THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 455/22

In the matter between:

RICCARDO PAOLO SPAGNI **APPELLANT**

and

THE ACTING DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE **FIRST RESPONDENT**

THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS **SECOND RESPONDENT**

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

THE DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICES **FOURTH RESPONDENT**

THE MINISTER IN THE DEPARTMENT OF INTERNATIONAL RELATIONS AND COOPERATION **FIFTH RESPONDENT**

Neutral citation: *Spagni v The Director of Public Prosecutions, Western Cape and Others* (455/2022) [2023] ZASCA 24 (13 March 2023)

Coram: DAMBUZA ADP and MABINDLA-BOQWANA JA and MJALI, CHETTY and SIWENDU AJJA

Heard: 23 November 2022

Delivered: 13 March 2023

Summary: Superior Courts Act 10 of 2013 – s 16(2)*(a)*(i) – order sought to declare extradition request invalid having no practical effect or result – appeal moot –appeal dismissed with costs.

ORDER

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

1 Leave to adduce further evidence is granted with no order as to costs.

2 The appeal is dismissed with costs, including costs of two counsel.

JUDGMENT

Mjali AJA (Dambuza ADP and Mabindla-Boqwana JA, and Chetty and Siwendu AJJA concurring):

[1] The appellant, Mr Riccardo Spagni unsuccessfully sought, in the Western Cape Division of the High Court, Cape Town (the high court), to review, set aside, and have declared as unconstitutional and invalid, the Acting Director of Public Prosecutions, Western Cape's (ADPP) formal extradition request to the United States of America (the USA) dated 21 September 2021. He also sought a declaration that the ADPP had no authority to submit an extradition request to a foreign state on behalf of the Republic of South Africa (South Africa). The application for review was a sequel to a request submitted by South Africa to the USA for the extradition of Mr Spagni for the continuation of his partly heard trial in the Regional Magistrates Court, Western Cape Division, Cape Town (the regional court) on charges of fraud.

[2] The basis for the challenge launched against the extradition request concerned a question of who had the authority to submit an extradition request for a sought person to a foreign State on behalf South Africa. Mr Spagni is of the view that that power is vested exclusively within the executive authority who is the Minister of Justice and Correctional Services and not with the National Prosecuting Authority (NPA), certainly not with the ADPP. In Mr Spagni's view, that power cannot be delegated.

Background

[3] Mr Spagni, was the subject of a provisional extradition request dated 21 September 2021 (the request), which was submitted by South Africa to the USA. The request emanated from his failure to appear in the regional court on several occasions leading up to 4 November 2020 for the continuation of his trial. The reasons advanced by his legal representative for his non-appearance were initially based on medical grounds, namely, that it was not in his best interests to travel from his residence in Plattenberg Bay, (a distance of approximately 500 km) to Cape Town due to the Covid-19 risk. The matter was then postponed to 24 March 2021 by agreement with his legal representative, who intimated that Mr Spagni would consult his doctor as to what protocol would need to be observed for his safety, both in travelling to Cape Town as well as his attendance in court.

[4] It turned out that at the time his legal representative gave that indication, Mr Spagni was in the USA. As a result, he failed to appear in court on 24 March 2021. His lawyer had no instructions from him and did not know his whereabouts and could not reach him on the phone. The trial

was postponed until 19 April 2021 in order for Mr Spagni to be traced. From the investigations conducted following his failure to appear in court, it transpired that Mr Spagni had applied for a non-immigrant visa to the USA on 28 September 2020 and was granted same on 7 October 2020.

[5] On 21 March 2021, just three days before the trial resumed, Mr Spagni and his wife left South Africa for Bermuda, where they were quarantined for a while and then proceeded to the USA on 14 April 2021. They settled in New York and established two residences there. That period coincided with the time Mr Spagni failed to attend court and through his lawyer, submitted medical certificates in the regional court citing his inability to travel from his residence in Plattenberg Bay to Cape Town.

[6] Mr Spagni was arrested by the USA authorities on 21 July 2021 following an application for his arrest that was transmitted by the South African office of Interpol to its counterparts in the US in terms of Article 13 of the Extradition Treaty between the USA and South Africa (the treaty).[1] He was later released on bail with certain conditions, which included him being fitted with a GPS monitor; giving up his passport; that he remains in the jurisdiction of the Middle District of Tennessee, Nashville Division; and that he reports to the court as often as that court ordered.

[7] Mr Spagni launched an urgent application on 8 November 2021 in the high court for the relief stipulated in paragraph 1 of this judgment. That application was dismissed with costs on 6 April 2022. The appeal before us

[1] Article 13 of the Extradition Treaty concluded between the Republic of South Africa and the United States of America on 16 September 1999.

is against the whole of that judgment, with leave to appeal having been granted by that court.

[8] At the hearing of this appeal the first and second respondents applied in terms of section 19(1)*(b)* of the Superior Courts Act 10 of 2013 (the Act) read with rule 11(1)*(b)* of the Supreme Court of Appeal Rules (the SCA rules) for leave to adduce, by way of affidavit, further evidence of the intervening developments subsequent to the granting of the order sought to be impugned. The respondents contended that the evidence sought to be adduced was material to this Court's determination of the appeal as the order sought on appeal would have no practical effect. Mr Spagni did not oppose the application for the submission of further evidence but held the view that despite such developments, the determination of the issues in this appeal would have a practical effect or was in the interests of justice to determine

Legal framework

[9] In terms of s 19(1)*(b)* of the Act, this Court has the power to receive further evidence on appeal. The test for the admissibility of further evidence on appeal is well-established. An applicant must meet the following requirements. First, there must be a reasonably sufficient explanation, based on allegations, which may be true, why the new evidence was not led in the court a quo. The applicant must satisfy the court that it was not owing to any remissness or negligence on his or her part that the evidence in question was not adduced at the trial. Secondly, there should be a *prima facie* likelihood

of the truth of the new evidence. Thirdly, the evidence should be materially relevant to the outcome of the case.[2]

[10] As to the question of mootness, the general principle is that an application is moot when a court's ruling will have no direct practical effect. The reasoning behind this principle is that courts' scarce resources must be used to determine live legal disputes rather than abstract propositions of law. Courts should refrain from giving advisory opinions on legal questions that are merely abstract, academic or hypothetical and have no immediate practical effect or result.[3]

[11] Section 16(2)*(a)* of the Act provides that:

'(i) When at the hearing of an appeal the issues are of such a nature that the decision sought will have no practical effect or result, the appeal may be dismissed on this ground alone.

(ii) Save under exceptional circumstances, the question whether the decision would have no practical effect or result is to be determined without reference to any consideration of costs.'

[12] Mootness is not an absolute bar to the determination of issues on appeal. There are instances where there have been exceptions to the provision and the courts have exercised a discretion in a limited number of cases, where the appeal, though no longer presenting existing or live controversies, raised a discrete legal point which required no merits or

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[2] *S v de Jager* 1965 (2) SA 612 (A) *at 613C – D, De Aguair v Real People Housing (Pty) Ltd* [2010] ZASCA 67; 2011(1) SA 16 (SCA); [2010] 4 All SA 459 (SCA) para 11.

[3] *National Coalition for Gay and Lesbian Equality v Minister of Home Affairs* 2000 (2) SA 1 (CC); 2000 (1) BCLR 39 (CC) para 21; *JT Publishing (Pty) Ltd and Another v Minister of Safety and Security* 1997 (3) SA 514 (CC); 1996 (12) BCLR 1599 (CC) para 15.

factual matrix to resolve.[4] This Court may entertain an appeal, even if moot, where the interests of justice so require.[5]

[13] The nature of the discretion has been described as follows: 'It is a prerequisite for the exercise of the discretion that any order the court may ultimately make will have some practical effect either on the parties or on others. Other factors that may be relevant will include the nature and extent of the practical effect that any possible order might have, the importance of the issue, its complexity and the fullness or otherwise of the argument.'[6]

[14] As to how that discretion is to be exercised, the following is instructive:

'This court has a discretion in that regard and there are a number of cases where, notwithstanding the mootness of the issue as between the parties to the litigation, it has dealt with the merits of an appeal. With those cases must be contrasted a number where the court has refused to enter into the merits of the appeal. The broad distinction between the two classes is that in the former a discrete legal issue of public importance arose that would affect matters in the future and on which the adjudication of this court was required, whilst in the latter no such issue arose.'[7]

Discussion

[15] The following transpired from the further evidence that was submitted. Mr Spagni voluntarily and knowingly waived his extradition rights in terms of Article 19 of the Treaty at the enquiry that was held on 25 May 2022 before the Tennessee District Court. He is in South Africa on the

[4] *Natal Rugby Union v Gould* [1998] 4 All SA 258 (A).
[5] *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC).
[6] *Minister of Justice and Correctional Services and v Estate Late James Stransham-Ford and Others* [2016] ZASCA 197; [2017] 1 All SA 354 (SCA); 2017 (3) BCLR 364 (SCA); 2017 (3) SA 152 (SCA) para 22.
[7] *Centre for Child Law v Governing Body of Hoërskool Fochville & Another* [2015] ZASCA 155; [2015] 4 All SA 571 (SCA); 2016 (2) SA 121 (SCA) para 11.

strength of that waiver for the continuation of his trial, which was set to continue on 3 November 2022 in the regional court.

[16] Against this evidence, the first and second respondent submitted that the decision and the relief sought by Mr Spagni, will have no practical effect or result as it has been overtaken by events. Further, that there is no longer a live controversy between the parties.

[17] Counsel for Mr Spagni, on the other hand, argued that his waiver and return to this country is inconsequential to the determination of the lawfulness of the extradition request sent to the USA by the second respondent. Further, that if the request was unlawful and invalid, it means that Mr Spagni's waiver was made on the basis of an unlawful and invalid extradition request, which continues to determine the basis of his presence in South Africa and the jurisdiction that may be exercised over him. Thus, it will have legal implications for Mr Spagni's ongoing criminal trial in that he may only be prosecuted for the offences for which extradition had been successfully sought. On that basis he submitted that the decision in this appeal will have a practical effect and for that, he relied on the decision of this Court in the matter of *S v Stokes (Stokes)*.[8] Another reason advanced is that the decision of this Court will have a direct impact on similar matters. Accordingly, it is in the interests of justice to determine the merits of this matter.

[18] Factually, there exists no live controversy between the parties. The determination of the issues in this matter will not have any practical effect,

[8] *S v Stokes* [2008] ZASCA 72; [2008] 4 All SA 260 (SCA); 2008 (5) SA 644 (SCA); 2008 (2) SACR 307 (SCA).

considering that Mr Spagni is already back in the country for the continuation of his fraud trial and that the orders sought were to have the request submitted to the USA for his extradition, declared invalid and set aside. To declare invalid and to set aside a request for the extradition of Mr Spagni in circumstances where he himself waived his rights and returned to the country would have no practical effect other than an abuse of court resources. Bearing in mind that Mr Spagni was legally represented and fully cognisant of the implications of the unequivocal waiver of his rights under the extradition treaty, it is not open to him to now challenge the validity of the extradition request. He could have challenged its validity during the enquiry that was held *inter alia* for such purposes, but made a conscious decision not to do so.

[19] As regards the argument that the extradition request continues to have legal implications for Mr Spagni's ongoing trial, it is essential for a proper consideration of that argument to quote the contents of Mr Spagni's affidavit, filed in support of his waiver of rights pertaining to extradition. They are as follows:

'AFFIDAVIT IN SUPPORT OF WAIVER OF RIGHTS

I, Riccardo Paolo Spagni a/k/a Ricardo Paolo Spagni, having been fully informed by my attorneys, Jonathan Farmer and Brian E. Klein, of my rights under the extradition treaty in force between the United States and South Africa and 18 U.S.C § 3184-3196, do hereby waive any and all such rights and ask the Court to expedite my return, in custody, to South Africa.

My attorneys, with whose service I am satisfied, have explained to me the terms of the extradition treaty in force between the United States and South Africa, the applicable sections of Title 18 of the United States Code, and the complaint filed by the United States Attorney in fulfilment of the United States Code, and the complaint filed by the

United States Attorney in fulfilment of the United States treaty obligations to the Government of South Africa. I understand that pursuant to 18 U.S.C § 3184, I am entitled to a hearing at which certain facts would need to be established, including:

-That currently there is an extradition treaty in force between the United States and South Africa;

- That the treaty covers the offences for which my extradition was requested;

-That I am the person whose extradition is sought by South Africa; and

-That probable cause exists to believe that I committed the offences for which extradition was requested.

I admit that I am the individual against whom charges are pending in South Africa and for whom process is outstanding there. I fully understand that in the absence of a waiver of my rights, I cannot be compelled to return to South Africa unless and until a court in the United States issues a ruling certifying my extraditability and the Secretary of State of the United States issues a warrant of surrender.

I have reviewed the complaint and I fully understand my right to a hearing at which my counsel and I could challenge the extradition request presented by the Government of South Africa. I hereby waive my rights under the extradition treaty and the applicable sections of Title 18 of the United States Code, and agree to be transported in custody, as soon as possible, to South Africa. I agree that the conditions of my bail will continue in this District until the eve of the duly authorized representative of the Government of South Africa departing South Africa to effectuate my transport to South Africa, at which time I will surrender to the United States Marshal, as directed by the United States Government. No representative, official, or officer of the United States or the Government of South Africa, nor any other person whosoever, has made any promise or offered any other form of inducement or made any threat or exercised any form of intimidation against me. I execute this waiver of rights knowingly, voluntarily, and entirely of my own free will and accord.'

[20] Mr Spagni made an unequivocal waiver of his extradition rights. Importantly when he waived such rights he stated that he fully understood his right to a hearing at which he and his counsel could challenge the

extradition request presented by the government of South Africa. He fully understood the charges for which the extradition was sought and that they related to the partly heard trial in South Africa, for which he agreed to return for its continuation. There is no complaint in this matter that Mr Spagni is prosecuted for any other charges except those he is already was aware of, which was the case in the *Stokes* matter. Therefore, the reliance on *Stokes* is misplaced as that matter is distinguishable from this one on both facts and on issues.

[21] What remains to be determined is whether it is in the interests of justice that this Court exercise its discretion and determine the issues raised on appeal even though they no longer present live controversies. The question whether it is in the interests of justice to hear the matter depends on many factors and the discretion that the court must exercise in this regard must be according to what the interests of justice require. The Constitutional Court endorsed the following factors to be potentially relevant in the consideration of the exercise of the discretion to hear a matter that no longer presents live controversies. They are: the nature and extent of the practical effect that any possible order might have; the importance of the issue; the complexity of the issue; the fullness or otherwise of the argument advanced; and resolving disputes between different courts.[9]

[22] Considering the factual basis on which this appeal has been founded and the inescapable fact that Mr Spagni, duly represented and in full cognisance of his rights, waived any challenge on the validity of the

[9] *MEC for Education: Kwazulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).

document that he now seeks to have invalidated, the interests of justice simply do not arise. Mr Spagni has also failed to make out a case for public interests in a number of respects. The cases he relied on to advance the public interest point either implicated rights which affected the wider society or required the higher court to settle a complex legal issue of public importance or there were conflicting decisions on the same issue.

[23] Mr Spagni could not articulate the nature of the right he wishes to assert on behalf of the members of the public. When pressed on the issue, his counsel submitted that the object was to vindicate the rule of law, an issue which was in the public interest. That is however too broad an assertion to make. While the case might raise an interesting legal debate, its factual context cannot be ignored. Mr Spagni cannot wish away the fact that he voluntarily gave up his own rights and elected to be brought to South Africa and not challenge his extradition. As to how that impacts other people and how he has an interest in fighting a case for future litigants remains a mystery. It remained unclear as to whether he wanted to assert a right to know if the request was valid or he sought to vindicate the rule of law as he contended. No case for public interest has been made out in the papers.

[24] In an attempt to bring this case within the considerations laid down in the *MEC for Education v Pillay*[10]and other judgments on this issue, counsel for Mr Spagni directed us to the recent judgment of *Schultz v Minister of Justice and Correctional Services and Other*[11], which he submitted made a

[10] *MEC for Education v Pillay* (CCT 51/06) [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC) (5 October 2007).
[11] *Schultz v Minister of Justice and Correctional Services and Others* (21/35658) [2022] ZAGPJHC 60 (11 February 2022).

conflicting finding from that of the high court in this matter and accordingly warrants this Court to settle the legal position. That argument loses sight of the fact that *Schultz* is distinguishable from this one flowing from the unequivocal waiver of rights, which Mr Spagni cannot wish away. On the interests of justice aspect too, Mr Spagni has failed to make out a case and the appeal falls to be dismissed. No argument was made as to how the issues in this matter would impact on the general welfare of the public and why that would warrant recognition and protection, bearing in mind Mr Spagni's conscious and unequivocal waiver of his rights.

[25] Finally, what was stated by this Court in *Rand Water Board v Rotek Industries (Pty) Ltd*,[12] demands repetition:

'The present case is a good example of this Court's experience in the recent past, including unreported cases, that there is a growing misperception that there has been a relaxation or dilution of the fundamental principle. . . that Courts will not make determinations that will have no practical effect.'

[26] With regard to costs, I am of the view that although the appeal was finally determined on the basis of mootness, the totality of the issues on appeal did justify the employment of two counsel. In the result the following order is made:

1 Leave to adduce further evidence is granted with no order as to costs.

2 The appeal is dismissed with costs, including costs of two counsel.

GNZ MJALI

[12] *Rand Water Board v Rotek Industries (Pty) Ltd* 2003 (4) SA 58 (SCA) para 26.

ACTING JUDGE OF APPEAL

Dambuza ADP (Mabindla-Boqwana JA and Mjali, Chetty, Siwendu AJJA concurring)

[27] I have read the judgment prepared by my colleague Mjali AJA. I agree that the application for admission of further evidence should succeed with no order as to costs, and that the appeal must be dismissed, with Mr Spagni, paying the respondents' costs. In this concurrence I discuss certain additional points which I consider important for a proper appreciation of the issues before us. And I too confine myself to the issue of mootness and make no pronouncement on the merits of the appeal. I restate some of the background to the extent necessary to underscore the importance of these issues.

[28] As set out in the first judgment, the appeal is against the order of the high court, in terms of which Mr Spagni's challenge to the extradition request made from this country to the USA was dismissed. Mr Spagni holds dual citizenship. He is a South African-Italian citizen. From 2011 he has been facing criminal charges of fraud, forgery and uttering in the Cape Town courts – first, in the Cape Town District Court and later in the regional court. The amount involved is R1,5 million. His trial commenced on 22 August 2019.

[29] Following the onset of the Covid-19 pandemic and the country being placed on national lockdown on 26 March 2020, Mr Spagni's trial was postponed on several occasions in his absence. He then failed to appear in court on 24 and 25 March 2021, these being the dates on which the trial was to proceed. It was later established that on 21 March 2021 he and his family

had travelled to Bermuda and thereafter to the USA on a non-immigrant visa, which he had obtained on 7 October 2020.

[30] On 21 July 2021, he was arrested in Nashville, Tennessee, in the USA, pursuant to a provisional arrest request from the South African office of the Interpol made in terms of Article 13(1) and (2) of the Treaty.[13] Following his release on bail, a formal extradition request from South Africa reached the USA on 23 September 2021. The request was initiated by the ADPP, Ms Nicolette Bell, who is the applicant in the application to adduce further evidence. It was endorsed by the second respondent in that application, Ms Shamila Batohi, the National Director of Public Prosecutions of South Africa (NDPP). The Director General in the Department of Justice and Constitutional Development[14] (Department of Justice) had confirmed the designation and authenticated Ms Bell's signature. It was also certified by the consular at the US Embassy in Pretoria in terms of Article 10(2) of the Extradition Treaty.

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[13] The article provides that:
'1. In case of urgency, the Requesting State may, for the purposes of extradition, request the provisional arrest of the person sought pending presentation of the documents in support of the extradition request. A request for provisional arrest may be transmitted through the diplomatic channel or directly between the Republic of South Africa Department of Justice and the United States Department of Justice. The facilities of the International Criminal Police Organization (INTERPOL) also may be used to transmit such request. The application may also be transmitted by post, telegraph, telefax or any other means affording a record writing.
2. The application for provisional arrest shall contain:
(a) a description of the person sought;
(b) the location of the person sought, if known;
(c) a description of the offence(s);
(d) a concise statement of the acts or omissions alleged to constitute the offence(s);
(e) a description of the punishment that can be imposed or has been imposed for the offence(s);
(f) a statement that a document referred to in Article 9(3)(a) or Article 9(4)(a), as the case may be, exists; and
(g) a statement that the documents supporting the extradition request for the person sought will follow within the time specified in this Treaty.

[14] As the department was known at the time.

[31] During the intervening period, between 29 August 2021 and 24 September 2021, Mr Duncan Okes, who was Mr Spagni's legal representative at the time, wrote to the respondents advising that Mr Spagni wished to return to South Africa voluntarily. In response, Mr De Kock of the NPA advised that the Prosecution Authority had no role to play in Mr Spagni's election to return to South Africa and that only Mr Spagni or his legal representative could waive the extradition proceedings which were pending in the USA courts, and consent to be surrendered to South Africa by the USA in terms of Article 19 of the Treaty.

[32] Mr Spagni's wishes to return to South Africa were repeated in further correspondence addressed by his legal representative to the Minister of Justice and the Minister in the Department of International Relations and Co-operative Governance (DIRCO). In their correspondence, Mr Spagni's lawyers also took issue with the lawfulness of the formal extradition request, challenging the authority of the Directorate of Public Prosecutions, in particular the ADPP, to launch same. They suggested that his return to South Africa was analogous to the fruits of a forbidden tree.

[33] On 8 October 2021, Mr Spagni launched the review proceedings in the high court. Therein he sought review of the extradition request on the basis of illegality. The application was premised on the contention that the extradition request was unlawfully submitted by the ADPP to the USA when the power to execute undertakings contained in the Extradition Treaty vested only in the executive authority of the country. Mr Spagni contended that the absence of evidence of involvement of the Minister of Justice and the Minister in DIRCO in the extradition process rendered the extradition

request unlawful. He argued that if he were to return to South Africa as a result of the unlawful extradition process, the South African courts would have no jurisdiction over him.

[34] The ADPP and the NDPP denied that they acted beyond their powers. They asserted that the information required under Article 4 of the Treaty resided and could only be compiled by a prosecutor. They also argued that their mandate to initiate requests for extradition is derived from s 20(1)*(b)* read with s 24(1)*(a)* of the NPA Act and s 179(1)*(b)* read with s 179(2) of the Constitution, which empower the prosecuting authority to execute functions incidental to prosecution of criminal proceedings. In any event, so they argued, the extradition request was submitted to the USA authorities with the cooperation of functionaries in the Department of Justice and through DIRCO.

[35] The high court found, among other things, that the NDPP's powers as set out in s 179(2) of the Constitution include securing the attendance of an accused at his or her trial as held in *Kaunda and Others v President of the Republic of South Africa and Others*.[15] Furthermore, the role of the Director-General of the Department of Justice in extradition applications is that of a Central Authority, the court held. Therefore, the presentation of the application to the Director General by the ADPP was not irregular. The court highlighted the acknowledgement by the ADPP in the extradition request that the final authority of the NPA resided with the Minister of Justice and held that once the ADPP's signature and capacity was authenticated in the

[15] *Kaunda and Others v President of the Republic South Africa and Others* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) para 31.

Apostille and the seal was placed thereon, and once the request to extradite was submitted through the correct channels, it became one submitted on behalf of South Africa. The preamble by the ADPP conveying the compliments could not displace her express acknowledgement of the Minister's authority over her own role.

[36] In this Court, the application for admission of further evidence relates to events that occurred subsequent to the judgment of the high court having been handed down. These events are not in dispute. To this extent, Mr Spagni did not oppose the application. He undertook to abide by the decision of this Court in respect thereof. Based on these events, the respondents contended that the challenge to the extradition process was moot, as a decision thereon would be of no practical effect. Mr Spagni disputed this contention and insisted that there remained a live issue for this Court to decide. It was also submitted on his behalf that as a matter of principle, he has a right to a decision on the lawfulness of the extradition request, and further, that it is in the interest of justice that the issue be determined by this Court.

[37] The events sought to be incorporated into the evidence already on record are the following. On 25 May 2022, at the extradition enquiry before the Tennessee District court, Mr Spagni formally waived his extradition rights, in accordance with Article 19 of the Treaty. The article permits surrender by the requested state, of the person sought to be extradited, without (further) extradition proceedings, if that person consents to the surrender. It provides that '[i]f the person sought consents to be surrendered

to the Requesting State, the Requested State may surrender such person as expeditiously as possible without further proceedings'.[16]

[38] In his 'affidavit of waiver of extradition' filed for consideration at the extradition hearing, Mr Spagni waived his right to an extradition hearing as provided in § 3184 to § 3196 in Title 18 of the United States Code (U.S.C.). Importantly, in that affidavit, Mr Spagni waived all his rights under the Treaty and asked the court to expedite his return, in custody, to South Africa. He also acknowledged therein that he understood that under 18 U.S.C. § 3184 he was entitled to a hearing at which an inquiry would be held into whether, among other things, the Treaty covers the offences of which he was charged, and whether there was probable cause that he had committed the offences of which he was charged.

[39] On the basis of the waiver, the Tennessee District Court granted an order that Mr Spagni's conditions of bail would continue until his surrender to the US Marshal for delivery and transportation to South Africa. Following all these processes, Mr Spagni returned to South Africa.

[40] Once he consented to his surrender to South Africa, the extradition inquiry did not proceed any further. All of this was not in dispute between the parties. Mr Spagni contends however, that his waiver does not render the appeal moot. He insists that the waiver is inconsequential for purposes of determining the lawfulness of the extradition request because it was made

[16] Section 19 of the Extradition Act 67 of 1962 provides that:
'No person surrendered to the Republic by any foreign State in terms of an extradition agreement . . . shall, until he or she has been returned or had an opportunity of returning to such foreign or designated State, be detained or tried in the Republic for any offence committed prior to his or her surrender other than the offence in respect of which extradition was sought or an offence of which he or she may lawfully be convicted on a charge of the offence in respect of which extradition was sought . . ..'

'on the basis of an unlawful extradition and invalid extradition request'. In addition, he insists that his legal interest in the determination of the lawfulness of the extradition request constitutes a 'live controversy' in the appeal.[17] His counsel submitted that it is in the interests of justice that the merits of the appeal be determined because the issues therein are of importance for future extradition requests by this country, particularly the correct repository of the power to make extradition requests. He furthermore submitted that the act of state doctrine prevented him from challenging the extradition request in the USA.

[41] For his first contention, Mr Spagni relied on the judgment of this Court in *Stokes*.[18] In that case, Mr Stokes returned to South Africa pursuant to waiving an extradition hearing in the USA subsequent to his arrest on a provisional arrest request by this country. The provisional request set out a charge of theft on which Mr Stokes was to be prosecuted in South Africa. Having found that the additional charge of fraud had not been an offence for which Mr Stokes' extradition had been sought, this Court held that he could not be prosecuted on that charge in this country, as the State sought to do, because it had not formed part of the provisional arrest request to which his waiver related.

[42] The analogy that Mr Spagni seeks to draw from *Stokes* is that his waiver did not nullify his extradition request. He could therefore still challenge the validity of the request. The two cases are not comparable.

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[17] *Pheko and Others v Ekurhuleni Metropolitan Municipality* [2011] ZACC 34; 2012 (2) SA 598 (CC); 2012 (4) BCLR 388 (CC) para 32.
[18] *S v Stokes* [2008] ZASCA 72; [2008] 4 All SA 260 (SCA); 2008 (5) SA 644 (SCA); 2008 (2) SACR 307 (SCA).

First, it is important to note that, unlike Mr *Stokes*, Mr Spagni contests the final extradition request rather than the request for provisional arrest. Further, Mr Spagni does not rely on a difference in the substance of the extradition request and the charges against him at the trial, as was the case in *Stokes*. There is no suggestion that he was misled about what charges he would be confronted with on his return to South Africa. In addition, the purpose of the waiver was achieved. The extradition proceedings were stopped and Mr Spagni was repatriated based on his consent to surrender. It is also important that Mr Spagni consented to surrender with full knowledge of the suggested unlawfulness of the extradition request as he had raised it, through his attorneys, in earlier correspondence to the South African authorities. Against this background his belated contention that the waiver is a nullity is contrived.

[43] This case is also distinguishable from *Pheko*[19] a decision of the Constitutional Court on which Mr Spagni relies. In *Pheko* the conduct of the municipality had caused the displacement of the respondents from their homes. In this case it was Mr Spagni's own conduct, through the waiver and consent to surrender, that resulted in his repatriation to South Africa. The extradition process was interrupted by the waiver. The waiver remains valid and Mr Spagni's return to the Republic pursuant thereto rendered this appeal moot. There is no live controversy between the parties.

[44] Are there interests of justice considerations which militate in favour of deciding the merits of the appeal? I do not think so. In this regard too Mr Spagni's contentions and the submissions made on his behalf were strained.

[19] See footnote 17 above.

His counsel was hard pressed to articulate the nature and substance of interests of justice sought to be advanced in this case, which would be of benefit in the resolution of disputes of this nature, in the future. This appeal turns on its peculiar facts. It is distinguishable from *Pillay*.[20] In that case, the Constitutional Court decided the merits of the appeal because the matter raised vital questions about the extent of protection afforded to cultural and religious rights 'in the school setting and possibly beyond'. The potential effect on other learners of the decision taken by the school to prohibit the wearing of nose studs at school was manifest.

[45] Similarly, in *AB and Another v Pridwin Preparatory School and Others*,[21] the Constitutional Court found that important and complex legal questions about the constitutional rights of learners in private schools under s 28(2) and 29(1)*(a)* of the Constitution were raised, and that the relief sought by the applicants in that matter would have a broad practical effect. In that case, there was evidence that the use of a school contract cancellation clause had spread to many schools which had the effect of negatively impacting the rights of children to basic education.

[46] Under s 16(2)*(a)* of the Superior Courts Act 10 of 2013 (the Act), this Court has discretion in appeals involving, for example, matters of law that are 'likely to arise frequently' and to hear and pronounce on the merits thereof. As this Court held in *Premier van die Provinsie Mpumalanga en 'n Ander v Stadsraad van Groblersdal*,[22] the question is whether the judgment

[20] *MEC for Education, KwaZulu-Natal and Others v Pillay* [2007] ZACC 21; 2008 (1) SA 474 (CC); 2008 (2) BCLR 99 (CC).
[21] *AB and Another v Pridwin Preparatory School and Others* [2020] ZACC 12; 2020 (9) BCLR 1029 (CC); 2020 (5) SA 327 (CC).
[22] *Premier van die Provinsie Mpumalanga en 'n Ander v Stadsraad van Groblersdal* 1998 (2) SA 1136 (SCA).

in the case before the court will have a practical effect or result and not whether it might be of importance in a hypothetical future case.

[47] The present matter is also distinguishable from cases such as *Sebola and Another v Standard Bank of South Africa Ltd and Another (Sebola)*[23], which Mr Spagni also seeks to rely on. In *Sebola,* the Constitutional Court decided that it was in the interests of justice to hear the matter for a number of reasons including that, the Sebola's had not withdrawn their application, even though the Bank had abandoned the judgement that had been granted in its favour. There were numerous conflicting decisions on the question whether the provisions of s 129 of the National Credit Act 34 of 2005 requires that a debtor actually receives the prescribed written notice before a credit provider institutes an action, and the issue arose frequently in our courts.

[48] Finally, the appellant failed to show that a decision in this case was necessary to settle an uncertainty arising from the judgment of the high court, Pretoria in *Schultz.* [24] In that case the court found that the prosecuting authority 'is the authorised authority to decide whether a request for the applicant's extradition from the USA should be made'. First, I highlight that in appropriate circumstances this court will decide the question of the correct repository of power for submission of extradition requests to another country. Furthermore, it appears to me that the issue of a lawful 'initiator', to which the finding in *Schultz* relates, may be different from the determination

[23] *Sebola and Another v Standard Bank of South Africa Ltd and Another* (CCT 98/11) [2012] ZACC 11; 2012 (5) SA 142 (CC); 2012 (8) BCLR 785 (CC).
[24] *Schultz v Minister of Justice and Correctional Services and Others*, Case no 2804/2022, 21 November 2022 (unreported).

of the lawful ‘requestor’ of, or ‘applicant’ for an extradition request. Consequently, a decision on the merits of this appeal might not settle the uncertainty that is said to arise from *Schultz.*

[49] For all these reasons, I agree that the appeal must fail.

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N DAMBUZA

ACTING DEPUTY PRESIDENT

APPEARANCES

For appellant:	A Katz SC and K Perumalsamy
Instructed by:	Hanekom Attorneys Inc, Cape Town
	Webbers, Bloemfontein
For first and second respondents:	I Jamie SC and L Stansfield
Instructed by:	The State Attorney, Cape Town
	The State Attorney, Bloemfontein.