IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CCT Case No:141/32025
SCA Case No: 1196/2023
FB Case No: 2482/2023

In the matter between:

NANDIPHA MAGUDUMANA	Applicant
and	
DIRECTOR OF PUBLIC PROSECUTIONS, FREE STATE	First Respondent
MINISTER OF POLICE	Second Respondent
CAPTAIN FLYMAN	Third Respondent
PRESIDING MAGISTRATE (NO) CASE 20A/113/23 MAGISTRATES COURT, BLOEMFONTEIN	Fourth Respondent
HEAD OF BIZZAH MAKHATE CORRECTIONAL CENTRE:KROONSTAD	Fifth Respondent
MINISTER OF HOME AFFAIRS	Sixth Respondent

SIXTH RESPONDENT'S WRITTEN SUBMISSIONS

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PART I

INTRODUCTION

1. This case is not about disguised extradition. It is about the lawful deportation of an illegal immigrant.

2. The Applicant, a common criminal fugitive, entered the United Republic of Tanzania ("Tanzania") unlawfully in contravention of its immigration laws.[1] The Applicant made two choices:

2.1. First, the Applicant chose to clandestinely exit South Africa.[2]

2.2. Second, the Applicant chose to illegally enter Tanzania.[3]

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1 Record Vol 4, pp325 SCA majority judgment at para 21 and pp346: SCA minority judgment para 74.

2 Notice of Motion to the application for Leave to Appeal dated 30 May 2025 ("NOM LTA").High Court judgment para 11; SCA minority judgment Makgoka JA para 74.

3 Record Vol4, p 346: SCA minority judgment Makgoka JA para 74.

4 R v Brixton Prison (Governor), Ex parte Soblen [1962] 3 All ER 641 at 660 E-F .Lord Denning "*....by international law any country is entitled to expel an alien if his presence is for any reason obnoxious to it; and as incidental to this right, it can arrest him, detain him, and put him on board a ship bound for his own country*. Minister of Home Affairs&others v Watchenuka&another 2004 (4) SA 326 (SCA) para 29 citing with approval in Nishimura Ekiu v The United States (1892) 142 US 651 at 659.

3. Tanzania, like all sovereign nations, has the right to control its borders[4] and expel individuals who do not have legal status to remain in the country.[5] By choosing to enter Tanzania, the Applicant submitted herself to the sovereign authority of Tanzania.[6]

4. Choices have consequences. On 6 April 2023, the Applicant was apprehended in the city of Arusha by the Tanzanian immigration authorities[7] in terms of the Tanzanian Immigration Act (Cap 54 revised edition of 2016) ("the Tanzanian Immigration Act")[8] having entered and remained there without legal documentation.[9] The Applicant was afforded an opportunity to consult with a Tanzanian lawyer.[10] The Applicant was detained at a facility under the control of the Tanzanian Tourist and Diplomatic Police Division.[11]

5. In the exercise of its sovereign discretion, Tanzania issued a notice declaring the Applicant a prohibited immigrant and ordered her to leave

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4 R v Brixton Prison (Governor), Ex parte Soblen [1962] 3 All ER 641 at 660 E-F .Lord Denning "....*by international law any country is entitled to expel an alien if his presence is for any reason obnoxious to it; and as incidental to this right, it can arrest him, detain him, and put him on board a ship bound for his own country*. Minister of Home Affairs&others v Watchenuka&another 2004 (4) SA 326 (SCA) para 29 citing with approval in Nishimura Ekiu v The United States (1892) 142 US 651 at 659.

5 Minister of Home Affairs v Watchenuka 2004 (4) SA 326 (SCA) at para 29 citing with approval Nishimura Ekiu v The United States (1892) 142 US 651 at 659

6 Robert Jennings and A. Watts, Oppenheim's International Law, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 901. "The fact that every state exercises territorial supremacy over all persons on its territory, whether they are its nationals or aliens, excludes the exercise of the power of foreign states over its nationals in the territory of another state."

7 Record Vol 4 pp321 SCA majority judgment para 8 (on 8 April 2023).

8 Record Vol 2: pp 96 at [pp 106] Section 12(1)(p) provides for the removal of all prohibited, unwanted or undesirable immigrants. [pp 108] Section 23(1)h) prohibited immigrant [pp109] Section 25(1) arrest; [pp 110] Section 25(2)(c) allows for the custody and conveying of prohibited immigrants to any place outside Tanzania; [pp111] Section 27(4) lawful custody.

9 Record Vol 4 pp 321 SCA majority judgment para 9

10 Record Vol 3 pp235 at para 54 and pp243 para 87

11 Record Vol 1 AA (SAPS) pp57 at para 55; Record Vol 3 RA pp243 at para 85

Tanzania "*within three days by escort.*"[12] The decision to deport lies within the exclusive jurisdiction of Tanzania subject only to the Tanzanian Immigration Act.

6. Deportation is a unilateral decision, but its execution requires agreement between states. Agreement between the state removing and the state receiving is an established international practice:

"A State may not just conduct an alien to its frontier and push him over without engaging itself in responsibility to the State to which he is thus forcibly expelled. It may, therefore, only deport him to a country willing to receive him, or to his national country."[13]

7. The state of origin is the most convenient option for deportation. As the court stated in *United States ex rel. Hudak v. Uhl:*[14]

"*That the sovereign may deport the alien to the country of his nativity and of which he is presumably a citizen cannot be questioned. Such power is limited only by the power of the native sovereignty to refuse to receive the alien if it so chooses.*"[15]

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12 Record Vol 2 pp173 (on 12 April 2023)

13 International Law Commission Sixty-second session Geneva, 3 May-4 June and 5 July-6 August 2010 Sixth report on the expulsions of aliens Submitted by Mr. Maurice Kamto, Special Rapporteur Addendum citing D. P. O'Connell, op. cit., p. 710.

14 United States Ex Rel. Hudak v UHL District Director of Immigration, 20 F. Supp. 928 (1937) District Court, N. D. New York September 1, 1937

15 United States Ex Rel. Hudak v UHL District Director of Immigration, 20 F. Supp. 928 (1937) District Court, N. D. New York September 1, 1937 at

8. Without agreement from South Africa, deportation cannot be implemented. Tanzania informed South Africa that the Applicant had been apprehended.[16] The Tanzanian immigration authorities required confirmation of her identity and nationality.[17] On 9 April 2023, the Applicant was verified as a South African citizen.[18]

9. South African citizens have a right to enter the Republic in terms of section 21(3) of the Constitution, 1996.[19] This right arises once identity and nationality have been established.[20] Agreement to accept return of a citizen, is a constitutional mandate.[21]

10. The primary consideration is, the Applicant's unlawful presence in Tanzania in contravention of its immigration laws. The Applicant was not arrested as a fugitive for her crimes in South Africa. Her status as a fugitive does not displace the operation of Tanzanian immigration laws.

11. Deportation in pursuit of a legitimate immigration objective is permissible regardless of whether the illegal person is also a fugitive. In *Kissel v Attorney-General of Canada*[22] the court explained:

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16 on 8 April 2023); Record Vol 1 FA pp8 at para 8

17 Record Vol 4 pp 321 SCA majority judgment para 9

18 Record Vol 4 pp 321 SCA majority judgment para 10

19 Section 21(3) Constitution: Freedom of movement and residence

20 Section 3(3) Constitution: Citizenship

21 Section 21(3) of the Constitution of the Republic of South Africa, 1996 provides that "Every citizen has the right to enter, to remain in and to reside anywhere in the Republic.".

22 Kissel v Attorney-General of Canada 2006 CANLII 47314 (ON SC) at pg 47 para 152

"Second, cooperation and communication between Canadian and American authorities with respect to a certain individual who is sought for prosecution in the United States also does not, by itself, suggest bad faith or improper motive. Indeed such communication and cooperation is necessary in order for Canadian authorities to successfully pursue the objectives of Canadian immigration law."

12. Tanzania is not obliged to retain an illegal immigrant and require South Africa to make a request for her extradition simply because she is also a fugitive.[23]

13. Tanzania's sovereign power to deport an illegal immigrant within its territorial jurisdiction is not affected by the action or inaction of South Africa in instituting an extradition request.[24] The notable authority is *R v Brixton Prison (Governor), Ex parte Soblen*[25] where the court stated:

"Are we to keep him here against our will simply because he is in his country a wanted man? Clearly not. If a fugitive criminal is here and the Secretary of State thinks that in the public good he ought to be deported, there is no reason why he should not be deported to his own country, even though he is there a wanted criminal."[26]

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23 Hogan v. R., 1976 CanLII 158 (SCC), [1977] 1 SCR 413

24 R v Brixton Prison (Governor), Ex parte Soblen [1962] 3 All ER 641 at 661 A-B

25 R v Brixton Prison (Governor), Ex parte Soblen [1962] 3 All ER 641 at 301

26 Ibid pg 301

14. Fugitives have no constitutional right to demand to be extradited. The state may consider itself fortunate to be rid of such criminal nationals. Extradition is a sovereign mechanism available to states, not an entitlement conferred upon individual fugitives.[27] As this Court has recently clarified in *Director of Public Prosecutions, Johannesburg and Another v Schultz*[28] the authority to issue an outgoing extradition request vests solely with the South African national Executive.[29]

15. South Africa did not make an extradition request to Tanzania.[30] It did not do so because Tanzania, in the exercise of its sovereign discretion, elected to deport the Applicant. The Applicant concedes that South Africa informed Tanzania that any decision to extradite "*would depend on any decision taken by the Government of Tanzania.*"[31] As the court held in *Halm v Canada (Minister of Employment and Immigration)*[32]

"*I see nothing inherently unfair in a foreign state delaying extradition proceedings when it is known that the individual in question is likely to be deported in any event.*"

16. Against this legal and factual background, the majority judgment of the

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27 Mohamed and Another v President of RSA and another 2001 (3) SA 893 (CC) at para 29–3 elements for extradition: acts of sovereignty, request for alleged criminal and delivery.

28 Director of Public Prosecutions, Johannesburg and Another v Schultz and Others; Director of Public Prosecutions, Bloemfontein v Cholota [2026] ZACC 3

29 Director of Public Prosecutions, Johannesburg and Another v Schultz and Others; Director of Public Prosecutions, Bloemfontein v Cholota [2026] ZACC 3 at para 84

30 Record Vol 1 SAPS AA pp 57 para 53; Record Vol 2 DHA AA pp

31 Record Vol 4 FA pp296 at para 32-33

32 Halm v Canada (Minister of Employment and Immigration) (1995) 91 F.T.R 106 (TD)

Supreme Court of Appeal per Justices Zondi DP (Kathree-Setiloane JA; Gorven JA and Molopa-Sethosa AJJA concurring) correctly dismissed the appeal ("SCA majority judgment").[33] The SCA majority judgment held that the Applicant:

16.1. Failed to discharge the onus proving that she had been apprehended and arrested and/or abducted by the Second Respondent, the Minister of Police ("SAPS") in Tanzania.[34]

16.2. Failed to amend her notice of motion and her founding affidavit to include relief against the Sixth Respondent, the Minister of Home Affairs ("DHA")[35] which relief, raised for the first time on appeal without formal application or *audi alteram* partem, did not invoke the court's discretionary permission.[36]

16.3. Found it unnecessary to consider the applicability of the law relating to disguised extradition as the Applicant failed to make out a case that SAPS arrested the Applicant in Tanzania and were involved in forcing her to board the aircraft and return to South Africa.[37] No relief was competent against the DHA.[38]

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33 Record Vol 4 pp317

34 Record Vol 4 SCA majority judgment pp325 paras 19-22

35 Record Vol 4 SCA majority judgment at pp331-331 at para32

36 Record Vol 4 SCA majority judgment at pp332 at para 33

37 Record Vol 4 SCA majority judgment pp336 at para 39-41.

38 Record Vol 4 SCA majority judgment pp336 at para 39-41.

17. The minority judgment of Makgoka JA ("SCA minority judgment")[39] held that:

17.1. Although the Applicant was lawfully arrested and detained by Tanzanian authorities because she was illegally in Tanzania,[40] extradition is the legal mechanism for the return of an illegal fugitive.[41]

17.2. The agreement between Tanzania and South Africa to hand-over the Applicant and her subsequent detention and transportation by the South African authorities was unlawful[42] and a disguised extradition.[43]

18. In this Court, the Applicant seeks relief premised on the reasoning of the SCA minority judgment. The Applicant contends that her "*hand-over*" by the Tanzanian Ministry of Home Affairs to the South African High Commission and/or the officials of the SAPS and DHA, by "*agreement*", and her subsequent deportation to South Africa formed part of a disguised extradition.

19. Where a foreign State independently exercised its immigration powers and deport to the state of origin notwithstanding knowledge that criminal

39 Record Vol 4 SCA minority judgment pp336.
40 Record Vol 4 p SCA minority judgment p346 para 74.6
41 Record Vol 4 SCA minority judgment pp346 para 74
42 Record Vol 4 SCA minority judgment pp359 para 114
43 Record Vol 4 SCA minority judgment pp360 para 119

proceedings may follow, agreement to receive its expelled national, is not collusion.

20. International law distinguishes between the hand-over of a person in deportation proceedings and the hand-over of jurisdiction in extradition proceedings; only the latter engages disguised extradition principles.

21. Agreement to receive the Applicant in terms of deportation procedures (hand-over of person) is not the same as an agreement to surrender an extradited individual (hand-over of jurisdiction). The "hand-over" of a deportee is, in law, no more than acceptance of a citizen following deportation. The Applicant conflates agreement to receive a deportee with agreement to surrender an extraditee.

22. Agreement to accept the hand-over of a citizen in the facilitation of deportation, is not evidence of collusion required for a disguised extradition.[44] The Applicant's obfuscation of the terminology does not alter the underlying lawful character of the process.

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44 Guy S. Goodwin-Gill, International Law and the Movement of Persons between States, Oxford, Clarendon Press, 1978, p. 201c The duty of a State to receive its nationals expelled from another State has been described as the corollary of the 'right' of expulsion

ORIENTATION

23. Our submissions are structured as follows:

23.1. In **PART II** we briefly set out the evolution of the relief sought by the Applicant as this matter progressed, we examine the current relief before this court and set out the issues for determination

23.2. In **PART III** and examine the SCA majority judgment and demonstrate the correctness of the findings.

23.3. In **PART IV**we deal with the SCA minority judgment and investigate the misconstruction in order to demonstrate that there is no factual or legal basis for the Applicant's reliance on disguised extradition.

23.4. In **PART V** we address the interests of justice and conclude that leave to appeal should be refused.

PART II

EVOLUTION OF RELIEF

24. The Applicant's relief has evolved as the proceedings progressed. Each reformulation is directed at circumventing the difficulty identified at the preceding stage.

25. In her initial application in the Free State division of the High Court, the Applicant sought an order, *inter alia,* declaring that her apprehension, arrest and abduction in Tanzania on or about 7 April 2023 and subsequent transportation to South Africa and purported arrest and detention pursuant thereto, were wrongful and unlawful.[45]

26. The Applicant's case was that she was neither deported nor extradited,[46] but was forcefully apprehended, arrested and abducted by the SAPS in Tanzania.[47] Best captured in her own words:

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45 Record Vol 1 NOM pp 1-3 at pp2 prayer 2

46 Record Vol 1, FA pp11 at para 14 ""

47 Record Vol 1, FA pp12 at para 17

"I can with certainty say that I have not been found by any Court in Tanzania to be an illegal immigrant, nor have I been deported by such Court to South Africa."[48]

27. The Applicant's Notice of Motion did not seek any relief against the Minister of Home Affairs ("DHA"). The DHA was granted leave to intervene. The Notice of Motion was not and has not been amended to include relief against the DHA.

28. Loubser J[49] held that the decision to deport was taken by the Tanzanian immigration authorities "*and nobody else*."[50] Loubser J found that the handing over of the Applicant constituted an extradition without process and not a deportation.[51] Loubser J concluded that, because the Applicant had acquiesced to her transportation back to South Africa, thereby giving informed and enforceable consent, her removal was lawful. Loubser J dismissed the application with costs.[52]

29. On leave to appeal, the Applicant contended that consent may not be given

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48 Record Vol 1, FA pp12 at para 17

49 Record Vol 4 High Court judgment pp373 para 29 Loubser J identified two questions for determination Whether there was evidence that the South African officials colluded with Tanzanian officials or had made an agreement with them to deport the Applicant in circumstances where extradition proceedings were available for her surrender to South Africa; Whether there was a handing over by Tanzania to South Africa of the Applicant with a purpose of enabling South Africa to deal with her in accordance with the provisions of South African law (which would point to extradition without process, not deportation)

50 Record Vol 4 High Court judgment at pp375 para 33

51 Record Vol 4 High Court judgment pp377 para 38; Record Vol 3 LTA High Court judgment pp268 para 5

52 Record Vol 4: pp 363-379; p 254, High Court Order dated 5 June 2023.

to unconstitutional conduct and sought an order *inter alia* declaring the conduct of the SAPS and/or the DHA to be unconstitutional.[53]

30. Loubser J refused leave to appeal[54] on the grounds that the issue he was required to determine concerned the alleged conduct of the SAPS in Tanzania[55] not the constitutionality of the DHA's conduct which the Applicant raised in reply.[56] He pointed out that the Applicant had not amended her Notice of Motion to include any constitutional relief against the DHA.[57]

31. In the Supreme Court of Appeal, the Applicant sought relief declaring that her apprehension and arrest in Tanzania by officials of the Second Respondent (SAPS) and Sixth Respondent (DHA) and her subsequent forced return to South Africa, were inconsistent with the Constitution and unlawful.[58]

32. In this application for leave to appeal, the Applicant seeks relief that:

"*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 SAPS and sixth respondents, and the subsequent deportation*

53 Record Vol 3 High Court LTA judgment pp266 at pg268 para6
54 Record Vol 3 High Court LTA judgment pp266 at pg270 para11
55 Record Vol 3 High Court LTA judgment pp266 at pg269 para7
56 Record Vol 3 High Court LTA judgment pp266 at pg269 para7
57 Record Vol 3 High Court LTA judgment pp266 at pg269 para7
58 Record Vol 3 Notice of Appeal pp275 at pp 276 para 2.1

of the applicant to South Africa, were unconstitutional and unlawful."[59]

(Emphasis added)

33. The relief sought is premised on a case that was not pleaded. The Applicant did not challenge Tanzania's decision to deport. The Applicant challenges the agreement to receive her made in consequence of the implementation of the deportation order. The Applicant challenges her hand-over pursuant to her expulsion, constituted a disguised extradition.

34. The DHA, an intervening party against whom no relief was sought, was not called upon to address such a case. Factual issues must be raised, ventilated and determined in a court of first instance and must be decided by that court before being raised in a court of appeal.[60] The consequence is decisive. The DHA is denied the opportunity to adduce evidence, address the factual basis of the allegation, and make submissions directed at this theory of liability.

35. To determine the appeal on this basis would infringe the requirements of procedural fairness entrenched in section 34 of the Constitution and results in manifest prejudice.

NEW RELIEF NOT COMPETENT

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59 Record Vol 4 pp283 NOM LTA prayer 2.2.1

60 Moroka v Premier of the Free State Province and Others(295/20) (2022) ZASCA 34 (31 March 2022) paras 8 and 36.

36. Quite apart from the procedural defects, factual and legal foundation for the the Applicant's constitutional relief, in whatever mutated format, is flawed for three main reasons:

36.1. First: Illegal fugitive citizens have no constitutional right not be deported by a foreign state.

36.2. Second: the relief sought in the Notice of Motion concerned the alleged conduct of the SAPS in Tanzania[61] not the constitutionality of the DHA's conduct raised in reply.[62] Loubser J concluded that there was no evidence of the SAPS involvement in the Applicant's alleged unlawful apprehension, arrest or abduction in Tanzania and made an *obiter* finding of disguised extradition. The Notice of Motion is not amended.

36.3. Third: Disguised extradition is determined on the facts. The Applicant does not challenge Tanzania's decision to declare her a prohibited immigrant and to initiate the deportation process. There is no evidence of any bilateral extradition process, no breach of any known treaty obligation or international protocol. Agreement to accept return of a fugitive does not convert deportation into disguised extradition.

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61 Record Vol 3 High Court LTA judgment pp266 at pg269 para7

62 Record Vol 3 High Court LTA judgment pp266 at pg269 para7

ISSUES FOR DETERMINATION

37. The issues are confined to:

37.1. Whether the SCA majority judgment correctly held that the Applicant failed to identify and establish the involvement of the SAPS in her apprehension, arrest and/or abduction in Tanzania;

37.2. Whether the SCA majority judgment correctly held that no relief was pleaded against the DHA and in the absence of *audi alteram partem*, no relief was competent;

37.3. Whether the SCA majority correctly declined to consider disguised extradition.

37.4. Only in the event that this Court is inclined to entertain the Applicant's reformulated relief based on the minority judgment that her *hand over by agreement* is a disguised extradition, then the following further questions arise:

37.4.1. Whether the agreement between Tanzania and South Africa facilitating her deportation constitutes connivance or "collusion" necessary to sustain a claim for disguised extradition.

37.4.2. Whether the Applicant's hand-over by the Tanzanian authorities pursuant to the deportation proceedings constitutes an unlawful arrest, apprehension or abduction by SAPS or the DHA in violation of Tanzanian sovereignty necessary to sustain a claim for disguised extradition.

38. We submit that the SCA majority judgment is correct and this application must be dismissed, for the reasons set out hereunder.

PART III

MAJORITY CORRECT: APPLICANT FAILED ESTABLISH IDENTITY OF PARTY ACTING UNLAWFULLY

39. The Applicant claims that the mere allegation of unlawful arrest and detention by the SAPS in Tanzania suffices to shift the onus to the Respondents.[63]

40. The SCA majority recognized that the central issue was the identity of the parties alleged to have unlawfully apprehended, arrested, abducted or involved in the Applicant's forced return to South Africa.[64]

41. The Applicant sought final relief in motion proceedings and is thus bound by the principles in *Plascon-Evans v Van Riebeeck Paints (Pty) Ltd.*[65] The SCA majority judgment held that on the SAPS version, the Applicant was lawfully arrested by Tanzanian authorities for violating its immigration laws.[66]

42. We submit that the reasoning of the SCA majority should prevail that the Applicant failed to establish the identity of the party acting unlawfully insofar

63 Record Vol 4 SCA Majority judgment pp325 at para 21; Record Vol LTA FA pppara 51.13

64 Record Vol 4 SCA majority judgment pp 325 para 19

65 Plascon-Evans v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 AT 634E-635C

66 Record Vol 4 SCA Majority judgment pp325 at para 21; pp346: SCA minority judgment para 74.

as she failed to establish that she was arrested and/or abducted in Tanzania by members of the SAPS and in terms of the principles set out in *Zealand and Mahlangu supra,* failed to shift the onus.[67]

43. More critically, the SCA majority judgment correctly concluded that the Applicant failed to establish a causal nexus between the SAPS's involvement in her arrest or removal from Tanzania:

43.1. The Applicant was arrested at Lanseria airport by members of the SAPS investigating the case and not by those members of the SAPS who formed part of the South African delegation to Tanzania.[68]

43.2. The SAPS did not take any action against the Applicant until her arrest at Lanseria airport.[69]

43.3. The Applicant did not attack the lawfulness of her arrest at Lanseria airport.[70]

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67 Record Vol 4 SCA majority judgment pp325 para 19

68 SCA majority judgment para 21

69 SCA majority judgment para 21

70 SCA majority judgment para 21

71 Zealand v Minister Justice Constitutional Development& another 2008 (2) SACR 1 (CC)

44. The SCA majority judgment examined the decisions in *Zealand v Minister for Justice and Constitutional Development*[71] and *Mahlangu and another v Minister of Police*[72] and stated:

"[19J It is clear from Zealand and Mahlangu that the onus shifts only once the identity of the party alleged to have acted unlawfully has been established."[73]

45. We submit that the SCA majority judgment correctly determined the factual disputes in favour of the SAPS and held that the Applicant failed to establish that that she was arrested by the SAPS in Tanzania.[74]

46. The SCA majority judgment correctly accepted the DHA's evidence that members of the SAPS accompanied the Home Affairs delegation only to provide protection, not to effect an arrest.[75] The Applicant does not dispute the security concerns or the legitimacy of requiring protection.[76]

47. We submit that the SCA majority judgment correctly applied the principle set out in *Zealand v Minister for Justice and Constitutional Development*[77] and *Mahlangu v Minister of Police*[78] that the onus only shifts once the identity of

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71 Zealand v Minister Justice Constitutional Development& another 2008 (2) SACR 1 (CC)
72 Mahlangu and another v Minister of Police [2021] ZACC 10
73 Record Vol 4 SCA majority judgment pp325 para 19
74 Record Vol 4 SCA Majority judgment pp336 at para 41
75 Record Vol 4 SCA majority judgment pp326 para 22
76 Record Vol 4 SCA majority judgment pp326 para 22
77 Zealand v Minister for Justice and Constitutional Development 2008 (2) SACR 1 (CC)
78 Mahlangu v Minister of Police [2021] ZACC 10

the party alleged to have acted unlawfully is established.[79]

MAJORITY CORRECT: RELIEF NOT COMPETENT AGAINST DHA

48. The SCA majority judgment correctly found that relief against the DHA is not competent in the absence of amendment to the pleadings.[80]

49. The SCA majority judgment correctly held that the Applicant's failure to amend her Notice of Motion to include relief against the DHA was fatal.[81] The SCA majority judgment correctly relied on *Zealand v Minister for Justice and Constitutional Development*[82] that the Applicant failed to shift the onus as the allegations against the DHA appear for the first time in the replying affidavit.[83]

50. The SCA majority judgment correctly held that the DHA's right to respond in terms of the *audi alteram partem* principle was compromised, and in the light of the avowed intent of the Applicant to proceed only against the initial five Respondents, the DHA would be prejudiced if relief were to be granted

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79 Record Vol 4 SCA majority judgment at pp325 at para19

80 Record Vol 4 SCA majority judgment pp328 para 27 "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 unconstitutional and unlawful"

81 Record Vol 4 SCA majority judgment at pp331-331 at para32

82 Zealand v Minister for Justice and Constitutional Development 2008 (2) SACR 1 (CC)

83 Record Vol 4 pp332: SCA majority judgment para 32

when this was not foreshadowed and in the absence of a formal application to amend even on appeal.

51. The SCA majority judgment pointed out that:

51.1. The application was issued on 19 May 2023.[84] The application cited only the First to Fifth Respondents.[85]

51.2. The cause of action was based on allegations that members of the SAPS allegedly apprehended, arrested and abducted the Applicant in Tanzania.[86]

51.3. The Applicant's attorneys of record stated in correspondence that they did not seek any relief against the Department of Home Affairs; and saw no need the for the Department to be joined as a Respondent.[87]

51.4. The DHA made application to join on 26 May 2023 and answering affidavits were delivered in due course.[88] The answering affidavit was provided to assist the SAPS as no relief was sought against the DHA.

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84 Record Vol 4 SCA majority judgment pp326 para 23
85 Record Vol 4 SCA majority judgment pp326 para 23
86 Record Vol 4 SCA majority judgment pp326 para 23
87 Record Vol 4 SCA majority judgment pp327 para 24
88 Record Vol 4 SCA majority judgment pp327 para 26

51.5. The High Court proceeded only on the relief sought against the five Respondents cited in the original application.[89]

51.6. On appeal, in her heads of argument, the Applicant sought relief that officials of DHA were involved in the Applicant's apprehension and arrest in Tanzania and her subsequent "forced return" and this is inconsistent with the Constitution, unlawful and invalid. [90]

51.7. No application was brought to amend the notice of motion to include any relief against the DHA.

52. The SCA majority judgment concluded that relief, involving a direct and substantial interest, could not be granted without affording the DHA the opportunity to be heard in accordance with *audi alteram partum*.

53. The SCA majority approach was legally sound and consistent with binding authority insofar as the Applicant failed to amend her relief to include the DHA,[91] failed to make out a case against the DHA in her founding affidavit[92] and no relief was competent against the DHA.[93]

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89 Record Vol 4 SCA majority judgment pp328 para 27
90 Record Vol 4 SCA majority judgment pp328 para 27
91 Record Vol 4 SCA majority judgment pp328 para 27
92 Record Vol 4 SCA majority judgment pp326 para 23
93 Record Vol 4 SCA majority judgment pp330 para 30

MAJORITY CORRECT: NOT CONSIDER DISGUISED EXTRADITION

54. The SCA majority correctly held that disguised extradition was not a consideration as the Applicant failed to establish any alleged unlawful actions on the part of South African officials in Tanzania.[94]

55. The SCA majority judgment correctly declined to consider the law pertaining to disguised extraditions on the basis that the Applicant's case was that the SAPS had arrested her in Tanzania and forced her to return to South Africa and no relief against the DHA is competent.[95]

56. Absent proof of South African officials having orchestrated the Applicant's arrest or requested the removal of the Applicant for the purpose of prosecution prior to her arrest (which is necessary to ground a claim of disguised extradition), the relief sought cannot be sustained.

57. The SCA majority judgment did not make pronouncements on the alleged disguised extradition given that the Applicant failed to identify the involvement of the SAPS in her arrest as an illegal immigrant in Tanzania or make out a case which the DHA was obliged to meet.[96]

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94 Record Vol 4 SCA majority judgment pp335 para 39

95 Record Vol 4 SCA Majority judgment pp336 at para 39

96 SCA majority judgment para 32

PART IV

MINORITY MISCONSTRUCTION

58. The misdirection in the SCA minority judgment stems from an assumption that fugitives can only be lawfully returned through extradition. This is misdirection appears from the following extract:

> "*As I demonstrate in this judgment, the Department of Home Affairs engaged in an unlawful extradition by deporting the appellant to South Africa without following the extradition process. It is this conduct that must be declared unlawful and invalid to the extent of its inconsistency with the Constitution.*"[97]

59. As a result, the minority judgment gives insufficient weight to the fact that the Applicant entered Tanzania illegally, was declared a prohibited immigrant and deported. Consequently, the minority judgment embarks on a micromanaged consideration of a hypothetical process:

> "[*46] ...I am of the view that despite not having been arrested by the SAPS, consideration should also be given to the lawfulness of:*

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97 Record Vol 4 Minority judgment pp337 para 47

(a) the handing over of the appellant by the Tanzanian authorities to the South African authorities;

(b) the South African authorities detention of the appellant upon such hand-over; and

(c) the transportation of the appellant back to South Africa where she was arrested upon arrival and subsequently prosecuted."

60. The minority judgment overlooks the core constitutional principle of factual proof. There is no factual foundation on which to infer that the DHA acted unlawfully or colluded to bypass extradition mechanisms. The facts show administrative compliance and cooperation, not subterfuge or deceit. We say this with reference to the facts as well as the law.

61. In the section hereunder, we demonstrate that the minority judgment, however well-intentioned, ventures beyond the pleadings, conflates deportation with extradition, and undermines established principles of international comity and judicial deference.

HANDING OVER BY TANZANIA TO SOUTH AFRICA

62. A sovereign state such as Tanzania cannot be precluded from taking steps to deport any individual who has transgressed its immigration laws. There

was no ulterior purpose in the Applicant's arrest and deportation. The purpose was to deport the Applicant to South Africa because she was an illegal immigrant.

63. As this Court has recently clarified in *Director of Public Prosecutions, Johannesburg and Another v Schultz*[98] the authority to issue an outgoing extradition request vests solely with the South African national Executive.[99]

64. A *hand-over by agreement* between the Tanzanian authorities and the South African officials is not evidence of collusion and does not transform lawful deportation into disguised extradition in breach of the Constitution and international law conventions. International and comparative jurisprudence condemns abduction, deception, or territorial infringement; not lawful cooperation and agreement between sovereign states acting within their respective powers.[100]

65. As the Canadian court stated in B*embenek v Canada (Minister of Employment and Immigration)*:[101]

"*Disguised extradition is typically established when the evidence is not strong enough for extradition and the authorities of both countries collude*

98 *Director of Public Prosecutions, Johannesburg and Another v Schultz and Others; Director of Public Prosecutions, Bloemfontein v Cholota* [2026] ZACC 3

99 Ibid at para 84

100 Minister of Information, Immigration and Tourism v Mackeson 1980 (2) SA 747 at 752A-B

101 Bembenek v Canada (Minister of Employment and Immigration 1991 CANLII 11763 (ON SC) at pg 49C-H

together through deportation to achieve indirectly what they could not achieve through extradition. That is not this case. The applicant has not established here that the case for extradition is so weak that the authorities decided to launch immigration proceedings for the improper purpose of a groundless extradition.

Although the applicant has not established the typical case of disguised extradition, it is asserted that the evidence shows that the immigration officials did bring the immigration proceedings as a disguised form of extradition. That is an allegation of bad faith. The applicant bears a heavy onus to show bad faith. The applicant must go so far as to show that the immigration proceedings are a sham."

66. Other than the Applicant's unsubstantiated allegations, there is no objective evidence that South African officials procured or orchestrated the Applicant's arrest for contravention of Tanzanian immigration laws.

LAWFULNESS OF THE HANDING OVER OF THE BY THE TANZANIAN AUTHORITIES TO THE SOUTH AFRICAN AUTHORITIES

67. The Tanzanian immigration authorities issued a Notice of Prohibited Immigrant ("the Notice of Prohibited Immigrant"),[102] and facilitated the Applicant's deportation to South Africa, her country of origin.

68. The Notice of Prohibited Immigrant constitutes *prima facie* evidence of a valid issuance under the Tanzanian Immigration Act.[103] The Notice of Prohibited Immigrant is the legal basis for the Applicant's removal, escort and return to South Africa. The Notice of Prohibited Immigrant:

68.1. Declared the Applicant a prohibited immigrant in Tanzania.

68.2. Declared the Applicant's presence in Tanzania, unlawful; and

68.3. Ordered the Applicant to leave Tanzania within three days by "*escort*".

69. Tanzania, as the deporting state is entitled to choose the destination to which they will deport the Applicant. The state of origin is the most convenient option

102 Record Vol 1, pp 81: Notice to prohibited immigrant dated 12 April 2023.

103 R v Brixton Prison (Governor), Ex parte Soblen [1962] 3 All ER 641 at 660-661 This court cannot inquire into the legality of actions taken by Tanzania in the exercise of its sovereign powers

for deportation. That Tanzania may deport an illegal prohibited immigrant to the country of her origin and of which she is a citizen cannot be questioned.

70. As Lord Bingham CJ explained in *R v Staines Magistrates Court and others, ex parte Westfallen:*[104]

"It was indeed a natural step for Norway to send the applicants back to where they had come from. There is in the material before us nothing to suggest that the British authorities procured or influenced that decision. It is true that they did not in any way resist it, and there is no reason why they should have resisted it. It is very probable that they welcomed the decision, but in my judgment they would have been failing in their duty as law enforcement agencies if they had not welcomed it. In my judgment there is nothing to suggest any impropriety such as would attract application of the ratio in Bennett v Horseferry Road Magistrates' Court (1993) 3 ALL ER 138, (1994) 1 AC 42 in this case." (Emphasis added)

71. The Tanzanian immigration authorities delineated South Africa, the Applicant's country of origin for her deportation. There is no evidence that South Africa influenced the Tanzanian immigration authority's decision regarding the Applicant's destination. The court of first instance, per Loubser J mentioned that the issue regarding the Applicant's choice of destination was

104 R v Staines Magistrates Court and others, ex parte Westfallen, R v Staines Magistrates Court and others, ex parte Soper, R v Swindon Magistrates Court and others ex parte Nangle (1998) 4 All ER 216 QBD

within the jurisdiction of the courts in Tanzania.[105] South Africa's role was reactive, not instigative.

72. There is no evidence of an ulterior purpose as the decision to return the Applicant to South Africa was a decision of the Tanzanian immigration authorities acting within sovereign powers.

73. The Applicant incorrectly assumes that a person subject to deportation is entitled to select her destination. This arises from a misunderstanding of immigration law. Provided there is no risk of refoulment or persecution in the receiving country, advised that the Applicant has no right to choose her destination. This principle was confirmed by the Supreme Court of Ireland in *P(D) v Governor of the Training Unit & Ors:*[106]:

"*There remains then the submission by Dr. Forde that the deportation was also invalid, in that he was being brought to Romania and that he should be deported to a country of his choice. That is, I am satisfied, is a total misconception of the process of deportation. The deporting State, are entitled to choose the destination to which they will deport the applicant. They must, of course, be in a position from their point of view to ensure that they can effect his entry into the country to which they decide to deport him because otherwise it would simply involve them in difficulty and further expense. They are perfectly entitled to make an election. In this case they made a very*

105 Record Vol 4 High Court judgment at pp375 para 34

106 P(D) v Governor of the Training Unit & Ors [2001] IESC 113 (28 November 2001)

obvious election to return him to the country of origin, the country from which he had come. I am satisfied that was perfectly within their competence as the deporting State, if I can so describe them and I am satisfied that that ground also fails." (Emphasis added)

74. There is nothing untoward in South Africa receiving its deported citizen in compliance with its constitutional and international obligations.

SOUTH AFRICAN AUTHORITIES' DETENTION OF THE APPELLANT UPON SUCH HAND-OVER

75. Section 25(2)(c) of the Tanzanian Immigration Act states that the Applicant may "*be placed in custody until he boards a ship or aircraft or obtains any other means of transport conveying him to any place outside Tanzania.*"

76. The words "*until he boards a ship or aircraft...*" (albeit in English legislation) have been interpreted to mean that the sovereign state, is empowered to choose the ship or aircraft and determine the prohibited immigrant's destination.[107]

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107 Mohamed and Another v President of RSA and another 2001 (3) SA 893 (CC) at para 31 regarding the interpretation of UK Aliens Order 1953 with similar wording:
Removal of aliens subject to deportation orders 21. (1) An alien in whose case a deportation order has been made may be placed, under the authority of the Secretary of State, on board any ship or aircraft which is about to leave the United Kingdom; and the master of the ship or commander of the aircraft shall, if so required oy an immigration officer, take such steps as may be necessary for preventing the alien from landing from the ship or aircraft before it leaves the United Kingdom, and may for that purpose detain the alien in custody on board the ship or aircraft"

77. The Tanzanian authorities, acting within their sovereign immigration powers, arranged for her escort out of Tanzania by means of handing her over to South African immigration officials.

78. Although officials of the South African High Commission in Tanzania assisted and the SAPS and DHA escorted the Applicant, she remained in Tanzania's legal and physical control until she exited its sovereign territory. In other words, execution of the deportation order is only complete once the aircraft has departed Tanzanian airspace and the Applicant has been removed from Tanzania.

79. The Tanzanian authority's handover of the Applicant to the South African officials is in accordance with the Tanzanian Immigration Act, to give effect to her deportation.

80. The Notice of Prohibited Immigrant ordered the Applicant to leave by "*escort*". The Tanzanian Immigration Act does not specify the precise nature of the removal, hence a wide discretion regarding the "*escort*" is permissible.

81. Section 12(1)(l) of the Tanzanian Immigration Act enjoins its immigration officials to combat illegal immigration by cooperating with immigration departments of other countries and international organizations.

82. Since a removal by escort requires facilitated and monitored accompaniment to destination, it makes imminent sense for the Tanzanian Immigration officials to have liaised with their South African counterparts to assist with the Applicant's "escort" out of Tanzania.

83. There is no evidence of an ulterior purpose or that the DHA was involved or influenced the manner in which the Applicant was handed over by the Tanzanian authorities to the officials of the South African High Commission in Tanzania and thereafter to the officials of DHA (protected by the SAPS Respondent).

84. A case in point is *Ocalan v Turkey*[108] where the European Court of Human Rights stated:

"*Independently of the question whether the arrest amounts to a violation of the law of the state in which the fugitive has taken refuge- it must be established to the court 'beyond reasonable doubt' that the authorities of the state to which the applicant has been transferred have acted extra-territorially in a manner that is inconsistent with the sovereignty of the host state and therefore contrary to international law." (See mutatis mutandis, Stocke v Germany (App No 11755/85 12 October 1989 report of the Commission at paragraph 54)"*

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108 Ocalan v Turkey Ect HR APP No 46221/99 (at p. 325 par 92

85. The Applicant was lawfully arrested and detained by the Tanzanian authorities, acting within their sovereign powers, for violating immigration laws following which she was declared a prohibited immigrant and was ordered to be escorted out of Tanzania. She was escorted from Tanzania by South African immigration officials and lawfully arrested by members of the investigating team of the SAPS upon arrival at Lanseria Airport.

86. Accordingly, the Applicant's escort was executed pursuant to the sovereign decision of Tanzania acting under its immigration laws, and not as a result of any clandestine extradition arrangement initiated by the SAPS or the DHA.

INTERNATIONAL COMITY BETWEEN STATES AGREEMENT

87. Section 12(1)(I) of the Tanzanian Immigration Act provides that one of the general duties and responsibilities of immigration officers shall be to:

"*combat illegal immigrant by cooperating with immigration departments of other countries and international organisations that deals with immigration matters.*"

88. The Tanzanian immigration authorities made contact with the DHA as their immigration counterpart in order to reach an agreement on the practicalities relating to the Applicant's deportation.

89. South Africa officials were present at the invitation of Tanzania immigration officials exercising powers in accordance with the Tanzanian Immigration Act. Compliance with sovereign legislation is not evidence of collusion. Agreement with Tanzanian immigration officials regarding the practical facilitation of the Applicant's hand over, escort and return to South Africa, is not subterfuge.

90. In addition, both Tanzania and South Africa have ratified the Vienna Convention on Diplomatic Relations, 1961 which provides for cooperation between states and aims to promote friendly relations.[109]

91. The Applicant seeks to convert legitimate intergovernmental cooperation into unlawful collusion. This contention is legally unsustainable. Practical cooperation between states does not render a lawful deportation unlawful, nor does it transform deportation into extradition.

92. There is no evidence that prior to the Applicant's arrest:

92.1. South Africa had knowledge of her whereabouts and entry as an illegal immigrant in Tanzania;

92.2. South Africa requested Tanzania to arrest the Applicant; or

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109 Vienna Convention on Diplomatic Relations, 1961 Article 3

92.3. South Africa demanded her return to South Africa.

93. After being informed of the Tanzanian decision to deport, South Africa agreed to accept the return of the Applicant.

TRANSPORT BACK TO SOUTH AFRICA

94. Deportation is an exercise of sovereign immigration control. It is regarded as civil administrative proceedings as the deporting state is enforcing its immigration law. It is not criminal proceedings.

95. Sovereign control is territorial. As recognized by the International Court of Justice, the territorial sovereignty of a State includes its internal waters, territorial sea and airspace under international law:

"*The basic legal concept of State sovereignty in customary international law, expressed in, inter alia, Article 2, paragraph 1, of the United Nations Charter, extends to the internal waters and territorial sea of every State and to the air space above its territory.*"[110]

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110 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Merits, Judgment, I.C.J. Reports 1986, p. 111, para. 212. "Territorial sovereignty extends principally over land territory, the territorial sea appurtenant to the land, and the seabed and subsoil of the territorial sea. The concept of territory includes islands, islets, rocks, and reefs." Ian Brownlie, Principles of Public International Law, 6th ed., Oxford, Oxford University Press, 2003, p. 105 (citations omitted). "Internal waters, lying behind the baselines used to delimit territorial waters, are completely within the jurisdiction of the State. The territorial sea also is an area over which the coastal State exercises full sovereignty and in which, subject to the requirements of innocent passage, all the laws of the coastal State may be made applicable. The sovereignty here exercised is no different in kind from that over State territory." Guy S. Goodwin-Gill, The Refugee in International Law, 2nd ed., Oxford, Clarendon Press, 1996, pp. 162-163. See also Robert Jennings and A. Watts,

96. The deporting state remains legally responsible for the execution of its expulsion order until removal from its territory is completed, even where officials of the receiving state participate in escort or transport arrangements.

97. As the court explained in *United States ex rel. Hudak v. Uhl:*[111] custody of the deporting state ends only when she is able to leave the removal vehicle:

"*It is, of course, clear that the authority of the United States can no longer be exerted over the alien once he is able to leave the ship at any foreign port.*"[112]

98. Section 27(6) of the Tanzanian Immigration Act states:

"*A deportation order shall remain in force the period specified therein, unless sooner varied or revoked by the Minister, or, if no period is so specified, until varied or revoked by the Minister.*"

99. At all material times prior to departure and whilst in the aerial jurisdiction of Tanzania, the Applicant remained subject to Tanzanian immigration authority; first as a prohibited immigrant, then as a person under removal

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Oppenheim's International Law, 9th ed., vol. I – Peace (Parts 2 to 4), 1996, p. 572.

111 UNITED STATES ex rel. HUDAK v UHL District Director of Immigration, 20 F. Supp. 928 (1937) District Court, N. D. New York September 1, 1937

112 UNITED STATES ex rel. HUDAK v UHL District Director of Immigration, 20 F. Supp. 928 (1937) District Court, N. D. New York September 1, 1937

and finally as an escorted deportee. The role of South African officials only arose upon completion of her removal from Tanzanian jurisdictional airspace.

SECTION 41 IMMIGRATION ACT

100. Section 1(i) of the Immigration Act defines admission as

"entering the Republic at a port of entry on the basis of the authority to do so validly granted by this Act or by an immigration officer in terms of this Act".

101. Section 9 of the IA makes it plain that one is only "in" the Republic once one has passed through a designated port of entry and complied with the prescribed formalities. It is thus clear that the person cannot "enter" until her citizenship has been verified and she is given authority to enter in terms of the Immigration Act by an immigration officer.

102. Section 41 of the Immigration Act requires any person approached on reasonable grounds by a police officer or immigration officer to identify themselves either as a citizen or as a person lawfully present in the Republic. Anyone unable to identify themselves as persons lawfully in South Africa will be deemed to be illegally present and hence subject to an arrest, detention, and possible deportation.

103. The Applicant remained physically in the custody and detention of the Tanzanian authorities until she departed from the territorial sovereignty of Tanzania.

104. Her "hand over" at Kilimanjaro airport was a transfer of a person not transfer of jurisdiction. The Applicant remained within the custody of Tanzania until the aircraft exited the territorial jurisdiction of Tanzania. On arrival in South Africa, the Applicant was arrested.

SADC PROTOCOL

105. South Africa did not make an extradition request to Tanzania.[113] Without a request for extradition, the SADC Protocol finds no application.

SUMMARY: DISGUISED EXTRADITION

106. Disguised extradition arises where authorities deliberately employ deportation to evade legal safeguards governing extradition.

107. Disguised extradition requires evidence that South African officials secretly exerted coercive authority in Tanzania to engineer a deportation by abduction or deception specifically to evade legal safeguards that would otherwise

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113 Record Vol 1 SAPS AA pp 57 para 53; Record Vol 2 DHA AA pp

govern extradition. There is no unlawfulness attributable to South Africa for the following reasons:

107.1. The decision to return the Applicant to South Africa was made by the Tanzanian immigration authorities, in whose custody she was held.

107.2. There is no objective evidence that the Tanzanian immigration officials were not pursuing an obvious and legitimate duty to give effect to the applicable immigration laws.

107.3. The South African officials were informed by the Tanzanian immigration authorities of the requirement to escort the Applicant from Tanzania. The South African officials did not act contrary to any law or exercise any force upon the territory of Tanzania which violated the territorial sovereignty or breached international law.

107.4. The circumstances under which the Applicant was brought to South Africa cannot be likened to an abduction by agents of the governments of South Africa.

107.5. The Applicant was returned to South Africa without any evidence of force or deception being practiced by South African officials.

108. Disguised extradition entails a deliberate circumvention of extradition laws or treaties to deliver a requested individual directly or indirectly to a State with a law enforcement interest, using immigration laws.

PART V

THE INTERESTS OF JUSTICE NECESSITATE DISMISSAL OF THE APPLICATION

109. This Court has repeatedly stated that it is essential for a constitutional issue to be pleaded properly, timeously and not raised for the first time on appeal to this Court. Failure to do so is fatal.[114]

110. The jurisprudence of this Court is clear that the Court retains a discretion to grant leave only when the interests of justice so require. The cases of *Paulsen and Another v Slip Knot Investments.*[115] and *S v Boesak*[116] are instructive in this regard.

111. In considering the interests of justice, prospects of success are an important aspect of the enquiry. The Applicant must show that there are reasonable

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114 Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile&Others 2010 (5) BCLR 422 (CC) paras 16 to 24.

115 Paulsen&Another v Slip Knot Investments (Pty) Ltd 2015 (3) SA 479 CC para 12-31

116 S v Boesak 2001 (1) SA 912 CC paras 11-12

prospects that this Court will reverse or materially alter the decision of the SCA.

112. In litigation one of the most fundamental imperatives, as a necessary corollary of fairness and the rule of law, is procedural order. Section 34 entrenches principles of natural justice. This includes, as a "minimum standard of justice", equal treatment before the courts during a hearing, adherence to *audi alteram partem* and the provision of proper notice of allegations. Rules of court ought to be interpreted and applied in a way that would render court proceedings fair.[117]

113. The Applicant, as *dominis litis*, determines in her Notice of Motion the issues to be decided by the court of first instance. She must make it clear in her founding affidavit what the case is that the DHA is required to meet.[118]

114. Despite knowledge and opportunity, insufficient tested facts have been placed before this Court, the SCA and the Court of first instance for a finding against the DHA. The paucity of facts is attributable to the fact that the stance adopted by the Applicant in the SCA and the different stance in this Court was not the case that the Applicant sought to make out in the pleadings in the Court of first instance, during the hearing in that Court or before the SCA.

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117 Cheadle et al, South African Constitutional Law: The Bill of Rights, 2nd ed, 28-3 to 28-6; De Beer NO v North Central Local Council and South Central Local Council and Others 2001 (11) BCLR 1109 (CC) at para 11.

118 Stead v Conradie & Andere 1955 (2) SA 111 (A) at 122 A-I

115. Should the Applicant now be allowed to adopt this new stance which in effect introduces causes of action not pleaded or ventilated in the Court of first instance or in the SCA and in particular to rely on new untested facts:

115.1. It will be in conflict with the trite general principle that factual issues are to be ventilated in a court of first instance in accordance with the issues determined by the pleadings.

115.2. It will be tantamount to an unfair hearing in conflict with the provisions of section 34 of the Constitution of the Republic of South Africa, 1996, as the DHA was not given the opportunity to respond, in respect of such facts and causes of action.

116. A fundamental aspect is that litigation is conducted within the boundaries of the pleadings. In *National Director of Public Prosecutions v Zuma*[119] Harms DP articulated that the function of a judicial officer is to confine the judgment to the issues before the court and not to decide matters that were not germane or relevant; or create new factual issues or make gratuitous findings against persons who were not called upon to defend themselves and fail to distinguish between allegation, fact and suspicion.[120]

117. The principle relied upon by Harms DP is a foundational principle of our legal system asserting that justice can only be achieved if the procedure

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119 National Director of Public Prosecutions v Zuma 2009 (2) SA 277 (SCA);

120 Ibid para 15

leading to a decision is fair. The rules of procedural fairness, which have evolved over centuries, are the result of accumulated wisdom derived from experience. All parties must have an opportunity to be heard by presenting their evidence, to scrutinize the evidence of the opposing party, and to make submissions regarding their positions on the law and facts.

118. It is both fundamentally unfair and inherently unreliable for a court to make findings against a party based on a theory of legal liability not advanced. [121]

119. It is submitted that this court should be very reluctant to make far-reaching findings against the DHA on the basis of its answering affidavit submitted in an application seeking to declare that members of the SAPS arrested and/or apprehended the Applicant in Tanzania. At best its significance is a prism through which to view the Applicant's lawful deportation.

120. We submit that granting the new relief against the DHA is in conflict with the provisions of section 34 of the Constitution and submit that this Court should adopt the approach of the SCA majority judgment which held that no relief against the DHA is competent.

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121 Rodaro v Royal Bank of Canada 2002 CanLII 41834 (ON CA)

CONCLUSION

121. The SCA majority judgment is based on a sound and well-reasoned analysis of the common cause facts and the application of the appropriate legal principles.

122. We have dealt with the substance of each ground of appeal and demonstrated that the SCA majority, did not err or misdirect itself in whatsoever manner when it dismissed the Applicant's appeal.

123. The narrative presented by the Applicant seeks to characterize South Africa as a rogue state, acting in defiance of both Tanzanian sovereignty and international comity, and in contravention of sections 231, 232, and 233 of the Constitution of 1996. This is factually and legally incorrect. As this Court pointed out in *Director of Public Prosecutions, Johannesburg and Another v Schultz*:

"[99] ...While Ebrahim established an important precedent, it should not be interpreted to mean that any irregularity in extradition proceedings, no matter how insignificant, should result in a court declining to exercise its criminal jurisdiction. Such principles are not supported by the facts of Ebrahim, and would not strike an appropriate balance between the concern for lawful process and the imperative to combat impunity."

124. The costs associated with having this Court engage with an appeal in this matter are totally unnecessary when ultimately, the prospects of a different conclusion are highly unlikely.

125. We submit that this application for leave to appeal should be dismissed with costs.

NICOLE MAYET SC

HARRIETT MUTENGA

30 MARCH 2026