REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

Case Number: 2022/25436

(1)	REPORTABLE: YES / NO	
(2)	OF INTEREST TO OTHER JUDGES: YES/NO	
(3)	REVISED: YES/NO	
[1]	_____	_____
[2]	DATE	SIGNATURE

In the matter between:

SERETSE KHAMA IAN KHAMA	Applicant
AND	
DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG	First Respondent
DEPUTY DIRECTOR OF PUBLIC PROSECUTIONS, GAUTENG LOCAL DIVISION, JOHANNESBURG	Second Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS, MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	Fourth Respondent
NATIONAL COMMISSIONER OF THE SOUTH AFRICANPOLICE SERVICES	Fifth Respondent
MINISTER OF POLICE	Sixth Respondent
MINISTER OF INTERNATIONAL RELATIONS AND COOPERATION	Seventh Respondent

Neutral citation: *Seretse Khama Ian Khama & Director of Public Prosecutions, Gauteng Local Division, Johannesburg & Others* (Case No. 2022/25436) [2023] ZAGPJHC 560 (24 May 2023)

JUDGMENT

Extradition Act – interpretation of s 5(1)(b) – whether Magistrate permitted to receive representations before issuing warrant of arrest – applicant relying on rights under s 12(1)(a) and s 34 of Constitution for interpretation permitting representations – held: application ripe for hearing despite absence of extraction request – sufficient that applicant's rights threatened – held: s 5(1)(b) does not authorise Magistrate to receive representations before issuing warrant of arrest – held further that s 5(1)(b) not unconstitutional insofar as it does not permit representations – irrelevant material in founding affidavit struck out.

KEIGHTLEY J and STRYDOM, J (MLAMBO JP Concurring):

Introduction

[1] This case is about the interpretation and constitutionality of section 5(1)(b) of the Extradition Act of 1962[1] (the Act). The applicant cites his rights under section 12(1) and section 34 of the Constitution. He seeks a declaratory order to the effect that, properly interpreted, section 5(1)(b) permits a Magistrate seized with an application for an arrest warrant under that section, in appropriate circumstances, to consider representations by a person whose arrest is sought before the issuing of the warrant. In the alternative, and if this Court rejects the applicant's interpretation of s 5(1)(b), the applicant seeks an order declaring section 5(1)(b) unconstitutional to the extent that such authorisation is not implicit in the provision. His final prayer is for an order directing that any of the respondents who intend to make an application for a warrant for the applicant's arrest must provide the applicant through his attorneys with reasonable notice of that application.

[1] Act 67 of 1962.

[2] An application to strike out was brought by the first to third respondents concerning certain paragraphs contained in the applicant's founding affidavit. To the extent necessary, we deal with the strike out application later in our judgment.

[3] In addition, the respondents raise a point i*n limine*, contending that the application is premature and not ripe for hearing. The point *in limine*, if successful, is dispositive of the application, rendering a determination on the merits unnecessary. Before considering the legal issues that arise for determination, we deal with the necessary background material.

Parties

[4] The applicant is Mr Seretse Khama Ian Khama (applicant), a Botswana citizen of adult age, and the former President of the Republic of Botswana. He is presently residing in South Africa lawfully.

[5] The first and second respondents are the Director and Deputy Director of Public Prosecutions, Gauteng Local Division, Johannesburg. They are cited in their official capacity as representatives of the National Prosecuting Authority authorised under section 17(2) of the Act to appear at extradition proceedings.

[6] The third respondent is the National Director of Public Prosecutions, cited in her official capacity as the head of the National Prosecuting Authority.

[7] The fourth respondent is the Minister of Justice and Correctional Services, cited in his official capacity as the member of the executive empowered by the Act to decide whether to surrender persons whose extradition is sought to requesting states under the Act.

[8] The fifth respondent is the National Commissioner of the South African Police Services. The sixth respondent is the Minister of Police. Both are cited in their official capacities as representatives of the South African Police Services (SAPS).

[9] The seventh respondent is the Minister of International Relations and Cooperation. She is cited in her official capacity as the member of the executive responsible for international diplomacy and relations.

Factual Background

[10] In November 2021, the applicant left Botswana and entered South Africa. Apart from some international trips, he has sojourned in South Africa since then. The applicant says that he is exiled in South Africa as he had to leave Botswana in fear for his life. He avers that he has been the target of a co-ordinated, state sponsored attack by the incumbent president of Botswana for expressing his opposition to what the applicant says are the current president's 'authoritarian policies and decisions.

[11] On 19 April 2022, the applicant was charged in Botswana with 13 counts relating to the alleged unlawful possession of seven firearms and the ownership of unregistered firearms. In April 2022, the Government of Botswana issued a summons in which it called on the applicant to appear before the Broadhurst Regional Magistrates' Court to answer those charges. On the day of the applicant's appearance, his attorneys in Botswana appeared on the applicant's behalf and explained to the Court that neither the applicant nor his attorneys in Botswana had received the summons. The applicant only became aware of the charges against him through social media. To this end, the Court accepted the explanation and postponed the matter to 6 June 2022. The applicant did not appear in Court on 6 June 2022, as previously communicated by the Magistrate, and the matter was consequently postponed to the end of August 2022.

[12] Around 10 June 2022, an article appeared in a publication called "Mmegi online" under the headline "Hurdles as State ponders Khama extradition". The article records that: "The State [of Botswana] is aware that Khama is in the neighbouring SA but for now it cannot get him because no warrant has been issued".

[13] In his founding affidavit, the applicant avers that he understands that, as part of the onslaught against him, Botswana intends to seek his extradition on what he

says are “trumped-up, fabricated charges”. Should he be arrested in South Africa or extradited to Botswana, he will be persecuted for his political views, putting his life and bodily integrity at risk.

[14] On 22 June 2022, the applicant’s attorneys wrote to the respondents, stating that it had come to their attention that a possibility exists that South Africa may receive a request from Botswana for the applicant’s extradition. The purpose of the letter was to inform the respondents that the applicant would cooperate fully with all future extradition proceedings that may be instituted. In these circumstances, the letter continued, “any efforts to arrest and detain him would be inappropriate, unreasonable, unlawful, and unconstitutional”. The applicant’s attorneys requested that he be afforded an opportunity to submit representations to the appointed Magistrate before any warrant for his arrest under section 5(1)(b) of the Act was issued.

[15] The Deputy Director of Public Prosecutions, Gauteng Local Division, Johannesburg (Deputy Director) responded by way of a letter on 27 June 2022 (“the DPP’s letter”). It read as follows:

> “1. The content of your letter is noted.
>
> 2. Your request that your client be allowed to make representations to the Magistrate <u>when</u> an application for the warrant of his arrest is made, cannot be agreed to due to the fact that there is no provision of (*sic*) such a procedure in the Extradition Act No. 67 of 1962.
>
> 3. Any facts that your client wish (*sic*) to place before the Magistrate, to substantiate his claim that the charges to the [be] brought against him in Botswana have been trumped up, must be placed before the Magistrate after his arrest and when he appears before the said Magistrate.
>
> 4.This office will, however, as a courtesy to your client, be amenable that he be informed before his arrest so that he can report to the SAPS and the necessary formalities be taken care of before the matter is placed on the court roll." (Emphasis added)

[16] The applicant interprets this letter as implying that the National Prosecuting Authority will apply for his arrest imminently. This interpretation arises from the use of the word “when” as opposed to “if” in paragraph 2, as underlined above. The respondents deny the implication sought to be drawn by the applicant. To date, the Deputy Director has not received a request from Botswana for the applicant’s extradition.

[17] The Deputy Director's stance remains as set out in the DPP letter: the Act does not permit a Magistrate to receive representations prior to the issuance of a warrant of arrest. The applicant says that this interpretation of section 5(1)(b) is incorrect and that, properly interpreted in line with the Constitution, the section entitles him to make representations before a Magistrate prior to his arrest. As indicated earlier, the applicant avers that, alternatively, section 5(1)(b) is unconstitutional to the extent that it does not permit such representation prior to arrest.

[18] The dispute between the parties is an interpretational one. This being so, the logical place to start is with the relevant statutory framework.

Statutory framework

[19] Extradition proceedings work on both the international and domestic planes on an interrelated basis. A request from one state to another to extradite an individual in the requested state is a matter of public international law, which governs the relations between states. However, domestically, before a state can lawfully surrender a person in response to an extradition request, its relevant authorities must act in accordance with its own internal laws regulating extradition.[2] It is in this latter respect that our Courts are called upon to pronounce upon the legality of extradition requests. As will become apparent in our analysis of the Act, the interplay between the international and domestic planes creates a dynamic tension between policy determinations, under the aegis of the relevant Minister, and legal determinations, under the aegis of the Courts.

[20] It is critical to understand that while our extradition procedure incorporates some aspects of criminal procedure, such as the issuance of a warrant of arrest, because of its unique blend of international and domestic law, extradition operates according to its own particular blueprint. An extradition inquiry and criminal proceedings are not the same in all respects. [3] Extradition proceedings are aimed at determining whether there is reason to remove a

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[2]. *Harksen v President of the Republic of South Africa and Others* [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (5) BCLR 478 at para 4.

[3] See *Harksen v Attorney-General, Cape and others* 1999 (1) SA 718 (C) at 737 C; and *Harksen v Director of Public Prosecutions and another* 1999 (4) SA 1201 (C) at 1211 G–1212 A.

person to a foreign state – not to determine whether the person concerned is or is not extraditable. The hearing before the Magistrate is but a step in the proceedings:

> ”extradition is deemed a sovereign act, its legal proceedings are deemed *sui generis*, and its purpose is not to adjudicate guilt or innocence but to determine whether a person should properly stand trial where accused or be returned to serve a sentence properly imposed by another state.”[4]

[21] The peculiar legal nature of the extradition process is apparent from the statutory framework of the Act. This framework has been discussed and analysed in several Constitutional Court judgments, and it is unnecessary here to regurgitate that prior analysis. We will focus instead on those aspects of the Act that have particular relevance to the issues arising in this case.

[22] The parties agree that the status of extradition requests from Botswana to South Africa means that the procedure described in sections 4, 5, 8, 9, 10 and 11[5] apply in the applicant’s. Also of relevance are sections 13 and 15.

[23] Should a request for the applicant’s extradition be made, under section 4 it will be made to the Minister of Justice and Correctional Services (the Minister). The request must be made by a recognised diplomatic or consular representative of Botswana, or by way of a direct Minister-to-Minister communication through diplomatic channels. The point is that the request is diplomatic in nature and does not involve any legal proceedings.

[24] The legal proceedings are initiated under section 5, which deals with warrants of arrest. It reads, in relevant part:

> “(1) Any Magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person-
>
> (a) …

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[4] *Geuking v President of the Republic of South Africa and* Others [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) (*Geuking*) at paras 26-50, citing Bassiouni *International Extradition United States Law and Practice* 4 ed (Oceana Publications, New York 2002) at 66.

[5] As opposed to a s 12 inquiry by a Magistrate in circumstances where the offence is alleged to have been committed in an associated state. Botswana is not an associated state. Both South Africa and Botswana are bound by the SADC Protocol on extraditions.

(b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would, in the opinion of the Magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic.

(2) Any warrant issued under this section shall be in the form and shall be executed in the manner as near as may be as prescribed in respect of warrants of arrest in general by or under the laws of the Republic relating to criminal procedure." (Emphasis added)

[25] In *Smit v Minister of Justice and Correctional Services & Others*[6] the Constitutional Court found that the effect of the underlined portion of section 5(1)(b) is to import the requirements under section 43(1) of the Criminal Procedure Act.[7] For purposes of an extradition arrest warrant, section 43(1)(c) is of particular relevance. It provides that:

"Any Magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police-

…

(c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence."

[26] The importation of this requirement into section 5(1)(b) of the Extradition Act is that the Magistrate must bring her own independent mind to bear on whether there are reasonable grounds to suspect that the person sought to be extradited has committed the offence identified in the extradition and warrant request.[8] As we discuss in more detail later in this judgment, this particular feature of section 5(1)(b) lies at the heart of the applicant's case for what he contends is the correct constitutional interpretation of the section.

[27] The issue of a warrant under section 5 acts as a trigger for the remainder of the extradition process to unfold. As a consideration of the other relevant sections demonstrates, several permutations are possible.

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[6] *Smit v Minister of Justice and Correctional Services and* Others [2020] ZACC 29; 2021 (3) BCLR 219 (CC) 2021 (1) SACR 482 (CC) (*Smit*) at para 107.
[7] Act 51 of 1977.
[8] *Smit* above n 6 at para 111.

[28] Under section 8, the Magistrate who issued a warrant is directed "forthwith" to furnish the Minister with particulars relating to the issue of the warrant. Subsection (2) gives the Minister far-reaching powers. He may:

> "at any time after having been notified that a warrant has been issued as contemplated in subsection (1)-
>
> (a) In the case where the warrant has not yet been executed, direct the Magistrate concerned to cancel the warrant; or
>
> (b) In the case where the warrant has been executed, direct that the person who has been arrested be discharged forthwith, if the Minister is of the opinion that a request for the extradition of the person concerned is being delayed unreasonably, or for any other reason that the Minister may deem fit."

[29] The first possible permutation, therefore, is that the person whose extradition is sought is, by dint of Ministerial fiat, and notwithstanding the issue of a warrant of arrest by a Magistrate, spared arrest, or released from detention. Section 8 demonstrates what we referred to earlier as the dynamic tension between the Ministerial exercise of power and that of the Courts under the Act.

[30] In cases where the Minister does not exercise his section 8 power, section 9(1) of the Act prescribes that the arrested person-

> "shall, as soon as possible be brought before a Magistrate […] whereupon such Magistrate shall hold an enquiry with a view to the surrender of such person to the foreign State concerned."

[31] Section 9(2) describes the nature of the enquiry. It provides that:

> "Subject to the provisions of this Act, the Magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic and shall, for the purposes of holding such enquiry, have the same powers, including the power of committing any person for further examination and of admitting to bail any person detained, as he has at a preparatory examination so held."

[32] Where, as in the applicant's case, it is alleged that the person has committed an offence in a foreign state which is not an associated state, the enquiry proceeds under section 10 of the Act. Sections 10(1) and (3) state that:

> "(1) If upon consideration of the evidence adduced at the enquiry, the Magistrate finds that the person brought before him [or her] is liable to be surrendered to the foreign State concerned and, in the case where such a person is accused of an offence, that there would be sufficient reason for putting him on trial for the offence, had it been committed in the Republic, the Magistrate shall issue an order committing such a person to prison to await the Minister's decision with regard to his surrender, at the same time informing such person that he [or she] may within fifteen days appeal against such an order to the [High] Court.
>
> (2) If the Magistrate finds that the evidence does not warrant the issue of an order of committal or that the required evidence is not forthcoming within a reasonable time, he shall discharge the person brought before him [or her]."

[33] To assist the Magistrate in determining that there is sufficient evidence to warrant a prosecution in the foreign state, section 10(2) provides that: "the Magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign state concerned, stating that it has at its disposal sufficient evidence warranting the prosecution of the person concerned." Once again, if the Magistrate orders the committal of the person whose extradition is sought, she is directed under section 10(4) "forthwith" to forward to the Minister a copy of the record of proceedings and any report she may deem necessary.

[34] The purpose of the direction contained in section 10(4) becomes apparent from section 11, which gives to the Minister the final say on whether a person should be extradited or not. It reads (in relevant part):

> "The Minister may-
>
> (a) order any person committed to prison under section 10 to be surrendered to any person authorised by the foreign State to receive him or her; or

(b) order that a person shall not be surrendered-

…

(iii) at all, or before the expiration of a period fixed by the Minister, if he or she is satisfied that by reason of the trivial nature of the offence or by reason of the surrender not being required in good faith or in the interests of justice, or that for any other reason it would be unjust or unreasonable or too severe a punishment to surrender the person concerned; or

(iv) if he or she is satisfied that the person concerned will be prosecuted or punished or prejudiced at his or her trial in the foreign State by reason of his or her gender, race, religion, nationality or political opinion." (Emphasis added)

[35] Once again, the dynamic tension between the role of the Court, and that of the Minister in extradition proceedings is demonstrated in these two sections of the Act. We know from *Smit* that the role of the Magistrate in extradition proceedings is not that of a rubberstamp. Just as with the issue of a warrant of arrest under section 5, the Magistrate in a section 10 enquiry acts as a judicial officer with the power to weigh up the relevant facts and to reach a decision as to whether the person whose extradition is requested is liable to be surrendered.

[36] However, there are limits to the ambit of the Magistrate's powers under section 10, as explained by the Constitutional Court in *Director of Public Prosecutions: Cape of Good Hope v Robinson*.[9] A decision by a Magistrate under section 10(1) that a person is liable to be surrendered does not result in the extradition of that person. The decision to extradite is a ministerial decision exercised under section 11.[10] What is more, that section gives the Minister a wide discretion to take into account such factors as the interests of justice, the *bona fides* of the request to surrender and the prospects of a fair trial should the person be surrendered to the requesting state.

[9] *Director of Public Prosecutions: Cape of Good Hope v Robinson* [2004] ZACC 22; 2005 (4) SA 1 (CC); 2005 (2) BCLR 103 (CC) (*Robinson).*
[10] *Robinson*, above at para 50.

[37] The Court in *Robinson* clarified that these are factors for the Minister, and not for the Magistrate, to decide in a section 10 enquiry. The Court found that:

> "the High court ignored the fact that it is the Minister who is empowered to consider whether it will be unjust or unreasonable, having regard to all the circumstances of the case to surrender the person concerned. This would suggest that the Magistrate is not authorised to make that decision under section 10(1). The suggestion that the Magistrate has no power to make a decision of that kind under section 10(1) is strengthened by the fact that the Magistrate conducting the section 12 enquiry is expressly empowered not to make an order of surrender if this is not in the interests of justice or if it would be unjust or unreasonable in all the circumstances of the case. The scheme of the Act makes it quite clear that the question whether a person sought to be extradited will become the victim of an unfair trial as a result of the extradition must be weighed in the equation at the time when consideration is being given to whether there should be a surrender. It is premature to take this factor into account any earlier."[11] (Emphasis added)

[38] The Act thus specifically demarcates the exercise of powers between the Magistrate and the Minister. Critically, considerations of, among others, justice, fairness and the *bona fides* of the request, fall exclusively within the ambit of the Minister's powers. The extent of the Minister's powers is cemented in section 15, which gives him the power, at any time, to order the cancellation of any warrant of arrest, or the discharge from custody of a person detained under the Act if, among others, the Minister is satisfied that the offence in respect of which surrender is sought is "an offence of a political character".

[39] The Act also makes provision in section 15 for an appeal to the High Court against any order made by a Magistrate under section 10. A person lodging an appeal may apply to the Magistrate concerned to be released on bail pending the outcome of such an appeal.

[40] In summary, then, in a case like the present, even if a Magistrate issues a warrant of arrest under section 5, the Minister has the power to cancel the warrant for any reason he may deem fit under section 8. In such event, the extradition process will go no further. If the warrant is not cancelled by the

[11] *Robinson* above n 9 at para 52.

Minister, the person whose extradition is sought will be subject to a section 10 inquiry. The Magistrate has the power to release him or her on bail pending that enquiry. The outcome of the section 10 enquiry does not automatically result in the surrender of the affected person to the requesting state: first, because an appeal is provided for in section 13, and second, because the Minister may, on broad considerations of good faith, justice and fairness, direct that he or she may not be surrendered. Moreover, the Minister has the further power to cancel a warrant and discharge a person from custody if the offence is one of a political character under section 15.

[41] This is the broad statutory framework within which section 5(1)(b) of the Act is to be interpreted.

The issues for decision

[42] The first issue for decision arises from the respondents' point *in limine*: is the matter ripe for hearing or, as the respondents contend, is it premature and should the application be dismissed for this reason alone?

[43] If the point *in limine* is dismissed, the merits of the application must be considered.

[44] The primary issue on the merits boils down to the determination of the question whether, as contended for by the applicant, section 5(1)(b) of the Act should be interpreted so as to permit a Magistrate to consider representations by a person whose extradition is sought prior to a warrant of arrest being issued.

[45] The secondary issue on the merits, which only arises if this Court rejects the applicant's interpretation of section 5(1)(b), is whether that section is inconsistent with the Constitution in that it impermissibly infringes the rights to freedom and security, and to a fair trial, of a person in the applicant's position.

Is this matter ripe for hearing?

[46] It is the respondents' contention that this matter is premature and academic because there is no pending extradition request issued for the applicant nor is there a request for a warrant of arrest of the applicant. In other words, there is

no live dispute between the parties, and the application falls to be dismissed on this score alone. The applicant disputes this, saying that the matter is not premature. Even if it is, the applicant submits that the interpretation and constitutionality of section 5(1)(b) is a matter of public importance and that the interests of justice warrant a determination by this Court.

[47] It is a trite principle of our law that a Court hearing a matter should not accept an invitation to make determinations that will have no practical effect.[12] Indeed, Courts should and ought not to decide abstract issues or those of pure academic interest only. In Coin S*ecurity Group (Pty) Ltd v SA National Union for Security Officers*[13] it was recognised that:

> "It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."

[48] The purpose of the principle that a matter should be ripe before the Courts will engage it is to ensure that the issues are in fact ready for adjudication by the forum. The doctrine of ripeness thus serves as a form of judicial restraint. As it was put in *Ferreira v Levin NO & others; Vryenhoek v Powell NO & others*[14]

> "the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallized, and not with prospective or hypothetical ones."[15]

[49] The authors Currie and De Waal note the important role timing plays in the justiciability of a dispute. Bringing a matter to Court at the right time is crucial to its justiciability, so as to ensure that Courts do not entertain legal disputes

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[12] See *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 at para 21.
[13] See *Coin Security Group (Pty) Ltd v SA National Union for Security Officers & Others* 2001 (2) SA 872 (SCA) at para 9; and *SA Metal Group (Pty) Ltd v The International Trade Administration Commission* (267/2016) [2017] ZASCA 14.
[14] *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell No and Others* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (*Ferreira*).
[15] Id at para 119.

prematurely. As a rule, a dispute must be ready for adjudication, or in other words, it must be ripe for the Court to consider it.[16]

[50] A matter will be abstract or academic when it is not founded on any factual matrix,[17] or where a litigant's right is only hypothetical and remote. In other words, where they have no real interest in the matter.[18]

[51] The applicant points to the DPP's letter and the use of the term "when", and not "if" a warrant is sought. He submits that on its plain terms the letter suggests an imminent arrest warrant. This, he says, is a clear demonstration that the dispute is not abstract or academic. The applicant's interpretation of the DPP's letter is not supported by the evidence. The Deputy Director disputes that anything was meant by the use of the term "when" in the letter. He states that what he intended to convey was simply that it was more appropriate for representations to be made after an arrest. He did not intend to convey that the applicant's arrest was imminent. Further, in a letter sent by the State Attorney, on behalf of the Department of Justice and Correctional Services, the applicant's attorney was informed that that Department was not aware of any official legal proceedings against the applicant.

[52] There is thus no evidence that an extradition request has been made. It would be untenable to infer, as the applicant wishes this Court to do, solely from the use of one word in the DPP's letter that such a request is imminent. The applicant's contention that his arrest is imminent is unfounded.

[53] However, this is not the end of the inquiry as to ripeness. Underlying the interpretational dispute is the applicant's right not to be deprived of his freedom arbitrarily or without just cause and his right to a resolution of his dispute in a fair public hearing. The applicant points to well-established Constitutional Court authority to the effect that a matter cannot be premature or academic once a constitutional right is threatened.[19] This is because section 38 of the

[16] Currie and De Waal *The Bill of Rights Hand Book* 6 ed (Juta Legal and Academic Publishers, 2017).

[17] *Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others* (CCT 333/17; CCT 13/18) [2018] ZACC 23; 2018 (10) BCLR 1179 (CC); 2018 (2) SACR 442 (CC) at para 36.

[18] *Ferreira* above n 14 at para 164.

[19] *Law Society of South Africa and Others v President of the Republic of South Africa and Others* (CCT67/18) [2018] ZACC 51; 2019 (3) BCLR 329 (CC); 2019 (3) SA 30 (CC) at para 23.

Constitution gives standing to anyone who alleges that a right in the Bill of Rights has been infringed or threatened.[20]Provided the applicant can establish that his section 12(1)(a) or section 34 rights are threatened, his application is not premature.

[54] In *Geuking v President of the Republic of South Africa and Others*,[21] the Constitutional Court considered a challenge to section 10(2) of the Act. There, as in this case, the section 10 inquiry had not commenced. The High Court had held that it was thus not inevitable that the Magistrate would be requested to rely on the certificate referred to in that section and the matter was premature. The Constitutional Court found the High Court had erred: the Deputy Director had informed the applicant there that his office would rely on a section 10(2) certificate, and accordingly the rights claimed "were clearly threatened". The applicant in *Geuking* was not required to wait until the actual inquiry commenced and the certificate was introduced in order to challenge the constitutionality of that section.

[55] In this case a similar situation prevails. It is so that there has not yet been a request for extradition and hence, no request for the issuance of a warrant of arrest. However, it is common cause that the applicant faces criminal charges in Botswana and that he is not willing to go back to that country of his own free will. Should the Botswana authorities wish to enforce his presence for trial they will be required to follow the extradition process. The applicant's case has an established factual basis and is not premised on mere speculation, as suggested by the respondents. What is more, absent a decision being made as to the proper interpretation of section 5(1)(b), any application for a warrant for the applicant's arrest will be made without notice. Consequently, the only

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[20] Section 38 of the Constitution provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
>
> (a) anyone acting in their own interest;
> (b) anyone acting on behalf of another person who cannot act in their name;
> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
> (d) anyone acting in the public interest; and
> (e) an association acting in the interest of its members."

[21] *Geuking v President of the Republic of South Africa and Others* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC) (*Geuking*) at paras 32-33.

opportunity the applicant may have to challenge section 5(1)(b) of the Act and to obtain clarity on whether he can make representations to avoid an arrest, is now. The applicant cannot wait for the request for extradition to be made. Delay may result in an arrest warrant being issued and executed before he is able to challenge it.

[56] It follows that the dispute is ripe for determination. It is not abstract or premature. As such, this Court is obliged to decide the issue.[22] Even if this were not so, the dispute raises constitutional issues the resolution of which are in the public interest. Clarity should be provided on whether a person who stands to be arrested in extradition proceedings should be allowed to make representations to a Magistrate who considers whether to issue a warrant of arrest or not. The interest of justice dictates that this Court should deal with this application on its merits.

[57] It follows that the point *in limine* must fail. We turn to consider the issues on the merits.

Can section 5(1)(b) of the Extradition Act be interpreted to permit representations to a Magistrate before a warrant of arrest is issued?

[58] The succinct issue here is whether the applicant's interpretation of section 5(1)(b) of the Act is legally and constitutionally sustainable. The applicant submits that section 5(1)(b) can and should be interpreted to empower a Magistrate with a discretion to consider, in appropriate circumstances, representations by a person in respect of whom a warrant of arrest is sought for purposes of extradition proceedings. This is because the applicant's section 12(1)(a) and 34 Constitutional rights are implicated. The applicant submits that his interpretation accords with the recognised tenets of statutory interpretation where constitutional rights are involved.

[59] The act of interpretation is a unitary exercise taking into account the language of the statute, its context and purpose.[23] The Constitutional Court has described the interpretational exercise as follows:

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[22] *Geuking* above n 4 at para 35.

[23] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* 2022 (1) SA 100 at para 25.

"A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:

(a) that statutory provisions should always be interpreted purposively;

(b) the relevant statutory provision must be properly contextualised; and

(c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in (a)."[24]

[60] When interpreting legislation that implicates a fundamental right entrenched in the Bill of Rights, a Court must read the particular statute through the prism of the Constitution.[25] Courts must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section[26]. The latter proviso is important: if a reading that is in conformity with the Constitution would unduly strain the language of the legislation, then that reading is not viable.[27] Where a provision is capable of more than one meaning, a Court must adopt a meaning that does not limit a right in the Bill of Rights. If a provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the Court is obliged to prefer the latter meaning.[28]

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[24] *Cool Ideas 1186 CC v Hubbard and Another* [2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) at para 28.
[25] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) (*Makate*) at para 87.
[26] *Investigative Directorate:Serious Economic v Hyundai Motor Distributors (Pty) Ltd: In Re Hyundai Motor Distributors (Pty) Ltd v Smit N.O*. 2001 (1) SA 545 (CC) (*Hyundai*) at para 23.
[27] *Smit* above n 6 at para 117, citing *Hyunda*i above n 26 para 88.
[28] *Makate* above n 25 at para 88.

[61] On a plain reading, neither section 5(1)(b) nor any of the associated sections expressly give the Magistrate a discretion to seek or consider representations from a person whose extradition is sought prior to issuing a warrant of arrest. The applicant contends, however, that the section is reasonably capable of such an interpretation. What is more, an interpretation giving the Magistrate a discretion, in appropriate cases, to consider representations, promotes the protection of an affected person's constitutional rights. As such, the applicant says that the Court is obliged to prefer this interpretation over that of the respondents, which amounts to a blanket ban on representations in all instances, regardless of the circumstances of any particular case.

[62] In this regard, the applicant argues that the rights in sections 12(1)(a) and 34 of the Constitution entitle a person, whose arrest is sought under section 5(1)(b), to procedural fairness before the Magistrate. Section 12(1)(a) of the Constitution provides that everyone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily and without just cause. Section 34 similarly gives a person in the position of the applicant the right to have any legal dispute decided in a fair hearing. The procedural facet of these rights requires that no one be deprived of physical freedom unless fair and lawful procedures have been followed.

[63] In the context of a warrant of arrest under section 5(1)(b), where a person's liberty is at stake, the applicant contends that a fair procedure requires the interposition of an impartial entity, independent of the executive to act as an arbitrator. In this regard, the applicant relies on *Smit*, and the Court's determination there that the Magistrate's role is not simply to rubberstamp the executive's request for a warrant of arrest. The applicant points to the fact that the Court in *Smit* appears to have endorsed the view that a Magistrate's role under section 5(1)(b), as opposed to under section 5(1)(a), envisages that she will bring her own independent mind to bear on the question of whether a warrant should be issued. In this regard, the Court said:

> "The procedural requirement of the right not to be deprived of freedom arbitrarily or without just cause protected by section 12(1)(a) of the Constitution appears to be satisfied by the Magistrate's consideration of the

> questions whether: the person concerned has been convicted of an extraditable offence by a competent court of the requesting State; or, there are reasonable grounds to suspect that the person has committed the offence charged. I say 'appears to be satisfied' because I do not want to be categorical as section 5(l)(b) is not under challenge. A categorical pronouncement will have to be made when there is a challenge to the section."[29]

[64] The applicant submits that the guarantee of a fair procedure of necessity demands that the Magistrate be accorded a discretion to receive representations from the affected person before she can be satisfied that there are reasonable grounds to suspect that the offence has been committed. He argues that it would be patently unfair, and contrary to section 12(1)(a) for a person in his position, who claims to be the victim of trumped-up charges for political reasons, to have his liberty deprived by a warrant of arrest without any avenue open to him to make representations to the Magistrate. The applicant contends that this is the effect of the respondents' preferred interpretation of section 5(1)(b).

[65] It is so that under section 9(2) a person whose extradition is sought may be admitted to bail at her first appearance before a Magistrate. However, says the applicant, this is too late: he or she will already have been deprived of her liberty once the warrant of arrest is issued and executed. Furthermore, and as discussed earlier, the Court found in *Robinson*, that the section 10 enquiry before the Magistrate is not concerned with the question of whether the arrested person will subject to an unfair trial if they are surrendered to the requesting state. What this means, contends the applicant, is that the kind of representations he wishes to make, as set out in detail in his founding affidavit, will be irrelevant to any section 10 enquiry that may be held in his case. This means that the only opportunity for someone like the applicant to make representations of this nature is to a Magistrate before a warrant is issued and the extradition process is triggered. According to the applicant, this further demonstrates why his interpretation of section 5(1)(b) promotes the

[29] *Smit* above n 6 at paras 111-2.

constitutional rights guaranteed in sections 12(1)(a) and 34, and why this interpretation must be adopted.

[66] The respondents contend that the Applicant's interpretation does not accord with the plain reading of the section. They say that where the legislature intends representations to be sought, such representations are given expression in the legislation. The respondents further contend that the applicant's interpretation offends the principle of equality before the law and is not capable of practical application.

[67] The applicant conceded that an interpretation rendering a section compliant with the Constitution can only be adopted if that interpretation would not unduly strain the language of the legislation. If so, that reading is not viable. While section 5(1)(b) on its plain terms does not refer to the discretion he contends for, the applicant points out that the section does not exclude a discretion on its terms either. The applicant insists that he is not asking this Court to read into section 5(1)(b) an express discretion on the part of the Magistrate to accept or call for representations, or a procedure to regulate how this should take place. All he wants, he says, is for the Court to adopt an interpretation that leaves the door open to the possibility of representations to assist the Magistrate to form a judicial opinion as to whether a warrant of arrest is justified.

[68] One of the difficulties with this submission is that it is impractical: of what use is the recognition that the door is open to representations to a Magistrate considering a warrant of arrest without laying down a procedure in terms of which those representations may be made? The applicant accepted, in oral argument before us that as a matter of course, warrants of arrest, generally, are dealt with *ex parte*. There is no established procedure either in the Criminal Procedure Act or in the Extradition Act for any form of notice or subsequent procedure to regulate anything but an *ex parte* process. This leaves a whole range of questions open. In what circumstances may a person make representations? Must the prosecuting authority or the Court give him or her notice that a warrant of arrest will be sought? Can a Magistrate *mero motu* call for representations? What about a person whose whereabouts is unknown: do they enjoy the same right?

[69] What these questions demonstrate is that, despite the applicant's submission to the contrary, he is, in fact, asking this Court to go further than simply to keep the door open to the prospect of representations in an appropriate case, like his own. The applicant's interpretation of necessity requires a reading in of a right to make representations and a process in terms of which that right may be exercised. In *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others*,[30] the Constitutional Court explained the difference between the process of interpreting provisions constitutionally and of a reading in once a provision has been found to be unconstitutional as follows:

> "There is a clear distinction between interpreting legislation in a way with 'promote(s) the spirit purport and objects of the Bill of Rights' as required by s 39(2) of the Constitution and the process of reading words into or severing them from a statutory provision which is a remedial measure under s 172 (1) (b), following upon a declaration of constitutional invalidity under s 172(1)(a) The first process, being an interpretive one, is limited to what the text is reasonably capable of meaning. The latter can only take place after the statutory provision in question, notwithstanding the application of all legitimate interpretive aids, is found to be unconstitutionally invalid."

[70] The difficulty for the applicant is that his interpretation stretches section 5(1)(b) beyond its reasonably capable meaning. It is not just that the section in its plain terms does not provide for a right to make representations before a Magistrate issues a warrant of arrest. The context and purpose of the Act supports the same conclusion.

[71] Of critical importance is what we referred to earlier as the dynamic tension between the role and powers of the Magistrate, on the one hand, and those of the Minister, on the other. In terms of section 5(1)(b) the discretion of the Magistrate is limited and narrow. First, the Magistrate must be satisfied that there is sufficient information before him or her that the person to be arrested is a person accused or convicted of an extraditable offence; second, that the offence is extraditable; third, that the extraditable offence was committed within the jurisdiction of the foreign state and fourth, whether in the opinion of the

[30] *National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others* [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 at para 24.

Magistrate, had this offence been committed in the Republic of South Africa, the issue of a warrant of arrest would have been justified.

[72] The extent of the Magistrate's role is limited to that of granting authorisation for the detention of a person for extradition purposes. Unlike in the case of extradition to associated states, where the Magistrate has the final say on whether the person should be surrendered for extradition,[31] in the case of extradition to foreign states, the extradition decision lies solely in the discretion of the Minister.

[73] As confirmed in *Robinson*, it does not lie within the ambit of a Magistrate's powers in a section 10 enquiry to consider and make determinations on whether the affected person is likely to have a fair trial if surrendered, or whether the charges are trumped-up, as the applicant contends in his case. These considerations lie exclusively with the Minister. The scheme of the Act is such that the question of whether the person will become the victim of an unfair trial, or face trumped-up charges, must be weighed by the Minister when it comes to his determination of whether there should be a surrender: taking this factor into account any earlier would be premature.[32]

[74] Moreover, the Constitutional Court in *Robinson* found that:

> "There is nothing constitutionally objectionable in a statutory scheme that requires the Magistrate to determine whether the person sought to be extradited has been convicted of an extraditable offence and thereafter to grant the Minister a discretion including a discretion to determine whether it is in the interests of justice to extradite any person. Nor is it appropriate to determine whether a law is objectionable on the basis of an underlying apprehension that members of the executive entrusted with making certain decisions will not do it properly …"[33]

[75] If, as has been authoritatively decided, a Magistrate has no powers to consider such issues under section 10 because they lie within the exclusive jurisdiction

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[31] In terms of section 12 of the Act. Section 12(2) gives the enquiry Magistrate more or less the equivalent powers as the Minister has to refuse the surrender of a person under section 11. It should be noted, too, that the process for issuing a warrant of arrest in respect of associated states is regulated separately under section 5 of the Act.

[32] *Robinson* above n 9 at para 52.

[33] Id at para 53.

of the Minister, how is section 5(1)(b) reasonably capable of being interpreted to give the Magistrate a discretion to take them into account, based on representations made by an affected person, before he or she issues a warrant of arrest? The question is rhetorical. The obvious answer is that section 5(1)(b) cannot be so interpreted. It would effectively give the Magistrate the power to terminate the extradition process, by refusing to issue a warrant of arrest, on grounds which, under the Act lie within the exclusive preserve of the Minister. As Madlanga J, writing for the majority in *Smit*,[34] reasoned in relation to section 5(1)(a):

> "Willing as I am to find a constitutionally compliant interpretation of section 5(1)(a), the problem I have is how one wiggles out of its provisions and somehow finds other requirements that satisfy the procedural facet of the section 12(1)(a) right. This, without unduly straining the language of the provision."[35]

[76] In our view, not only does the applicant's interpretation in this case unduly strain the language of section 5(1)(b), it goes further and upends the entire scheme of the Act. To read section 5(1)(b) as permitting a Magistrate to consider or call for representations before issuing a warrant of arrest would defeat the purpose of the entire Act. It would provide a Magistrate with the authority to decide whether the extradition process should proceed. It would impermissibly widen the limited discretion of the Magistrate, as envisaged in section 5(1)(b), and expropriate to the Magistrate powers that lied within the prerogative of Minister.

[77] We conclude that given the text, the context and the purpose of sections 5(1)(b), read with section 39(2) of the Constitution in mind, there is no room for a finding in terms of which it is declared by this Court that section 5(1)(b) of the Act authorises a Magistrate seized with an application for an arrest warrant to permit and consider the making of representations by a person before the Magistrate issues a warrant for the arrest of that person in appropriate circumstances.

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[34] *Smit* above n 6 at para 117.
[35] Id at para 118.

The Constitutional Challenge.

[78] We turn, then, to the alternative issue raised in this matter: a declarator of unconstitutionality given that this Court has found that section 5(1)(b) cannot reasonably be interpreted to authorise a Magistrate to consider representations. The applicant seeks for this Court to declare section 5(1)(b) unconstitutional and invalid to the extent of its inconsistency with the Constitution. He also asks for an order that should any of the respondents intend making application for a warrant for his arrest in the future, he be given reasonable notice of such application.

[79] The applicant argues that the section, as interpreted by us, unjustifiably limits the rights in sections 12(1)(a) and 34 of the Constitution. Further, it violates the separation of powers in that the Magistrate is straightjacketed and prevented from considering relevant information as demanded by fairness.

[80] The gist of the applicant's case is that on our interpretation of section 5(1)(b) a person like the applicant will be deprived of her liberty without having the opportunity to persuade the Magistrate that the offences in respect of which her extradition is sought are trumped up and that she will not receive a fair trial if arrested and surrendered. Not only does this amount to an arbitrary deprivation of liberty without just cause, but it also offends the principle of separation of powers: it effectively means that the role of the Magistrate in deciding to issue an arrest warrant is reduced to that of simply rubberstamping the Minister's decision that the extradition process should be triggered by an arrest. This, says the applicant, is contrary to what the Constitutional Court identified in *Smit* as being unacceptable from a separation of powers point of view.

[81] The first difficulty with the applicant's submissions is that it is well settled in our law that fairness is not an absolute or immutable concept but depends on the context of the decision.[36] The context of the decision to issue a warrant in terms of the Act is to bring the person before a Magistrate only as the first step in the Minister's consideration of whether to extradite a person or not. The extradition process is usually resorted to precisely because the person whose surrender is

[36] See for example, in this regard, *Du Preez and Another v Truth and Reconciliation Commission* 1997 (3) SA 204 (A).

sought is a fugitive from justice or, at least, is not willing voluntarily to return to the requesting state for trial. An application for a warrant of arrest is directed at securing the person concerned so that the extradition process can take its course, much like a warrant of arrest is used in ordinary criminal procedure to secure the attendance of an accused person in court. As noted earlier, the applicant accepted that in the latter instance an *ex parte* procedure is followed in the ordinary course. Given the context and purpose of the warrant of arrest under section 5, depriving an affected person of the right to make representations before a warrant is issued does not amount to a constitutionally unfair process.

[82] A further difficulty with the applicant's case is that our interpretation is premised on the demarcation of functions between the Minister and the Magistrate in the extradition process. We have found that under the Act it is the Minister that has the power to consider issues such as whether the charges in respect of which an affected person is sought are trumped up, or whether he or she will receive a fair trial if surrendered. Our interpretation is not that these issues may never be considered at all: only that they are not for the Magistrate to consider before issuing a warrant of arrest.

[83] As discussed earlier in the statutory framework section of this judgment, under section 8(2) of the Act the Minister may, for any reason he deems fit, cause the cancellation of a warrant of arrest even before it is executed. Thus, the fact that a Magistrate cannot consider representations under section 5(1)(b) does not render the process unfair: it is open to an affected person to make her representations to the correct authority, namely the Minister to prevent him or her from being taken into custody. Thus, the Act envisages that this may have the effect of staving off any deprivation of liberty if the representations are successful and a warrant is cancelled. Despite what the applicant submits, fairness is adequately catered for in the scheme of the Act.

[84] As to the applicant's contention that our interpretation of section 5(1)(b) violates the principle of separation of powers, we cannot agree. The respondents pointed out that under this section the Magistrate is required to give independent, judicial consideration to whether, according to the information

placed before him or her: the offence is an "extraditable offence" under the Act; the offence in the opinion of the Magistrate justifies the issue of a warrant for the arrest of a person, had it been alleged that he or she committed the offence in the Republic; and, with the importation of section 43(1) of the Criminal Procedure Act, there are reasonable grounds to suspect that the offence has been committed.

[85] In *Smit*, the Court contrasted the role of the Magistrate under sections 5(1)(a) and 5 (1)(b). The former subsection provided for a warrant to be issued simply "upon receipt of a notification of the Minister to the effect that a request for the surrender of (the) person to a foreign State had been received by the Minister". The Court pointed out that subsection (a) was unconstitutional as it left the Magistrate with no discretion as is provided for in subsection (b). The Court reasoned as follows:

> "[t]he 'jurisdictional facts' for a Magistrate to issue a warrant are to be gleaned from section 5(1)(a) and (b). Section 5(1)(b) affords a Magistrate the leeway to act as a Magistrate. I say so because in *Heath* this Court said the function of issuing search warrants is suited to the judicial office because it entails the weighing-up of facts and reaching a decision on them. Section 5(1)(b) does afford a Magistrate an opportunity to exercise a judicial function in this fashion. That is so because this section makes provision for the Magistrate to issue a warrant only if she or he would have issued one in respect of an offence committed in South Africa …"[37]

[86] Consequently, the fact that the Magistrate under section 5(1)(b) does not have the power to consider representations as to the *bona fides* of the request for extradition does not preclude the Magistrate from exercising the normal judicial function involved in considering whether to issue a warrant of arrest. Section 5(1)(b) affords a Magistrate the leeway to exercise her judicial discretion and to act as a Magistrate, not merely to rubberstamp executive decisions. The Magistrate must rely on her knowledge and experience not only to conclude whether the offence meets the definition of "extraditable offence" in the Act, but also whether he or she would have issued a warrant for the arrest if this offence

[37] See *Smit* above n 6 at para 107.

was committed in this country. To this extent, the same criteria which would be used for an arrest for a crime committed in South Africa would apply.

[87] As the Court reasoned in *Smit*, while the Magistrate is required to bring her own independent mind to these considerations:

> "[s]he or he is not expected to play the role of a review or appellate arbiter on the legal correctness of the conviction; not even at the level whether there are reasonable grounds to believe that the conviction is legally correct. To use an Americanism, the Magistrate must not second-guess the conviction by the foreign court. To do so, would be to undermine the judicial system of the requesting state. That, in turn, would be inconsistent with the idea of comity between South Africa and those nations it owes extradition obligations."[38]

[88] In other words, the role of the Magistrate under section 5(1)(b) does not extend to assessing the merits or demerits of the alleged offences nor to the personal circumstances of the person sought to be extradited and her relationship with the requesting state. However, the fact that her role does not extend this far does not mean that he is she is not exercising an independent judicial function.

[89] While the Court in *Smit* was required to consider the constitutionality of the power conferred on a Magistrate by section 5(1)(a) (which it found wanting), in the process it remarked, without deciding, on the constitutionality of section 5(1)(b):

> "The procedural requirement of the right not to be deprived of freedom arbitrarily or without just cause protected by section 12(1)(a) of the Constitution appears to be satisfied by the Magistrate's consideration of the questions whether: the person concerned has been convicted of an extraditable offence by a competent court of the requesting State; or, there are reasonable grounds to suspect that the person has committed the offence charged. I say 'appears to be satisfied' because I do not want to be categorical as section 5(1)(b) is not under challenge. A categorical pronouncement will have to be made when there is a challenge to the section."[39]

[38] Id at para 111.
[39] Id at para 112.

[90] Although the Court did not make a categorical pronouncement on the constitutionality of section 5(1)(b) in *Smit*, in our view its *prima facie* assessment was correct, for the reasons we have advanced above. There is further support from the Court on the constitutionality of the section, as interpreted by us. In *Robinson*, as we have discussed, the Court analysed the demarcation of roles between the Magistrate and Minister under the Act, finding that there was nothing constitutionally objectionable in this statutory scheme.

[91] Although not directed at section 5(1)(b), the view expressed by the Court in *Robinson* supports our premise that the constitutional requirements to promote section 12(1)(a) and section 34, and to respect the separation of powers, may be met by a statutory scheme that divides the exercise of power in extradition matters between the Magistrate and the Minister. In the case of section 5(1)(b), while the Magistrate may not have the power to accept representations pertaining to the *bona fides* of the offences alleged by the requesting state to have been committed by an affected person, the constitutional imperative of protecting and promoting the right to liberty from arbitrary deprivation is met by the Minister retaining the authority to give consideration to such issues.

[92] For all of these reasons, we conclude that section 5(1)(b) is not unconstitutional.

[93] But even if there is a possibility that we are wrong in our assessment, in our view, any infringement of rights under section 12(1)(b) or section 34 are justifiable under section 36 of the Constitution.

[94] In this case, the Republic of South Africa is bound under a reciprocal extradition Protocol with Botswana. It is in the interest of the country that these obligations are honoured. The Minister in terms of the Act is the person to make the policy-oriented decisions in this regard. To achieve this, a person sought to be surrendered must be available for surrender should such a decision be made. This is achieved by the arrest of such a person.

[95] In terms of section 36(1) a right in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonable and

justified in an open democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including-

a. the nature of the right;

b. the importance of the purpose of the limitation;

c. the nature and extent of the limitation;

d. the relation between the limitation and its purpose; and

e. less restrictive means to achieve this purpose.

[96] Both the right not to be deprived of one's liberty arbitrarily or without just cause, and the right to have a legal dispute fairly determined in a Court, or fundamental to the rule of law. There can be no gainsaying their importance. On the other hand, to the extent that section 5(1)(b) limits these rights by not permitting a consideration of representations to a Magistrate before the issue of a warrant of arrest, such infringement serves an important purpose. As we have said, it is aimed at securing the attendance of a person whose surrender is sought in an extradition process. It is of vital importance for South Africa, as a sovereign state, that it enacts laws that foster its reciprocal treaty obligations in extradition matters. Not only is this imperative for international comity, but it also ensures that South Africa is better able to meet its own obligations to pursue criminal justice against perpetrators within our own borders. These considerations also deal with the relation between the limitation and its purpose.

[97] The extent of the limitation is not substantial. At worst for the affected person, he or she must be brought before a Magistrate under section 9 as soon as possible, at which point the Magistrate may admit him or her to bail. Over and above this, the Minister has the power to intervene at any stage to cause a warrant of arrest to be cancelled prior to its execution, or to order the discharge of a person who has been committed under an executed warrant. As to the question of whether less restrictive means could achieve the purpose, it is

difficult to envisage how this might be achieved, without undermining the entire edifice of extradition.

[98] For these reasons we are satisfied that even if section 5(1)(b) were, contrary to our finding, held to be unconstitutional, the limitations imposed thereby on the affected constitutional rights are justified under section 36(1).

The application to strike out

[99] The first to third respondents sought an order striking out paragraphs 64 to 143.3 of the applicant's founding affidavit. In these paragraphs, the applicant outlines the intended representations he would wish to present to the Magistrate should a warrant for his arrest be sought in the future. It is crucial to note that this part of the applicant's founding affidavit provides factual detail about the circumstances leading up to his departure from Botswana. The respondents assail the paragraphs on the basis that they are irrelevant, unnecessary and bordering on an abuse of the Court process.

[100] The applicant averred that this factual matrix was provided for the following reasons: First, to disclose to the Court the full facts concerning the impending extradition; second, to demonstrate the issues that will arise before the Magistrate when he or she decides whether to issue a section 5(1)(b) warrant; third, to counter any suggestion that there is "no point" in making representations to a Magistrate before issuing a section 5(1)(b) warrant; and fourth, why the applicant should be afforded an opportunity to make representation before the Magistrate. As far as the fourth reason is concerned it has been conceded by the applicant that this is not an issue before the Court.

[101] On behalf of the respondents, it was argued that this evidence is irrelevant for considering this application.

[102] Striking out in an affidavit is regulated by Rule 6(15) of the Uniform Rules of Court which provides that:

> "The court may on application order to be struck out from any affidavit any matter which is scandalous, vexatious or irrelevant, with an appropriate order as to costs, including costs as between attorney and client. The court will not

grant the application unless it is satisfied that the applicant will be prejudiced if the application is not granted."

[103] An order striking out any matter from an affidavit will succeed where an applicant has shown that the matter to be struck out is scandalous, vexatious or irrelevant and that he or she will be prejudiced if the matter is not struck out. The test of irrelevance of the allegations forming the subject of the application is whether such allegations do not apply to the matter before Court or do not contribute in any way to a decision of the matter. The evidence must relate to the cause of action or merits of the case.

[104] In dealing with the approach as set out above, the Court in *Beinash v Wixley*[40] held that two requirements must be satisfied before an application to strike out a matter from any affidavit can succeed. First, the matter sought to be struck out must be scandalous, vexatious, or irrelevant. Second, the Court must be satisfied that if such matter was not struck out the parties seeking such relief would be prejudiced.

[105] The issue taken with paragraphs 64 to 143.3 is that it appears excessive for the applicant to invite this Court to consider the weight of his supposed representations he wishes to make to a Magistrate in the future when the real issue before this Court is to determine whether, on a proper interpretation of section 5(1)(b), a Magistrate has the power to consider any representations at all. In other words, it was never for this Court to determine whether the applicant should be permitted to make the representations he outlined in great detail in his founding affidavit. The impugned paragraphs simply were not relevant to issues before the Court.

[106] That respondents have not alleged any prejudice in their affidavit to justify striking out those paragraphs does not alter this fact. To allow material concerned with facts to put up before a Magistrate, to which it has not been determined if the Act permits such representations, would cause prejudice were it not to be struck out. For one thing, not only the respondents, but also the Court, were burdened with twenty additional pages of the founding affidavit to traverse, quite apart from the extensive annexures referred to in them. The

[40] *Beinash v Wixley* [1997] ZASCA 32; 1997 (3) SA 721 (SCA).

respondents are not parties to the any legal dispute that may exist between the applicant and the prosecuting authorities in Botswana. It could not be expected of them to respond to the extensive averments made by the applicant in this regard. The inherent prejudice to the respondents is manifest.

[107] In *Vaatz v Law Society of Namibia*[41] it was stated that irrelevant matter consists of "allegations which do not apply to the matter in hand and do not contribute one way or the other to a decision of such matter"[42] In relation to prejudice it was said that this "does not mean that, if the offending allegations remain, the innocent party's chances of success will be reduced. It is substantially less than that. How much less depends on all the circumstances…"[43]

[108] It is patently clear that where such irrelevant material is not struck out, the respondents would suffer prejudice in its case. The extensive details the founding affidavit contains relating to the applicant's anticipated criminal proceedings in Botswana, which issues do not fall to be determined by this Court, are irrelevant and must be struck.

Order and costs

[109] As far as costs in the main application are concerned, the principles laid down in *Biowatch Trust*[44] apply: The application implicated constitutional rights and the applicant ought not to be ordered to pay the costs of the state. The costs of the application to strike out are different. In our view, the applicant overstepped the acceptable limits of what ought to have been included in his affidavit, and he must bear the costs of the strike-out application.

[110] We make the following order:

a. The respondents' application to strike out paragraphs 64 to 143.3 of the applicant's founding affidavit is granted with costs, including the costs of two counsel.

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[41] 1991 (3) SA 563 (Nm) at 567B.
[42] Id.
[43] Id.
[44] *Biowatch Trust v Registrar Genetic Resources and Others* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

b. The applicant's application is dismissed with no order as to costs.

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R M Keightley
JUDGE OF THE HIGH COURT
JOHANNESBURG

_____

R Strydom
JUDGE OF THE HIGH COURT
JOHANNESBURG

I agree

_____

D M Mlambo XXXXX
JUDGE OF THE HIGH COURT
JOHANNESBURG

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal

representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date for hand-down is deemed to be 24 MAY 2023.

APPEARANCES

COUNSEL FOR PLAINTIFF:	**ADVOCATE D NTSEBEZA SC AND ADVOCATE A KATZ SC AND ADVOCATE E COHEN**
PLAINTIFFS ATTORNEYS:	**WEBBER WENTEL**
COUNSEL FOR DEFENDANT:	**ADVOCATE L HODES SC AND ADVOCATE T GOVENDER**
DEFENDANT ATTORNEYS:	**STATE ATTORNEY (F. RAMORASWI)**
DATE OF HEARING:	**01 MARCH 2023**
DATE OF JUDGMENT:	**24 MAY 2023**