed by the "monstrous" decision the Court announces today. For every nation that has an interest in preserving the Rule of Law is affected, directly or indirectly, by a decision of this character. As Thomas Paine warned, an "avidity to punish is always dangerous to liberty" because it leads a nation to 'stretch, to misinterpret and to misapply even the best of laws"[91]

68 In *R v Hartley,* the New Zealand Court of Appeal recognised the Courts will decline to exercise criminal jurisdiction where there is collaboration for purposes of securing a deportation, and evasion of extradition:

> There are explicit statutory directions that surround the extradition procedure. The procedure is widely known. It is frequently used by the police in the performance of their duty. For the protection of the public the statute rightly demands the sanction of recognised court processes before any person who is thought to be a fugitive offender can properly be surrendered from one country to another. And in our opinion there can be no possible question here of the court turning a blind eye to action of the New Zealand police which has deliberately ignored those imperative requirements of the statute. Some may say that in the present case a New Zealand citizen attempted to avoid criminal response by leaving the country; that his subsequent conviction has demonstrated the utility of the short cut adopted by the police to have him brought back. <u>But this must never become an area where it will be sufficient to consider that the end has justified the means</u>. The issues raised by this affair are basic to the whole concept of freedom in society. On the basis of reciprocity for similar favours earlier received are police officers here in New Zealand to feel free, or even obliged, at the request of their counterparts overseas to spirit New Zealand or other citizens out of the country on the basis of mere suspicion conveyed perhaps by telephone, that some crime has been committed elsewhere?"[92] (emphasis added).

69 Several judgments from various jurisdictions around the world, as well as the decision of the European Court of Human Rights, recognise that a disguised extradition is

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[91] *United States v Alvarez – Machain* 504 US 655 (1992) at 687 – 688.

[92] *R v Hartley* [1978] 2 NZLR 199 at 216 – 217.

inconsistent with international law.[93] There are three domestic decisions that confirm that a disguised extradition is unlawful and inconsistent with international law.

70 In *Thandani,* a case concerning damages arising from a disguised extradition, the AD held that it was unlawful for the South African Police to accommodate a request by the President of the Ciskei to arrest Thandani in South Africa, and later hand him over to the authorities in the Ciskei. The Court held:

> "There is a grave matter that calls for condemnatory comment. It appears from the undisputed and accepted evidence of Captain Schooling that he and other members of the Security Branch of the South African Police have by their actions deliberately disregarded and flouted provisions of the Criminal Procedure Act 51 of 1977, the Extradition Act 67 of 1962 and the extradition agreement between the Government of the Republic and the Government of the Ciskei. It was not their function to accommodate the mere request of a foreign ruler… No one in the Republic is above the law. Everyone in the Republic is obliged to observe and obey the law irrespective of how high or humble his station in the community may be. Even the State President as Head of the Executive is subject to the law."[94]

71 In *Wellem,* Froneman AJ upheld a plea of no jurisdiction where the accused was brought to South Africa by deceptive means. The accused was arrested in the Ciskei by the Ciskei Defence Force, who communicated with the South African Police and informed them of his arrest. The South African Police travelled to the Ciskei where they found the

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[93] See *Bozano v France* IHLR 3091 (ECHR) 1986, 18th December 1986; *Wallace v State of the Netherlands, Hoge Raad,* 13 September 1963; [1963] *Ned.Jur. No.* 509; *R v Governor of Brixton Prison ex Parte Soblen* [1962] 3 All ER 641. Here Lord Denning M.R. held that "*the Crown cannot and must not surrender a fugitive criminal to another country at its request except in accordance with the Extradition Acts duly fulfilled".* Although Lord Denning held that evidence of collusion will deprive the exercise of criminal jurisdiction, he concluded that there were no facts that the Home Secretary acted unlawfully. *R v Mullen* [2000] QB 520 where the Court of Appeal set aside Mullen's conviction and 30 – year sentence because of unlawful collusion between the British Secret Intelligence Service and the Zimbabwean Central Intelligence Organisation to secure Mullen's presence in the UK through deportation. *Casariego v. Uruguay* (R.13/ 5 6), ICCPR, A/36/4o (29 July '98') r85 (CCPR/C/13/D/ 5 6/1979); *Domukousky, Tsiklauri, Gelbakhiani and Dokvadze v. Georgia* (623, 624, 626 and 627/1995), ICCPR, A/ 5 3/40 vol. II (6 April 1998) 95 (CCPR/C/62/D/623/199 5); *Burgos v. Uruguay* (R.12/ 5 2), ICCPR, A/36/4o (29 July 1981) 176 (CCPR/C/1i3/D/ 5 2/1979).

[94] *Minister of Law and Order v Thandani* 1991 (4) SA 862 (AD) at 872F.

accused at a police station. They informed the accused that he was a suspect in a murder case and requested that he return with them to South Africa. The accused was not informed of any of his extradition rights. He was told that if he did not consent, he would remain in custody in the Ciskei until an extradition request is sent.

72 There are four important features of the judgment in *Wellem.*

72.1 First, Froneman AJ recognises that there is only a single lawful mechanism to obtain the presence of a fugitive in South Africa – this is through the Extradition Act.[95] It is not lawful to use a parallel process such as deportation to secure the presence of an accused person in South Africa because this "*would allow State officials to circumvent the important procedural and substantive safeguards for persons liable for extradition and would frustrate the very purpose of the Act… and make its provisions superfluous"*.[96]

72.2 Second, the South African officials are not entitled to perform their functions in a foreign territory. International law recognises that the laws of a country do not find extraterritorial application to another country.[97]

72.3 Third, the principle in *Ebrahim* does not only apply where an individual is forcibly removed from a foreign country, but also where their return has been obtained through deceptive means:

> "To hold that these facts amounted to an unlawful abduction or kidnapping of the accused from Ciskei to South Africa would amount to

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[95] *S v Wellem* 1993 (2) SACR 18 (E) at 27H and 28I.

[96] *Wellem* at 27I.

[97] *Wellem* at 29B – C.

> an extension of the principles enunciated in *Ebrahim's case* supra. Is such an extension justified? In my view, it is. The crime of kidnapping is committed not only where there is a forcible depravation of freedom of movement, but also where the victim is enticed by craft or cunning".[98]

72.4 Fourth, consent to deportation will be invalid where the accused has not been informed of all of their rights, including their rights under the extradition process. The onus is on the State to prove that the consent was informed, and with full knowledge of all the substantive procedural extradition rights:

> "The accused would only validly waive their rights to the procedural safeguards in terms of the Act, such as an enquiry before a magistrate prior to extradition and their right to appeal against his decision, had they known of such rights. The evidence accepted by us is clear that they were not informed of those rights, nor is there any other evidence to suggest that they were aware of those rights. Under these circumstances there can be no valid waiver."[99]

73 *Wellem's* case clearly accords with the Constitution. It gives effect to the principle of legality which recognises that if a mechanism to achieve an objective is prescribed by law, it is unlawful to use other mechanisms to achieve the same objective. When this occurs, a functionary will not be exercising its power in good faith. This was made clear by this Court in *Law Society,* where the President sought to remove the jurisdiction of the SADC Tribunal by signing a Protocol to this effect, when the SADC Tribunal Treaty prescribed the procedures for its amendment. It was clear that the President only sought to sign the Protocol because the amendment procedure under the Treaty was more onerous. He acted irrationally and unlawfully:

> "Legality therefore exists to ensure that the repository of public power stays within the vital limits of the power conferred and being exercised. Both Houses of

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[98] *Wellem* at 31E.

[99] *Wellem* at 30I – J.

> Parliament resolved… to ratify the Treaty. For this reason, no constitutional office bearer including the President, may act, on behalf of the State, contrary to its provisions. They are all agents of the state acting in line with its commitments made in terms of that Treaty. And there was and still is no legal basis for the President to act contrary to the unvaried provisions of a binding Treaty*".*[100]

74 The Constitution imposes a duty on all functionaries not to subvert the objects and purposes of an international agreement. There is a duty on South Africa to comply with its international law obligations in good faith, and not to undermine the obligations imposed by international law. This Court has confirmed this in *Fick,*[101] *Glenister*[102] and *Law Society.*[103]

75 Parliament ratified the SADC Protocol on Extradition on 14 April 2003.[104] This is the legal mechanism adopted by South Africa to secure the presence of an accused who is wanted to stand trial in South Africa. The respondents may not act contrary to its provisions – they may not "*undermine"* or "*subvert"* the mechanism adopted by South Africa for the return of sought persons. They are obliged to comply with it as a matter of both constitutional and international law.

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[100] *Law Society v President of the Republic of South Africa* 2019 (3) SA 30 (CC) para 48.

[101] *Government of the Republic of Zimbabwe v Fick and Others* 2013 (5) SA 325 (CC) para 59.

> "*South Africa has essentially bound itself to do whatever is legally permissible to deal with any attempt by any member state to undermine and subvert the obligations… under the Amended Treaty. Added to this are our own constitutional obligations to honour our international agreements and give practical expression to them…"*

[102] *Glenister v President of the Republic of South Africa and Others* 2011 (3) SA 347 (CC) para 74.

> "*Our Constitution takes into its very heart obligation to which the Republic, through the solemn resolution of Parliament, has acceded, and which are binding on the Republic in international law, and makes them the measures of the State's conduct in fulfilling its obligations in relation to the Bill of Rights."*

[103] *Law Society* para 54.

> *Additionally, this Court has previously observed that our country is under an obligation to protect the Tribunal and resist "any attempt to undermine or subvert it" the role and authority of the Tribunal and the obligations that flow from that Treaty. This is the consequence of our duty to fulfil our international law obligations. And it finds support in article 26 of the Vienna Convention*

[104] GN 405 of 25 May 2012: South African Development Community (Government Gazette No. 35368).

76 *Wellem's* case is also consistent with international law. It recognises the established norm of customary international law that the laws of one country do not have extraterritorial application. An agent of a State may therefore not exercise its powers (such as the arrest power under section 41 of the Immigration Act) in a foreign State. In *Kaunda,* this Court recognised that the laws of South Africa are "*territorially bound and has no application beyond our borders*."[105]

77 Although the Court in *December* overruled *Wellem,*[106] it is generally accepted that it was wrong to do so.[107] *Wellem's* case accords not only with international law but also the principles of legality. Dugard has referred to this decision as "*enlightened"* and *carefully reasoned".* And he has called on South African Courts to return to the principles it establishes.[108] We deal with both *December* and *Mahala* in part VI dealing with consent.

78 The third domestic case dealing with a disguised extradition is the *Buys* case.[109] The accused was arrested by the police in Bophuthatswana and transferred by agreement between the police of Bophuthatswana and South Africa, to custody in South Africa. Following the principles in *Ebrahim* and *Wellem,* the Court held:

> "In my opinion there cannot be two ways of extradition, namely one in terms of the Extradition Act and the Extradition Agreement, and the other without the Act

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[105] *Kaunda v President of the Republic of South Africa and Others* 2005 (4) SA 235 (CC) at [36 - 38]. See also *Commissioner of Taxes, Federation of Rhodesia v McFarland* 1965 (1) SA 470 (W) 474A-B; *Standard Bank of South Africa v Ocean Commodities Inc and Others* 1980 (2) SA 175 (T) 184G-185D.

[106] *S v December* 1995 (1) SACR 438 (A) at 441I.

[107] See the criticism of *December* in J Dugard 'Abduction: Does the Appellate Division care about International Law?' (1996) 12 *SAJHR* 24; GN Barrie 'The friendly posse and the disregard for territorial jurisdiction' (1996) 113 *SALJ* 576; HA Strydom 'Abductions on foreign soil – again: *S v Mahala* (1993) 9 *SAJHR* 308; N Botha 'Aspects of Extradition and Deportation' (1993/4) 19 *SAYIL* 163; JT Schoombie 'A license for unlawful arrest across the borders' (1984) 101 *SALJ* 713.

[108] Dugard above at 324 and 328.

[109] *S v Buys* 1994 (1) SACR 549 (O)

and Convention having been complied with, the extradition is illegal, and it follows that the Court therefore has no legal jurisdiction."[110]

79 The applicant's return to South Africa has nothing in common with a *bona fide* deportation. In *Mohamed,* this Court made it clear that what distinguishes extradition from deportation is that deportation is a unilateral act that is destination neutral. The person liable for deportation is simply required to leave the jurisdiction from which they are liable to be deported. Extradition is different. It concerns a request by one sovereign State to another sovereign State for the return of an individual sought for purposes of having that person stand trial or serve a sentence.[111]

80 *Mohamed* also recognises that where deportation is used to achieve the objectives of extradition, it will be unlawful: "*If however, what happened was in substance an extradition, it would have been unlawful because correct procedures were not followed."*[112]

81 The versions of both the SAPS respondents and the DHA make it clear that they were engaged in a disguised extradition.

81.1 One: the SAPS explain that the delegation assembled travelled to Tanzania to correctly identify the applicant. Once the applicant was correctly identified, she could be returned to South Africa for purposes of instituting a prosecution against her. Brigadier Bushiri explains:

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[110] *Buys* at 551. *Buys* case was similarly overturned in *December* at 441I.

[111] *Mohamed* paras 41 – 42.

[112] *Mohamed* para 40.

> "Adv LM Mgiba's participation in the engagement as an NPA official was limited to ensuring that in the event the person's identities were confirmed and they were returned to South Africa, the State would be able to prosecute them should that be necessary". [113]

81.2 Deportation is obviously not concerned with whether (a) the identity of an accused person relates to an alleged fugitive; and (b) a decision to prosecute. Both of these considerations are relevant to an extradition (not deportation). And there is no explanation at all why a member of the NPA was required to travel to Tanzania for purposes of deciding whether a prosecution should take place – these decisions are made domestically.

81.3 Two: the delegation recognised that if the applicant was correctly identified, she would need to be returned to South Africa for the purpose of prosecution. Having realised this, the obvious consequence is that they ought to have had an extradition request prepared – whether formal under article 6 of the Protocol, or in the case of urgency, the provisional arrest procedure under article 10 of the Protocol.

81.4 The delegation was requested by the Tanzanian authorities to indicate whether an extradition request was available.[114] The respondents elected not have an extradition request prepared, despite only being present in Tanzania for the purpose of identifying the applicant so that they may be returned to South Africa for prosecution. The respondents consciously chose not to follow the only lawful

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[113] SAPS AA rec (1) 59 para 66.

[114] SAPS AA rec (1) 56 para 53.

mechanism for the return of an alleged fugitive. They did so on the basis that they would be 'guided by Tanzania'.[115]

81.5 But a decision to seek the extradition of an alleged fugitive does not lie with the requested State. It is a decision **only** for the requesting State. It is therefore unclear why South Africa's decision would depend on the view taken by Tanzania.

81.6 Three: the destination to which the applicant was returned was not "*neutral".* She was returned to a place where her prosecution was sought. As was recognised in *Mohamed,* "*the destination of the deportee is irrelevant".*[116] But this was clearly not the case – the respondents recognised that the applicant (if correctly identified) would need to be returned to South Africa in particular for purposes of her prosecution.

81.7 Four: there was an agreement to deport.[117] Deportation is a unilateral act. And unlike extradition, is does not require the agreement or cooperation between two States. The clearest sign of a disguised extradition is collaboration between two countries for the return of a person who is liable for prosecution.

81.8 Mr Matthews makes it clear that "*an agreement was reached between the Tanzanian authorities and the High Commission, regarding the deportation of the applicant…"*[118] Ms Moroeng confirms that "*the agreement between the Tanzanian*

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[115] SAPS AA rec (1) 56 para 53.

[116] *Mohamed* above para 28.

[117] Matthews AA rec (2) 143 para 28; Moroeng AA rec (2) 180 para 13.

[118] Matthews AA rec (2) 143 para 28

authorities and the High Commission to deport… was reached at the premises of the High Commission".[119]

81.9 The agreement is fatal to the SAPS contention that the deportation decision was taken by Tanzania. The DHA confirms that it was a matter agreed upon by both countries.

81.10 Five: the DHA exercised an arrest power in a foreign country. They did so in terms of section 41 of the Immigration Act. This section provides that:

> "When so requested by an immigration officer or a police officer, any person shall identify himself or herself as a citizen, permanent resident or foreigner, and if on reasonable grounds such immigration officer or police officer is not satisfied that such person **is entitled to be in the Republic**, such person may be interviewed by an immigration officer or a police officer about his or her identity or status, and such immigration officer or police officer may take such person into custody without a warrant, and shall take reasonable steps, as may be prescribed, to assist the person in verifying his or her identity or status, and thereafter, if necessary detain him or her in terms of section 34."[120]

81.11 The DHA were not entitled to exercise the power under section 41 of the Immigration Act in Tanzania. In the first instance, the section makes it clear that it only applies in South Africa: It is concerned with whether a person, suspected of being an illegal foreigner, is entitled to be **in the Republic**. It is not concerned at all with whether persons are entitled to be in Tanzania. In the second instance, customary international law prohibits the exterritorial application of domestic

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[119] Moroeng AA rec (2) 180 para 13.

[120] For a discussion of this section see *Jeebhai and Others v Minister of Home Affairs and Another* 2009 (5) SA 54 (SCA) para 24 -25.

laws.[121] DHA's reliance on section 41 is thus entirely misplaced and unlawful. It acted under a power that it did not have, and it violated the principle of legality.[122]

81.12 The DHA needed to find a legal basis to justify the "handover". It had clearly restrained the applicant for the purpose of returning her to South Africa to face prosecution. And it sought to do so through section 41. The DHA, however, goes further. It argues that 'as a matter of international law,' the South African High Commission in Tanzania as well as its Commissioner constitute "*South African territory"* which permits it to rely on section 41.

81.13 The argument is fatally flawed for at least three reasons: (1) the Vienna Convention on Diplomatic Relations[123] does not regard the South African High Commission in Tanzania as South African territory. No article in the Convention does this; (2) The South African Courts have made it clear that acts performed at diplomatic premises of South Africa in a foreign country are <u>not</u> acts performed in South Africa. In *Santos v Santos,* it was held that *'diplomatic premises are not extraterritorial; acts occurring there are regarded as taking place on the territory of the receiving State, not on that of the sending State.'*[124](3) The applicant was not

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[121] *SS Lotus, France v Turkey* 1927 PCIJ Reports Series A no 10 at 18:

"The first and foremost restriction imposed by international law upon a State is that – failing a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory".

[122] *Law Society of South Africa and Others v President of South Africa and Others* 2019 (3) SA 30 (CC) at [83]. *AAA Investments (Pty) Ltd v Micro Finance Regulatory Council* 2007 (1) SA 343 (CC) para 68.

[123] Vienna Convention on Diplomatic Relations Done at Vienna on 18 April 1961. Entered into force on 24 April 1964. United Nations, Treaty Series, vol. 500, p. 95

[124] *Santos v Santos* 1987 (4) SA 150 (W) at 152 F – G. See also *Portion 20 of Plot 15 Athol (Pty) Ltd v Rodriguez* 2001 (1) SA 1285 (W) at 1293E. See also Dugard above n.40 at 382.

handed over at the High Commission in Tanzania. She was handed over at the Kilimanjaro International Airport.[125]

82 So, even if section 41 could have been relied on (which it could not) and even if the High Commission in Tanzania is South African territory (which it is not), on the DHA's own version, they could not rely on section 41 because the applicant was handed over at the Kilimanjaro International Airport not the High Commission.

83 A majority of the SCA held that there was no unlawfulness established against the SAPS. This is not correct. As the minority judgment correctly recognises:

> "On the facts, it is clear that the South African authorities went to Tanzania with only one purpose in mind – to take the applicant into custody for her to face prosecution. The composition of the South African delegation is revealing: high-ranking police officers, a member of Interpol, a Home Affairs official, a prison official and a prosecutor. The reason proffered for the delegation flying to Tanzania is that they needed to identify the applicant and Mr Bester. This is unconvincing. The identification could easily have been verified through the deoxyribonucleic acid (DNA), which would not have required the delegation's physical presence in Tanzania. To demonstrate this point, confirmation of the applicant's identity was verified through her fingerprints. There is no explanation of what role any of the people comprising the delegation played in this process.
>
> "The result is that the South African authorities had failed to discharge the onus resting on them to establish the lawfulness of them taking the applicant into custody and detaining her until she was arrested upon arrival in South Africa. Their conduct was therefore unlawful."[126]

84 The applicant's return to South Africa had nothing in common with deportation, but everything in common with extradition. The respondents' version establishes a disguised

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[125] Moroeng AA rec (2) 180 para 13.

[126] Minority Judgment rec (4) p 352 paras 93 – 94.

extradition because there was an agreement between Tanzania and South Africa for the applicant's deportation to achieve the purpose of extradition – returning a sought person for purposes of prosecution. As was recognised in *Horseferry* – applying *Ebrahim* – as well as *Wellem and Buys,* a Court will not exercise jurisdiction where a disguised extradition takes place. It undermines the legitimacy of the Courts and the constitutional order. And it requires Courts to condone a violation of the most fundamental principle in a constitutional order – the rule of law.

85 In *Mohamed,* the Constitutional Court emphasised:

> "South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution**. It is therefore important that the state lead by example.** This principle cannot be put better than in the celebrated words of Justice Brandeis in Olmstead et al v United States.
>
> > " In a government of laws, existence of the government will be imperilled if it fails to observe the law scrupulously . . . Government is the potent, omnipresent teacher. For good or for ill, it teaches the whole people by its example . . . If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy."
>
> The warning was given in a distant era but remains as cogent as ever. Indeed, for us in this country, it has a particular relevance: we saw in the past what happens when the state bends the law to its own ends and now, in the new era of constitutionality, **we may be tempted to use questionable measures in the war against crime**. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. **The legitimacy of the constitutional order is undermined rather than reinforced when the state acts unlawfully.** Here South African government agents acted inconsistently with the Constitution in handing over Mohamed without an assurance that he would not be executed and in relying on consent obtained from a person who was not fully aware of his rights and was moreover deprived of the benefit of legal advice. They also acted inconsistently with statute in unduly accelerating deportation and then despatching Mohamed to a country to which they were not authorised to send him."[127] (emphasis added).

[127] *Mohamed* para 69.

The Minority's Misconceptions as Alleged by the DHA

86 In its answering affidavit in the application for leave to appeal, the DHA contends that the applicant – and in turn, the SCA's minority – misconceived the applicable legal principles in nine respects.[128] The DHA is wrong about each of its alleged nine misconceptions.

87 The affidavit deposed to by the Director – General of DHA states that the Department has institutional experience with extraditions.[129] That too is wrong. The DHA has **no experience** with extraditions, whether incoming extradition requests or outgoing extradition requests.[130] As a factual and legal matter, this averment is incorrect.

88 The affidavit of the Director – General also misrepresents the authorities relied on. It quotes selectively from foreign cases and overlooks passages that are not favourable to it.

89 Crucially, the DHA ignores its own evidence in the High Court where it stated that it relies on section 41 of the Immigration Act to effect an arrest in a foreign country; that it is entitled to do so at the premises of the High Commission in Tanzania because it is South African soil; and that it is entitled to travel to a foreign country to verify the identity of persons.

90 The alleged misconceptions are without merit.

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[128] LTA AA rec (5) p 413 para 11.

[129] LTA AA rec (5) p 410 para 1.3.

[130] *Schultz v Minister of Justice and Correctional Services* 2024 (2) SACR 294 (SCA) para 11.

91 "Misconceptions 1 and 2: accused persons can never be deported": this is not the applicant's case.

91.1 Where a State innocently deports a person without conspiring with another State, there can be claim of unlawfulness. But that is not the case here because Tanzania and South Africa reached an agreement to by – pass the process for the return of a fugitive, i.e. extradition procedures. South Africa was asked about an extradition request but said it would be guided by Tanzania. It then secured an agreement with Tanzania. When states "*influence"* or "*procure the choice of route"* or "*collude"* with each other in reaching the decision to deport, their conduct will amount to a disguised extradition that is unlawful.[131]

91.2 Indeed, in *Soblen's* case[132] (which the DHA selectively relies on), Lord Denning MR recognises that where persons are wanted for criminal proceedings, the extradition process governs their return. DHA ignores this passage of *Soblen's* judgment –

> "in the absence of an extradition treaty, it is no answer for the Crown, or any officer of the Crown, to say that he wishes to send him off to another country to meet a charge there. That this is the law is clearly stated in Sir Edward Clarke's book on Extradition (1903) 4th edn p 26.

92 "Misconceptions 3 and 4: Mischaracterisation of Intergovernmental cooperation"**:**

92.1 DHA ignores its own evidence. It does not explain why it was necessary to reach an agreement for deportation when deportation is a unilateral act. It also does not

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[131] *R v Staines Magistrates' Court* [1998] 1 WLR QBD at 665H and 666D.

[132] *R v Governor of Brixton Prison Ex Parte Soblen (no2)* [1963] 2 QB 243 at 299.

explain what the cooperation was, if not to secure the applicant's deportation. The onus on the DHA. If it contends there was innocent cooperation, it must explain what that cooperation was for. It has not done so.

92.2 DHA also quotes selectively from the *Soblen* judgment in paragraph 16 of its affidavit.[133] It quotes from Lord Denning MR's judgment concerning the discretion States have to deport but ignores the limits on that discretion recognised in the judgment. The limit recognised by Lord Denning shows the conduct of DHA to be unlawful:

> "If therefore, the purpose of the Home Secretary in this case was to surrender the applicant as a fugitive criminal to the United States of America because they had asked for him, then it would be unlawful. But if the Home Secretary's purpose was to deport him to his own country because the Home Secretary considered his presence e here to be not conductive to the public good, then the Home Secretary's action is lawful. It is open to these courts to inquire whether the purpose of the Home Secretary was a lawful or unlawful purpose. Was there a misuse of power or not? The Courts can always go behind the face of the deportation order in order to see whether the powers entrusted by Parliament have been exercised lawfully or not."[134]

93 **"**Misconceptions 5 and 6": the onus does not shift where there is a mere allegation of unlawfulness, and the applicant should set aside the Immigration notice in Tanzania.

93.1 As a matter of law, the DHA is incorrect. *Zealand* and *Jeebhai, recognise* that it is necessary to merely plead unlawfulness for the onus to shift.

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[133] LTA AA rec (5) p 418 para 16.

[134] *Soblen* above at 302.

93.2 Moreover, the applicant's challenge is to the lawfulness of South African officials abroad. She is entitled to raise that challenge in South African Courts because the SAPS and DHA are required to act lawfully both domestically and abroad.

94 Each of the DHA's alleged misconceptions are not misconceptions at all. Its six arguments fall to be rejected.

VI. THE APPLICANT DID NOT CONSENT TO AN UNLAWFUL DISGUISED EXTRADITION

95 The defence of consent is not foreshadowed by the pleadings. It was raised for the first time by the SAPS respondents in written and oral argument before the High Court.[135] That the defence is raised by the SAPS respondents is surprising – their contention is that they did not play a direct role in the return of the applicant to South Africa. Instead, they merely assisted the DHA by "*escorting"* it.[136] And because this is the version of the SAPS, they had no capacity to request, obtain or receive the applicant's consent.

96 This fact alone is sufficient to dispense with the defence of consent. In order for any consent to be valid, it must be made to a functionary competent to receive the consent.[137]

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[135] This is not permissible. See *Zuma and Another v President of the Republic of South Africa* [2025] ZACC 21 (3 October 2025) para 44.

[136] SAPS AA rec (1) 60 para 69.

[137] In extradition proceedings, a waiver of an extradition hearing is certified by a judicial officer. See *Spagni v the Director of Public Prosecutions, Western Cape and Others* (455/2022) [2023] ZASCA 24 (13 March 2023) at [15 – 20] and *Wellem* at 30I.

97 It is questionable whether an individual may ever consent to an illegality. At least one reported decision suggests that an individual may not.[138] In *Mohamed,* this Court recognised that it is doubtful that an individual may consent to an unlawful act but did not decide the issue.[139] In *Lufuno Mpaphuli,* this Court also left the question open "*for another day".*[140]

98 It is not necessary for this Court to decide this issue in this case because the facts clearly illustrate that there was no consent given.

Consent was not established on the Pleadings

99 The SAPS respondents bear the onus to prove consent.[141] They have not discharged this onus. In *Mohamed,* the Constitutional Court recognised that –

> "To be enforceable, however, it [consent] would have to be fully informed consent and one clearly showing that the applicant was aware of the exact nature and extent of the rights being waived in consequence of such consent.

100 The High Court concluded that consent was established on the strength of two averments in the SAPS respondent's answering affidavit. The first is the allegation that the applicant "*did not offer any resistance or protest"*[142] to being handed over to the DHA

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[138] *S v Shaba* and Another 1998 (2) BCLR 220 (T) at 222H – I.

[139] *Mohamed* para 61.

[140] *Lufuno Mphaphuli and Associates (Pty) Ltd v Andrews* 2009 (4) SA 529 (CC) para 216. See also ft 29.

[141] *Mohamed* para 64.

[142] SAPS AA rec (1) 63 para 78.8.

and the second is the allegation that she "*informed all and sundry that she wanted to return to South Africa and her children."*[143]

101 Neither averment establishes clear and unequivocal consent. There is no evidence that the applicant was informed of her rights under the SADC Protocol on Extradition. She was not informed of her right to an extradition hearing where a *prima facie* case would have to be presented by South Africa. She was not informed that she would have the benefit of the principle of double criminality. And she was not informed of her entitlement to the benefit of the rule of speciality.

102 Each of these considerations are relevant to an informed waiver.

103 In extradition proceedings, a waiver of the right to an extradition hearing must be in writing.[144] This affords evidence of a clear and unequivocal waiver. This is clearly not established by the SAPS. There is no evidence regarding: (a) when the consent was given – did the applicant consent before South Africa chartered the plane or after? Did she consent before or after the handover took place? (b) what the consent was for? (c) to whom the consent was made? (d) what information was provided to the applicant prior to her consent? and (e) was the applicant informed of all of the protections available to her in an extradition enquiry?

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[143] SAPS AA rec (1) 64 para 78.9.

[144] *Spagni v the Director of Public Prosecutions, Western Cape* [2023] ZASCA 24 (13 March 2023) para 19. See also CM Bassiouni *International Extradition* (Oxford University Press, 2014) at 926 – 7 and ft 274.

104 As Froneman AJ held in *Wellem:* "*there can be no valid consent without proper knowledge of what is being consented to".*[145]

105 The SAPS place considerable reliance on the judgments of the SCA in *December* and *Mahala* in support of their contention that consent may be provided where the State foregoes extradition proceedings. The High Court too relied on both judgments.[146] It was wrong to do so.

106 *December* and *Mahala* are distinguishable from this case on the facts. In both of those cases the SCA concluded that there was no evidence of unlawfulness on the part of the State when consent was provided.[147] In the present case, the High Court concluded that the respondents acted unlawfully by engaging in a disguised extradition. Accordingly, to the extent that *December* and *Mahala* are applicable, it only applies where there is no prior finding of illegality.

107 The minority judgment of the SCA confirmed that *December* and *Mahala* were distinguishable because "*there* [was] *no finding of illegality"* in those cases.[148]

108 In any event, there is a more fundamental reason why this Court should not follow *December* and *Mahala.* Both cases are clearly wrong. They permit the State to use subversive methods of obtaining the presence of an accused in South Africa without following the process for extradition. Neither the Constitution nor International law permit

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[145] *Wellem* at 30.

[146] High Court Judgment rec (3) 265 para 40.

[147] *December* at 441J: "*Here was no unlawful conduct"; Mahala* at 516.

[148] Minority Judgment rec (4) p 356 para 104.

this. Where South Africa seeks the presence of an alleged fugitive, it is not entitled to send its officials to foreign State to secure the fugitive's consent to returning. This would defeat the objects and purposes of an extradition Treaty and the Extradition Act.

109 It would sanction South African officials exercising their powers beyond the territorial jurisdiction of South Africa, in contravention of customary international law. And it deprives the sought person of their rights under an extradition agreement. The approach in *December* and *Mahala* is inconsistent with *Fick, Glenister* and *Law Society,* which requires South Africa to honour its treaty obligations in good faith and not to subvert those obligations. The only mechanism to return an alleged fugitive is through extradition.

110 And it is because *December* and *Mahala* are inconsistent with the Constitution and International law, that Dugard has called upon the post – Apartheid Courts of South Africa to reject these authorities as "*judicial aberrations"*[149]:

> "The judgment in *December* is characterised by both its ignorance of and disdain for international law…"[150]

> "It is inconceivable that the Appellate Division, even as constituted in *S v December,* would blandly state that there was no infraction of public international law if South African police entered Zimbabwe or the United Kingdom in the manner in which they entered the Ciskei in order to arrest December. In all likelihood the court in both *Mahala* and *December* believed, correctly, that they were not concerned with the exercise of police power in a *real* foreign territory but in a part of South Africa, which for ideological reasons, had been proclaimed

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[149] Dugard above at 323. "*The only solution is for the courts of post – apartheid South Africa to repudiate these decisions as judicial aberrations applicable only to the Bantustan states and not between South Africa and foreign States."*

[150] Dugard above at 326. He explains why at 326 and 327.

'independent'. If this was so, it is unfortunate that the court did not find the courage to say so – particularly as Ciskei's fate was already sealed at the time of *Mahala* and Ciskei had been constitutionally terminated by the time of *December.* If it has done so, the court would have prevented these unfortunate decisions from serving as precedents for the future, in relation to truly independent states. **One hopes that future South African Courts will be attuned to the political circumstances which must, inevitably have influenced the court in *Mahala* and *December* and that they will return to the more enlightened decisions of *S v Ebrahim, S v Wellem* and *S v Buys*".**[151](emphasis added

111 The SCA's minority judgment recognised that it "*harbours serious doubts about the reasoning and conclusions in both cases"* but because the requirements for consent were not established, it was not necessary to consider whether those cases were correctly decided.[152]

112 For all these reasons, the SAPS respondent's consent defence must fail.

VII. CONCLUSION AND REMEDY

113 In the SCA, the SAPS argued that if the Courts conclude that it acted unlawfully, the Court should exercise its power under section 172(1)(b) of the Constitution and craft a remedy that would permit the criminal court to exercise jurisdiction over the applicant. The SAPS correctly did not persist with this argument in oral argument before the SCA.

114 Jurisdiction is a binary concept. A Court either has it, or it does not. The Court cannot create jurisdiction through its equitable remedial powers. This much has been confirmed by this Court in *Social Justice Coalition:*

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[151] Dugard above at 327 – 328.

[152] Minority Judgment rec (4) p 356 para 104.

> "If, as I find, this Court therefore lacks jurisdiction to entertain the application before it, there can be no basis to source its jurisdiction by recourse to a determination that the applicants rights have been infringed and the wide remedial remit of section 172 that gives this Court the power to make an order to cure that infringement. Jurisdiction is a binary concept – a court either enjoys jurisdiction, or it does not. This Court cannot simultaneously lack jurisdiction in terms of section 38 but enjoy jurisdiction under section 172. Section 172 makes this very clear. Its introductory works are these: "[w]hen deciding a constitutional matter *within its power".* This Court must enjoy jurisdiction to decide a matter. If it does, only then may it exercise the remedial power given to it in section 172.The first judgment holds to the proposition that if a remedy is required to make good an infringement of rights, this Court enjoys jurisdiction. That reverse engineering of jurisdiction is not, in my respectful view, a tenable interpretation of the Constitution." [153]

115 The minority judgment of the SCA correctly recognised that once a Court is confronted with unlawful conduct, it is duty – bound to declare it as such. And it also correctly recognised that under *Modderklip,*[154] it was not bound by the formulation of the applicant in its notice of motion.[155]

116 In the circumstances, the applicant submits that the following orders fall to be granted:

1. The appeal is upheld with costs, including costs of two counsel to be paid by the first, second, third, and sixth respondents, jointly and severally, the one paying the others to be absolved.

2. The orders of the High Court and the Supreme Court of Appeal are set aside and replaced with the following:

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[153] *Social Justice Coalition* above 64 para 149.

[154] *Modder East Squatters and Another v Modderklip Boerdery* [2004] 3 All SA 169 (SCA) para 18.

[155] Minority Judgment rec (4) p 360 para 118.

2.1. It is declared that the applicant's hand-over by the Tanzanian authorities to the officials of the South African High Commission in Tanzania and/or the officials of the second and sixth respondents, and the subsequent deportation of the applicant to South Africa, were unlawful;

2.2. It is declared that the fourth respondent, under case number 20A/113/23 as well as the Free State Division of the High Court in criminal proceedings under transferred case number 83/2023 lacks the jurisdiction to try the applicant;

2.3. The fifth respondent is ordered to forthwith release the applicant from the Bizzah Makhate Correctional Centre where she is being held in custody and detention; 4 The first, second, third and sixth respondents are ordered to pay the costs of the application, jointly and severally, the one paying the others to be absolved.'

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11 December 2025