CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 24/08
[2009] ZACC 1

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — First Applicant

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Second Applicant

DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA HIGH COURT — Third Applicant

versus

NELLO QUAGLIANI — Respondent

and

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA — First Applicant

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT — Second Applicant

DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA HIGH COURT — Third Applicant

versus

STEPHEN MARK VAN ROOYEN — First Respondent

LAURA VANESSA BROWN — Second Respondent

and

Case CCT 52/08
[2009] ZACC 1

STEVEN WILLIAM GOODWIN Applicant

versus

DIRECTOR-GENERAL, DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT First Respondent

MINISTER FOR JUSTICE AND CONSTITUTIONAL DEVELOPMENT Second Respondent

DIRECTOR OF PUBLIC PROSECUTIONS, PRETORIA HIGH COURT Third Respondent

PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA Fourth Respondent

with

SPEAKER OF THE NATIONAL ASSEMBLY First Intervening Party

CHAIRPERSON OF THE NATIONAL COUNCIL OF PROVINCES Second Intervening Party

Heard on : 26 August 2008

Decided on : 21 January 2009

JUDGMENT

SACHS J:

Introduction

[1] Extradition "is the surrender by one state, at the request of another, of a person within its jurisdiction who is accused or has been convicted of a crime

committed within the jurisdiction of the other state."[1] It involves three elements: acts of sovereignty on the part of two states; a request by one state to another state for the delivery to it of an alleged criminal; and the delivery of the person requested for the purposes of trial and sentencing in the territory of the requesting state.[2] Extradition law thus straddles the divide between state sovereignty and comity between states and functions at the intersection of domestic law and international law.

[2] It is within this context that the applications before this Court raise questions about the prerequisites under our Constitution for making extradition treaties binding on South Africa in international law, and for rendering their provisions enforceable in our domestic law. More specifically, the applications concern the validity and enforceability of the Extradition Agreement (the Agreement) between the United States of America (the United States) and the Republic of South Africa (South Africa).

[3] Two of the three applications were brought in the High Court by persons facing extradition from South Africa to the United States. The third was brought by a person whom South Africa is seeking to extradite from the United States. For convenience I will refer to all the persons facing extradition as the applicants, and

[1] La Forest *Extradition to and from Canada* 3 ed (Canada Law Book Inc, Ontario 1991) 15.

[2] *Mohamed and Another v President of the Republic of South Africa and Others* [2001] ZACC 18; 2001 (3) SA 893 (CC); 2001 (7) BCLR 685 (CC) at para 28.

to the respondents in the High Court, namely, the President of the Republic of South Africa (the President), the Minister for Justice and Constitutional Development (the Minister), the Director of Public Prosecutions and the Director-General of the Department of Justice and Constitutional Development, as the government. All the applicants contended that the Agreement between South Africa and the United States had not been validly entered into,[3] or alternatively, that if the Agreement was indeed valid at the international level, it had not been properly enacted into our law.

[4] The first two applications, by Mr Quagliani and by Mr van Rooyen and Ms Brown, a married couple, respectively, were heard together by agreement in the Pretoria High Court.[4] They succeeded on the alternative ground mentioned

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[3] The Agreement was signed on 16 September 1999 by representatives of South Africa and the United States, and subsequently published in GG 22430, 29 June 2001.

[4] The first application was brought by Mr Quagliani, a dual South African and Italian citizen. He is accused of conspiracy to import narcotics (specifically Methylenedioxymethamphetamine (MDMA)), which he allegedly imported into the United States. He was arrested in South Africa without a warrant on 26 November 2003 at OR Tambo International Airport in terms of section 40(1)(k) of the Criminal Procedure Act 51 of 1977 (the Criminal Procedure Act) for purposes of conducting an extradition hearing in terms of section 9 of the Extradition Act 67 of 1962 (the Act), and subject to the granting of warrants for his arrest in terms of the Act. He was held in detention from 26 November 2003 until 9 December 2003 on which date he was granted bail.

The second application was brought by Mr van Rooyen and Ms Brown, who are accused of fraudulently misrepresenting the current status of stem cell research and operating a clinic in the United States advertising and performing "stem cell transplants" on sufferers of amyotrophic lateral sclerosis (ALS), multiple sclerosis and other incurable diseases. It is alleged that the injections which they administered had no chance of curing or improving the medical condition of the patients. Mr van Rooyen and Ms Brown were arrested on 10 June 2006 at OR Tambo International Airport (also purportedly in terms of section 40(1)(k) of the Criminal Procedure Act) after being indicted in the United States District Court for the Northern District of Georgia on 28 March 2006. They are currently out on bail.

All three arrests were purportedly carried out pursuant to Article 13 of the Agreement pending extradition to the United States. Article 13 provides that "in case of urgency, the Requesting State may, for the purpose of extradition, request the provisional arrest of the person sought pending presentation of the documents in support of the extradition request".

above, namely, that the Agreement was not enforceable under South African domestic law because it was not self-executing and had not been enacted into legislation. The High Court made a declaration that the Agreement had not been enacted into the domestic law of South Africa[5] and that it was accordingly not in force.[6] I will refer to the decision relating to both these applications as the *Quagliani* decision. The government has applied to this Court for leave to appeal against this decision.

[5] The High Court did not give a ruling on two other contentions that had been raised.[7] The first was that the Agreement had not been properly entered into by the President, and although the High Court inclined strongly to the view that the President had acted properly through the national executive, it did not express a final conclusion on the matter. The second was that the resolutions approving

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[5] In terms of section 231(4) of the Constitution, which I discuss below at [33]-[38] and [42]-[49].

[6] For the purposes of section 3 of the Act which I discuss below at [42]-[49].

[7] Preller J had initially referred the matter to this Court for confirmation. However, when it was brought to his attention by counsel for the parties that a referral of this nature was not necessary, he then rectified the order in that respect.

The rectified order of 6 March 2008 reads as follows:

> "1. It is declared that the extradition agreement signed on 16 September 1999 between the Republic of South Africa and the United States of America published in Government Gazette 22430 on 29 June 2001, has not been incorporated into the law of South Africa as a result of the fact that the requirements of section 231(4) of the Constitution has not been satisfied and the treaty is accordingly not in force for purposes of section 1 of the Extradition Act 67 of 1962.
>
> 2. The first, second, sixth and seventh Respondents in case 959/2004 (first, second, seventh and eighth Respondents in case number 28214/2006) are to pay the costs of the applications, which costs will include the costs of two Counsel in both cases."

the Agreement had not been validly adopted by the National Assembly and the National Council of Provinces (NCOP).[8] This argument was not dealt with in the judgment, which simply referred in passing to the existence of affidavits filed on behalf of these two bodies.

[6] The third application concerned a South African citizen, Mr Goodwin, who, after allegedly absconding to the United States, was provisionally arrested there at the request of the South African government.[9] He sought his release in the United States on the ground that the Agreement was not valid in South African law, but the Californian court[10] dismissed his application, finding that as the challenge was based on the South African Constitution, it should properly be dealt with by a South African court. An application was then made on his behalf in the Pretoria High Court, which raised the same three arguments against the enforceability of the Agreement that had previously been advanced by the other applicants in the High Court. Ebersohn J hearing the matter held that the earlier decision in the same High Court had clearly been wrong, and rejected the argument based on the alleged failure to incorporate the Agreement into South African domestic law. He also dismissed the challenge based on the alleged

[8] The challenge based on the allegation that the National Assembly had not been quorate during the proceedings of approval of the Agreement was not pursued in this Court.

[9] Mr Goodwin is accused of various counts of fraud and theft running into hundreds of millions of Rands relating to the demise of Fidentia Asset Management (Pty) Ltd, a South African company. Mr Goodwin was taken into custody in Los Angeles on 5 April 2008, and remains incarcerated.

[10] United States District Court for the Central District of California.

invalidity of the Agreement and did not make a finding on the manner in which the resolutions had been adopted in Parliament.[11] Mr Goodwin now seeks leave to appeal against this decision, which I will refer to as the *Goodwin* decision.

[7] The applications for leave to appeal against the *Quagliani* decision and against the *Goodwin* decision were set down for hearing together in this Court. The Speaker of the National Assembly and the Chairperson of the NCOP were granted leave to intervene in respect of the issue of whether the approval of the resolution in the NCOP was validly given.

Application for leave to appeal directly to this Court

[8] Leave to appeal will be granted if a constitutional issue is raised and if it is in the interests of justice to do so. These applications for leave to appeal call upon this Court to analyse the power given by the Constitution to the national executive to negotiate and sign treaties, as well as the constitutional provisions regulating the manner in which treaties will come to have force of law domestically. These are constitutional matters.

[9] The interests of justice also favour final determination of the issues raised. The existence of conflicting judgments in the Pretoria High Court leaves the law

[11] *Goodwin, Steven William and The Director-General, Department of Justice and Constitutional Development and Others* Case No. 21142/08, Pretoria High Court, 23 June 2008, unreported at paras 30-4.

in an unsatisfactory state.[12] For the one to be right, the other must be wrong: at least one of the applications for leave to appeal must have prospects of success. Furthermore, as the government emphasised, it is not only the status of the applicants that is at stake. There are many other extradition agreements that have been adopted in the same manner as the one with the United States,[13] and problems regarding their enforceability could affect South Africa's relations with other countries involved.

[10] A more difficult question is whether the interests of justice call for a direct appeal to this Court. At the hearing all the parties supported direct appeal to this Court. The government pointed out that there had been considerable delay in finalising the two matters in the High Court, the first of which dated back to 2004; the matters were of high public importance and if they were not resolved with a

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[12] Above [3]-[6].

[13] The following information is available at http://www.dfa.gov.za, accessed on 20 December 2008. It is taken from two lists. The list "Bilateral Treaties signed by South Africa since 1 January 1994" (http://www.dfa.gov.za/foreign/bilateral10522.rtf, accessed on 20 December 2008) includes extradition agreements signed with:

Algeria	2001
Argentina	2007
Australia	1998, entry into force 2001
Canada	1999, entry into force 2001
China	2001, entry into force 2004
Egypt	2001, entry into force 2003
India	2003
Iran	2004
Lesotho	2001
Nigeria	2002

The list "Multilateral Treaties and Conventions entered into until 30 April 2008" (http://www.dfa.gov.za/foreign/multilateral0522.rtf, accessed on 20 December 2008) includes extradition agreements signed with:

EU	1957, entry into force 2003
SADC	Protocol on Extradition signed 2002, entry into force 2006.

degree of urgency, the ends of justice and good government would be prejudiced; there was a pressing need for a definite and final decision on controversial questions on extradition which had sprung up throughout the country; and South Africa's international obligations were involved. The government added that, in dealing with these matters, this Court would have the benefit of two judgments of the High Court.

[11] In my view, the interests of justice favour the matters being determined by this Court now. They raise important questions of a purely constitutional nature, the resolution of which is urgently needed to facilitate extradition proceedings. All the issues were fully argued before us. Leave to appeal should accordingly be granted.

Issues before this Court

[12] The parties were directed by the Chief Justice to present argument on whether—

a) the delegation by the President of his powers contained in section 2 of the Extradition Act (the Act)[14] was lawful;

b) the Agreement was validly approved in terms of section 231(2) of the Constitution;[15] and

[14] Act 67 of 1962.

[15] Section 231(2) of the Constitution states:

c) the Agreement had been incorporated into South African law in terms of section 231(4) of the Constitution.[16]

During argument the following three issues crystallised:

a) Was the Agreement with the United States validly negotiated and entered into (the "validity of the Agreement issue")?

b) Was the Agreement validly approved in the NCOP (the "mandates issue")?

c) Were the provisions of the Agreement enforceable in our law (the "enforceability issue")?

I shall deal with each in turn.

The validity of the Agreement issue

[13] The applicants submitted that the Agreement with the United States had not been validly entered into because the President had delegated his own responsibilities in this regard to members of his Cabinet.

"An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3)."

[16] Section 231(4) of the Constitution states:

"Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

[14] The uncontested facts follow. Preparatory negotiations between representatives of South Africa and the United States began in May 1998. Further discussions held in April 1999 led to two agreements being finalised, the Agreement and the Mutual Legal Assistance in Criminal Matters Treaty. At a later stage a memorandum was sent to the President from the Minister, expressing his intention to "submit a Presidential Minute in which [he] would seek approval from [the President] to sign the Treaties on behalf of the Government of the Republic of South Africa." Drafts of the agreements were submitted to the state law advisers to determine if the contents were in accordance with South African law and international law. Compliance was reported.

[15] The Minister then informed the President by memorandum that he would be visiting the United States in September 1999, during which time he would meet the Attorney General of the United States, and stated that "it would be appropriate if the treaties could be signed" during this meeting. On 10 September 1999 the President signed Presidential Minute No. 428, stating:

> "In terms of section 231 of The Constitution of the Republic of South Africa, 1996 [the Constitution], I hereby approve that the attached Extradition and Mutual Legal Assistance in Criminal Matters Treaties between the Government of the Republic of South Africa and the Government of the United States of America be entered into, and I hereby authorise the Minister of Justice to sign the Treaties and take the necessary steps in this regard."

Later that month, the Agreement was signed by the Minister in Washington, D.C.

[16] In March 2000 the Director-General of the Department of Justice and Constitutional Development requested the Minister to seek ratification of the Agreement from Parliament. The relevant documents and an explanatory memorandum were then submitted to Parliament. In accordance with parliamentary procedure, the Agreement and accompanying documents were considered by the Portfolio Committee on Justice and Constitutional Development, which recommended that the National Assembly approve and ratify the Agreement.

[17] On 2 November 2000, the NCOP approved by resolution the Agreement, which was tabled as a motion, and on the next day the National Assembly did the same. The Acting Minister of Foreign Affairs signed the instruments of ratification (referred to as the "Protocols" by the United States) in Cape Town.[17] The Public Affairs Office of the United States Embassy issued a Media Advisory[18] which stated: "United States Embassy Charge d'Affaires John Blaney and Minister of Justice Penuell Maduna will sign the protocols bringing into force the Mutual Legal Assistance Treaty (MLAT) and a new Extradition Treaty". On 25 June 2001 the formal exchange of instruments of ratification between the United

[17] On 28 March 2001.

[18] On 22 June 2001.

States and South Africa took place at the Union Buildings in Pretoria. And finally, on 29 June 2001, the Minister published in the Government Gazette the notice required by section 2(3)*ter* of the Act.[19] It attached the text of the Agreement. It also stated that Parliament had on 3 November 2000 "agreed to the ratification" of the Agreement, and that the exchange of the instruments of ratification to bring it into force had taken place on 25 June 2001.

[18] With these facts in mind I turn to the validity of the Agreement issue. The Act[20] gives the President, in terms, the power to enter into extradition agreements. Section 2(1)(a) states:

> "The President may, on such conditions as he or she may deem fit, but subject to the provisions of this Act concerning extradition—
>
> (a) enter into an agreement with any foreign State".

This provision has to be understood in the context of the Constitution which provides in section 231(1) that:

> "The negotiating and signing of all international agreements is the responsibility of the national executive."

The validity of the Agreement issue requires the determination of the relationship between these two provisions.

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[19] Above n 3.

[20] Above n 14.

[19] It was argued on behalf of the applicants that when the President assigned the power to enter into the Agreement to the Minister, along with the power to "take the necessary steps in this regard", he effectively gave him the power and responsibility to bring the Agreement into force. The result, it was submitted, was that it was the Minister, and he alone, who was unlawfully given the power to perform all the steps needed to bring the Agreement into force. This, coupled with the fact that the instruments of ratification were signed by the Acting Minister of Foreign Affairs, was said to have constituted a legally impermissible abdication by the President of his statutory duty to "enter into" extradition agreements. Counsel placed considerable reliance on the words used in the Extradition Act: "enter into an agreement".

[20] Counsel for the government submitted in response that the national executive had a constitutional responsibility to be involved in the negotiating and signing of international agreements. In addition, the Minister of Foreign Affairs was expressly given "full powers" to bind a state in international agreements under the Vienna Convention on the Law of Treaties.[21] The Presidential Minute in

[21] Article 7 of the Vienna Convention on the Law of Treaties, 1969 states:

> "1. A person is considered as representing a State for the purpose of adopting or authenticating the text of a treaty or for the purpose of expressing the consent of the State to be bound by a treaty if:
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> (a) he produces appropriate full powers; or
>
> (b) it appears from the practice of the States concerned or from other circumstances that their intention was to consider that

question showed two things: first, that the President had taken the decision to enter into the Agreement in terms of the Constitution; and second, that he had conferred on the Minister the power to sign on behalf of the government. Counsel added that the signature by the Minister of Foreign Affairs on the instruments of ratification only represented execution of a decision already taken by the President. In reality, the argument concluded, the actions complained of were merely formal, giving effect to a decision that had been taken by the President on the advice of, and in consultation with, the Minister.

The capacity in which the President acted

[21] In my view, the authority given by the Act to the President to enter into agreements has to be interpreted in the light of the specific power which section 231 of the Constitution gives to the national executive to negotiate and sign treaties. The President is the Head of State and the head of the national executive.[22] As Head of State the President is directly responsible for a range of matters such as: assenting to and signing Bills; appointing commissions of inquiry;

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person as representing the State for such purposes and to dispense with full powers.

2. In virtue of their functions and without having to produce full powers, the following are considered as representing their State:
   (a) Heads of State, Heads of Government and Ministers of Foreign Affairs, for the purpose of performing all acts relating to the conclusion of a treaty;
   (b) heads of diplomatic missions, for the purpose of adopting the text of a treaty between the accrediting State and the State to which they are accredited".

[22] See section 83(a) of the Constitution.

receiving diplomats; appointing ambassadors; pardoning offenders; and conferring honours.[23] As this Court pointed out in *SARFU II*,[24] when acting as Head of State, it may be desirable for the President not to act on his or her own, but to consult with and take the advice of ministers. What was important was that the President should take the final decision.

[22] When, as in the present matter, the President is exercising authority as head of the national executive under section 85 of the Constitution, the President is obliged to act in a collaborative manner.[25] Section 85(2)(e) provides:

> "The President exercises the executive authority, together with the other members of the Cabinet, by—
>
> (e) performing any other executive function provided for in the Constitution or in national legislation."

The need for collective exercise of executive power in relation to treaties is reflected in the manner in which the Constitution expressly confers treaty-making power on the national executive.

[23] It should be remembered that the Act was last amended at a time when the interim Constitution was in force. Under section 82(1) of that Constitution, the

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[23] See section 84(2) of the Constitution.

[24] *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) at para 41.

[25] Id.

negotiating and signing of international agreements was designated as an exclusive executive function of the President. When the Act was amended in 1996,[26] before the 1996 Constitution came into force, the drafters would have been aware of this provision. The power to enter into extradition agreements in the pre-constitutional era had been that of the State President, so it was not necessary for the Act to be amended substantively in that regard. As mentioned above, sections 231(1) and 85(2) of the 1996 Constitution removed the treaty-making power from the exclusive domain of the President and placed it expressly within the responsibility of the national executive authority functioning as a collective unit. The result was that when the 1996 Constitution came into force, what changed was not the responsibility entrusted to the President under section 2 of the Act, but the collective manner in which the President is now required to exercise this responsibility.

[24] It is accordingly impossible to read the Act as requiring the President personally to prepare the documents, to see the details through at each stage, and eventually to sign the final text. On the contrary, what the Act and the Constitution require is that, as head of the national executive and functioning in conjunction with the national executive, the President make a final decision in writing to enter into an extradition agreement.

[26] Extradition Amendment Act 77 of 1996.

[25] The power conferred upon the President in section 2 of the Act must now be read with section 231 of the Constitution which provides that the national executive bears the constitutional responsibility to negotiate and sign treaties. When the President decides to enter into an extradition agreement in terms of section 2 of the Act, he does so as head of the national executive. Given the provisions of section 231 of the Constitution, it is not improper for the President, once the decision to enter into the treaty has been made by the President, to confer other formal aspects relating to the accession to the treaty on other members of the national executive. It is important that these provisions should not be applied in a formalistic manner that will impair the ability of the national executive to function. The facts that I have set out above make it plain that the President did decide that the Agreement should be entered into in terms of section 231 of the Constitution as Presidential Minute No. 428 expressly states. The fact that in the same minute the President empowered the Minister (who is a member of the national executive) to sign the Agreement and take the necessary steps to ensure that the Agreement was formally concluded is entirely consistent with the power conferred upon the national executive by section 231 of the Constitution. Similarly, the fact that the Acting Minister of Foreign Affairs signed the instruments of ratification is also consistent with the conferral of the power upon the executive.

[26] I conclude therefore that the Agreement between South Africa and the United States was validly entered into.

The mandates issue

[27] Section 231(2) of the Constitution provides that—

> "An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces".

It was submitted by the applicants that the provincial delegates who voted to approve the Agreement in the NCOP did so without the mandates of their provincial legislatures. The result, they claimed, was that the approval of the Agreement was invalid, and the Agreement was therefore not binding on the Republic.

[28] Three interrelated preliminary questions arise. The first is whether it is appropriate for the applicants to raise the issue of lack of mandates without joining parties that would have a direct interest in the matter. In the present case these would be the appropriate representatives of the provinces, who, if called upon, would be the persons best qualified to inform the Court how mandates were or should have been given in each case. Absent special circumstances, this non-joinder in itself would be fatal to the applicants' claim in this area.

[29] Equally serious is the extraordinary delay in raising the mandates question, which must constitute a further impediment to the Court being seized of the matter. One of the issues in *Doctors for Life*[27] was whether a challenge could be made by applicants who had not made diligent and timeous attempts to bring a legal challenge to procedural failures by the legislature. In that matter the question was whether the NCOP had failed in its duty to facilitate public involvement under section 72 of the Constitution. That matter was not one of standing to assert a violation of rights under the Bill of Rights. Ngcobo J observed that applicants who have not pursued their legal course timeously may well be denied relief[28], and added that:

> "Rules of standing of this sort will prevent legislation being challenged on the ground of non-compliance . . . many years after the event by those who had no interest in making representations to Parliament at the time the legislation was enacted. It will thus discourage opportunist reliance by those who cannot show any interest in the duty to facilitate public involvement on that duty . . . . [T]his restricted form of standing further reflects this Court's concern to protect the institutional integrity of Parliament, while at the same time seeking to ensure that the duty to facilitate public involvement is given adequate protection."[29]

[30] Thus, save in very exceptional circumstances, late challenges to the validity of legislative processes should not be permitted. Legislatures should be

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[27] *Doctors for Life International v Speaker of the National Assembly and Others* [2006] ZACC 11; 2006 (6) SA 419 (CC) at para 216; 2006 (12) BCLR 1399 (CC) at 1466H-1467A.

[28] Id at paras 217-9; 1467C-G.

[29] Id at para 219; 1467E-G.

allowed a margin of appreciation in deciding on and implementing their procedures,[30] provided the basic prescriptions of the Constitution are adhered to. In addition, there is a strong need for procedural finality, which should not be confused with the ever-present right to challenge the constitutional consistency of the resultant law.

[31] This brings me to the third preliminary hurdle standing in the way of the mandates matter being determined by this Court. Unless there is evidence of procedural irregularities in the legislative process, it would not ordinarily be appropriate for a court to interrogate the procedures used.[31] Thus, if there is merely a bald allegation of irregularity without more, a court is ordinarily restrained by considerations of separation of powers and good government from interrogating the legislative process. The regular functioning of government would be unduly disrupted if courts could be called upon (on a purely speculative basis) to enquire at any stage into the regularity of completed legislative processes. Absent evidence to the contrary, a strong presumption must accordingly exist that the legislature followed constitutionally-mandated procedures in performing its functions. In the present case there is no evidence properly placed before this Court of any irregularity, a further bar to the applicants' argument.

[30] Id at paras 36-7 and 220-1; 1417B-E and 1467G-1468A.

[31] See for example *Doctors for Life* above n 27 at paras 37 and 211; 1417D-E and 1466A-B.

[32] Each of these preliminary factors on its own could have justified barring the applicants from pursuing the issue of there being a lack of mandates. The cumulative weight is fatal to the applicants in respect of the question of the mandates. The argument that the resolution was not validly adopted because the delegates were not properly mandated must therefore be rejected.

The enforceability of the Agreement in South African domestic law

[33] It is common cause that the Agreement has not been formally enacted as an Act of Parliament. The applicants argued that it is accordingly not law in the Republic, with the consequence that extradition to and from the United States could not be undertaken. Their argument was based on sections 231(2) and 231(4) of the Constitution. These sections provide:

> "(2) An international agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless it is an agreement referred to in subsection (3).
>
> . . . .
>
> (4) Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament."

[34] The applicants contended that the Agreement had not become law in the Republic because it had not been enacted into national legislation, that its

provisions were not self-executing, and that its provisions were also not consistent with the Act. The applicants accordingly submitted that their arrest and subsequent detention in terms of the Agreement had been unlawful because the Agreement had not been enforceable as part of law in the Republic.

[35] Their arguments in favour of non-enforceability were based on five interrelated propositions:

1) It is necessary to ensure that freedom rights of the individual are protected in our constitutional democracy;
2) because liberty was affected, the onus was on the government to establish that the Agreement was enforceable as part of South African law;
3) there is a strong presumption that treaties on their own do not become part of domestic law unless expressly incorporated through legislation;
4) the very term 'self-executing' requires that the provisions in question be capable of enforcement on their own without further legislative action; and
5) even if the provisions of the Agreement were to be regarded as self-executing, they were inconsistent with the Act and therefore unenforceable.

[36] In my view, the starting point for the analysis must be the relationship between the Act and section 231(4) of the Constitution. As its name indicates, the Act deals with extradition, a species of law with its own special qualities. By its very nature extradition has both a domestic law and an international law dimension. And although the two operate in different legal spheres, they are inextricably linked ─ you cannot extradite someone in your own country to your own country. The entering into of agreements with other countries on the basis of reciprocity therefore lies at the very heart of extradition law.

[37] In keeping with this, the Act expressly anticipates that treaties would be made with other countries, and, as I set out more fully below, provides the framework for giving domestic effect to the content of those treaties. For reasons which will become apparent, I have concluded that it is unnecessary to consider the question whether the Agreement should be regarded as self-executing.

[38] My reasons for coming to the above conclusion are set out below. They are based on an examination of the manner in which the intrinsic character and purposes of extradition are reflected in the operative provisions of the Act.

Purposes of extradition

[39] Historically extradition law "was designed to make systems of reciprocal surrender orderly and principled, and to make abduction, military incursions, and

fraudulent deportations unnecessary and illegal."[32] In many jurisdictions it has provided a judicially protected guarantee of freedom and fairness for individuals.

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[32] Pyle *Extradition, Politics, and Human Rights* (Temple University Press, Philadelphia 2001) at 3.

On the history of extradition Bassiouni states:

> "The first recorded extradition treaty in the world dates back to circa 1280 B.C. In one of the oldest documents in diplomatic history, Ramses II, Pharoah of Egypt, signed a peace treaty with the Hittites after he defeated their attempt to invade Egypt. King Hattusili III signed it for the Hittites, and the document, written in hieroglyphics, is carved on the Temple of Ammon at Karnak and is also preserved on clay tablets in Akkodrain in the Hittite archives of Boghazkoi. The peace treaty provided expressly for the return of persons sought by each sovereign who had taken refuge on the other's territory."

Bassiouni *International Law Extradition: United States Law and Practice*, 4 ed (Oceana Publications Inc, New York 2002) at 32.

Bassiouni observes too (at 32) that European texts of international law only refer to the practices of Greece and Rome, overlooking practices in other civilizations. Yet, until the eighteenth century, Europe was far behind in the practice of extradition in comparison to other civilizations.

It should also be mentioned that the practice of orderly extradition was known in traditional southern African societies. Writing about Sepedi clans, Prinsloo states:

> "'n Algemene ooreenkoms tussen stamme vir die uitlewering van misdadigers is onbekend. Indien 'n oortreder na 'n ander stamgebied vlug, kan hy slegs ingevolge besondere onderhandelinge deur die ander stam aan sy eie stam uitgelewer word. Die prosedure is dat die *kgoši* van die oortreder sy gedelegeerdes na die *kgoši* van die toevlugsgebied stuur, gebruiklik met 'n geskenk, om die versoek tot uitlewering te doen. Sodra die *kgoši* van die toevlugsgebied die oortreder opgespoor en in hegtenis laat neem het, laat weet hy die *kgoši* wat aansoek gedoen het, om die oortreder te kom haal. Daar is ook gevalle bekend waar die gedelegeerdes van die betrokke twee *magoši* die oortreder gesamentlik opgespoor het. Goeie buurmanskap vereis dat 'n *kgoši* se gedelegeerdes nie 'n oortreder tot binne die gebied van 'n ander *kgoši* volg nie, maar dat onderhandelinge vir uitlewering aangeknoop word. Sodanige onderhandelinge kan ten opsigte van enige oortreding aangeknoop word, maar die uitlewering hang van die betrokke *kgoši* se welwillendheid af." (Footnote omitted.)

Prinsloo *Inheemse Publiekreg in Lebowa* (Van Schaik (Edms) Bpk, Pretoria 1983) at 71. The Sepedi term for traditional leader is *kgoši* (plural: '*magoši*').

My rough translation of the above is as follows:

> "A general agreement between clans covering extradition of an offender is unknown. In the event of an offender fleeing to another clan, he can only be surrendered to his original clan through a process of special negotiations between the two. This process is one in which the *kgoši* to whose chieftainship the transgressor belongs, sends his delegates to the *kgoši* of the area to which the offender has fled. Usually after presenting a gift, the delegates request the handing over of the offender. As soon as the requested *kgoši* has tracked down and arrested the offender, the requesting *kgoši* is informed and invited to come and fetch him. There are also examples where delegates of the two *magoši*, jointly tracked down the offenders. The dictates of good neighbourliness require the requesting *kgoši's* delegates to refrain from following the offender into the territory of another *kgoši*, and rather to pursue the path of negotiation. Such negotiation can take place in respect of any transgression, but the actual extradition of the offender is dependent on the requested *kgoši's* willingness to heed the request."

It would be unduly limited to see extradition as an aspect of international relations in which ordinarily only states have an interest. An overly state-oriented approach may ignore the rights of individuals to freedom and fairness in the extradition process. And, as will be seen, in keeping with these principles, the Act contains provisions aimed at protecting the rights of individuals guaranteed in the Constitution.

[40] Yet, important though individual rights are, extradition proceedings cannot be looked at purely from the point of view of protecting individuals facing extradition. Transnational mobility of people, goods and services, as well as new technological means, have contributed to increased mobility of criminals.[33] La Forest states that—

> "[the extradition process] strengthens the law enforcement agencies within the state requesting the surrender by reducing the possibility of its criminals escaping. And it is to the advantage of the state to which a criminal has escaped, for no country desires to become a haven for malefactors."[34]

[41] The Act furthers the criminal justice objectives of ensuring that people accused of crime are brought to trial and that those who have been convicted are duly punished. The need for effective extradition procedures becomes particularly

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[33] Bassiouni above n 32 at xi.

[34] La Forest above n 1. The purposes of extradition were discussed in some detail by the Supreme Court of Canada in *United States of America v Cotroni* (1989), 48 C.C.C. (3d) 193 at 215-9.

acute as the mobility of those accused or convicted of national crimes increases. Indeed, one of the purposes of the Act in these circumstances is to reduce the temptation of law enforcement agencies to establish informal and unfair procedures for rendition.[35] However, even if abuses need to be prevented, inherent in any extradition arrangement is the potential for reciprocity.[36] In my view, it is

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[35] Thus in *Mohamed* (above n 2) this Court criticised the conduct of South African agents who, without following proper procedures handed over to agents of the United States a person to be put on trial in New York for alleged terrorist offences. The Court stated at paragraph 68:

> "South Africa is a young democracy still finding its way to full compliance with the values and ideals enshrined in the Constitution. It is therefore important that the State lead by example . . . . [W]e saw in the past what happens when the State bends the law to its own ends and now, in the new era of constitutionality, we may be tempted to use questionable measures in the war against crime. The lesson becomes particularly important when dealing with those who aim to destroy the system of government through law by means of organised violence. The legitimacy of the constitutional order is undermined rather than reinforced when the State acts unlawfully. Here South African government agents acted inconsistently with the Constitution in handing over Mohamed without an assurance that he would not be executed and in relying on consent obtained from a person who was not fully aware of his rights and was moreover deprived of the benefit of legal advice. They also acted inconsistently with statute in unduly accelerating deportation and then despatching Mohamed to a country to which they were not authorised to send him."

[36] Gilbert states:

> "While bilateral treaties were the first method to be used to conclude extradition relations, states have since developed alternative forms of arrangement. For instance, even though a universal multilateral convention open for accession by any state in the world is an impractical dream, regional conventions have proved popular. Furthermore, in an effort to ensure serious offenders do not escape justice, the United Nations sponsored anti-terrorist conventions have included clauses to permit them to be used as surrogate extradition treaties where no treaty exists between the requesting and asylum states. In more specific situations, states with close geographical and historical connections have reached agreements allowing for very much simplified procedures. Finally, states have occasionally provided for extradition without any international arrangement through domestic legislation; the object is to ensure that a state does not become a safe-haven for criminals and to facilitate in a practical way the comity of nations."

See Gilbert *Aspects of Extradition Law* (Martinus Nijhoff Publishers, The Netherlands 1991) at 20.

Gilbert states further (at 33):

> "Procedural extradition must be placed within the wider perspective of mutual assistance in criminal matters of which it is but a part. Thus, extradition is part of a wider network of systems of co-operation in law enforcement. Mutual legal assistance treaties are mainly used to obtain evidence outside the jurisdiction, but mutual assistance can also be

this core element of extradition that explains why and how the Act served as a mechanism through which the Agreement can be enforced.

The Extradition Act

[42] Section 2(1)(a) of the Act provides that the President may, subject to the provisions of the Act, enter into agreements with foreign states to provide "for the surrender on a reciprocal basis of persons accused or convicted" of the commission of extraditable offences. Section 2(3)(a) of the Act then provides that any such agreement will be of no force until agreed to by Parliament. I have already held that the Agreement was formally entered into by the President and the national executive. Later it was agreed to by Parliament. In the circumstances, the corollary of section 2(3)(a) must be that from that moment on the Agreement had appropriate force and effect as a binding obligation of international law.

[43] The remaining provisions of the Act then provide a comprehensive process, amongst other things, to give effect to the provisions of extradition agreements. So, for example, section 3(1) of the Act provides that a person accused or

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> seen in broader forms of co-operation when meeting the problem of crimes or criminals that cross frontiers."

On the core element of extradition, Bassiouni (above n 32 at 36) states the following:

> "The duty to extradite by virtue of a treaty, whether it be bilateral or multilateral, is the prevalent practice among states, though reciprocity and comity still exist as legal bases relied upon by a number of states, usually through the support of national legislation. For example, the United States requires a treaty, as does the United Kingdom and the most common law countries. The practice in the civil law countries, by contrast, is less demanding of formal treaty obligations. Instead, extradition may be granted on the bases of reciprocity and comity."

convicted of an offence included in an extradition agreement is liable to be surrendered to the foreign state in accordance with the extradition agreement. The Act continues by providing for warrants of arrest to be issued by magistrates upon receipt of a notification by the Minister that a request for the surrender of a person has been received by the Minister.[37] It also provides for the holding of an enquiry by a magistrate to determine whether the person is liable to be surrendered to the foreign state.[38] Finally, section 11 of the Act regulates the power of the Minister to order the surrender of the person.

[44] The Act, read with other legislation such as the Criminal Procedure Act, thus gives the executive branch all the required statutory powers to be able to respond to a request for extradition from a foreign state and for the executive branch to be able to request the extradition of individuals who are in foreign states. It should be added that although the power to request extradition to the Republic from a foreign country is not expressly provided for in the Act, it is necessarily implicit in sections 19 and 20. Both deal with requests for surrender, and indeed, section 19 expressly envisages extradition being requested in terms of an extradition treaty.[39]

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[37] See section 5 of the Act.

[38] See section 9 and 10 of the Act.

[39] Section 19 provides:

> "No person surrendered to the Republic by any foreign State in terms of an extradition agreement or by any designated State 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

[45] The Act, then, deals with a specific class of international agreements, namely, extradition agreements. It provides that all these agreements will be implemented in accordance with its provisions. Given the nature of these agreements and the fact that there will be many which would be entered into with different countries, it is desirable that there should be a single piece of legislation which deals with all of them and provides for their effective implementation. Were it to be otherwise, it would mean that each time an extradition agreement was entered into, it would be necessary to enact additional legislation which, in all probability, would be identical to all the other implementing legislation.

[46] It is clear that if the procedure stipulated in sections 2 and 3 of the Act, as well as section 231(1) and (2) of the Constitution is followed, an extradition agreement creates a binding international law obligation on South Africa. The question then is whether the Agreement "becomes law" in South Africa as

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> 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, unless such foreign or designated State or such person consents thereto: Provided that any such person may at the request of another foreign or designated State and with a view to his or her surrender to such State, be detained in the Republic for an extraditable offence which was so committed, provided such detention is not contrary to the laws of the State which surrendered him or her to the Republic."

Section 20 provides:

> "The Minister may at the request of any person surrendered to the Republic return such person to the foreign State in or on his way to which he was arrested, if—
>
> (a) in the case of a person accused of an offence, criminal proceedings against him are not instituted within six months after his arrival in the Republic; or
>
> (b) he is acquitted of the offence for which his surrender was sought."

contemplated by section 231(4) of the Constitution. There are two ways in which this question can be answered. The first is to say that the Agreement itself does not become binding in domestic law, but the international obligation the Agreement encapsulates is given effect to by the provisions of the Act. The second approach is that once the Agreement has been entered into as specified in sections 2 and 3 of the Act, it becomes law in South Africa as contemplated by section 231(4) of the Constitution without further legislation by Parliament.

[47] It is not necessary for the purposes of this case to decide which of these approaches is correct, for their effect in this case is the same. Either the Agreement has "become law" in South Africa as a result of the prior existence of the Act which constitutes the anticipatory enactment of the Agreement for the purposes of section 231(4) of the Constitution. Or the Agreement has not "become law" in the Republic as contemplated by section 231(4) but the provisions of the Act are all that is required to give domestic effect to the international obligation that the Agreement creates.

[48] I conclude, therefore, that on either of the approaches identified above, no further enactment by Parliament is required to make extradition between South Africa and the United States permissible in South African law.

[49] The last question that needs to be considered is whether the provisions of the Agreement are consistent with the Act.

Are the provisions of the Extradition Agreement in conflict with the Extradition Act?

[50] On either of the approaches mentioned above, it is not necessary to decide the question whether there is a conflict between the provisions of the Act and the provisions of the Agreement as I shall explain. If the first approach mentioned above is correct – that is that the provisions of the Act do not become law domestically but merely give rise to an international law obligation to which effect is given by the provisions of the Act – then this question does not arise. For on this approach, if there is an inconsistency between the Act and the Agreement then clearly the provisions of the Act will be the legally operative provisions in our domestic law. If the result of such inconsistency is that South Africa cannot give full effect to its international obligations, then that is a matter that will have to be resolved in the international sphere, not domestically.

[51] If the second approach is correct – that is that the provisions of the Agreement do become law, because they have been deemed to have been enacted by the anticipatory provisions of the Act – it is clear that they can only have become law to the extent that they are consistent with the Act. In the case of a conflict between a provision of the Agreement and a provision of the Act (or the

Constitution), therefore, the conflicting provision of the Agreement will not have become law as contemplated by section 231(4).

[52] As the case raised here is not based on any specific example of alleged conflict affecting the potential extradition of the applicants, it is not necessary for us to decide in this case whether there is a conflict between the Agreement and the Act, even on the assumption that the Agreement has become law. This is because if there is such a conflict, the provisions of the Act will clearly override the conflicting provisions in the Agreement.

[53] The result is that whichever of the two approaches is adopted in relation to the legal status of the Agreement in our law, its provisions cannot override the provisions of the Act. If there is repugnancy, the terms of the Act will prevail. Only a duly enacted amendment to the Act, which would have to be consistent with the Constitution, could permit the repugnancy to be resolved in favour of the Agreement.

Conclusion

[54] In the result, the three challenges to the validity and enforceability of the Agreement between South Africa and the United States fail. The appeal by the government in the *Quagliani* matter succeeds.

[55] To the extent that Mr Goodwin's appeal is based on similar challenges, it also cannot succeed. Mr Goodwin contended further that the Act gave no power to anybody within this country to request an extradition of someone who is in the United States. The answer is that the Act by implication does confer authority to make the request by reason of the provisions concerning reciprocity, as well as sections 19 and 20.[40] Mr Goodwin's appeal accordingly fails.

Costs

[56] In its written submissions the government did not ask for costs if its appeal succeeded in the *Quagliani* case. It did, however, ask for costs if Mr Goodwin's appeal failed.

[57] The cases were almost identical. As has already been mentioned, the issues were of considerable public importance, and the state was eager to have a comprehensive judgment that would pre-empt piecemeal applications in the future. Complex constitutional questions had to be dealt with concerning the nature of the President's powers, as well as the manner in which treaty obligations become part of domestic law. In the circumstances it would not be in the interests of justice for the applicants in either case to be ordered to pay costs.[41]

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[40] Id.

[41] In the *Quagliani* matter, the High Court made a costs order against all the respondents jointly and severally, the one paying the others to be absolved. In this Court, the intervening parties (the Speaker of the National Assembly and the Chairperson of the NCOP) protested that they should not have been joined, as the issue that had led to their intervening had not been ruled upon and no substantive relief was granted

Late application for postponement of the judgment

[58] It is necessary to deal with an extraordinary application that was made at the last minute for delivery of the judgment to be postponed. At midday on Wednesday 10 December 2008, notice had been given to the parties informing them that judgment in this matter would be delivered at 10:00am the next day, which was during the Court's recess. At the appointed time, Skweyiya J announced that for technical reasons delivery of the judgment would be postponed to Wednesday 17 December 2008.

[59] It so happened that during the morning of Thursday 11 December 2008, an application was lodged in a similar matter for the joinder of the Speakers of the various provincial legislatures (the Speakers). The applicant was Mr Stratton, who is seeking to resist extradition from Australia to South Africa. He brought the joinder application in support of an earlier application by him for direct access to this Court. The earlier application had been postponed by this Court until judgment in the present matter had been delivered.[42]

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against them. Since the adverse costs order has fallen away, it is not necessary to decide whether it had been correctly made.

[42] On 23 July 2008, this Court rejected his application to intervene or be admitted as an amicus in the present matter, and postponed its decision in respect of his application for direct access, pending delivery of judgment in the present matter.

[60] Mr Stratton claimed in his new application that the adoption by the NCOP of the resolution bringing the South Africa/Australia Extradition Treaty into force was invalid because the heads of the provincial delegations who had voted to approve the Treaty had not been properly mandated by their respective provincial legislatures to do so.

[61] Mr Stratton's attorney said he attended the oral proceedings in the present matter. One of the issues raised in debate with counsel was the failure to join the Speakers. After advising Mr Stratton of what he had heard in Court, he was instructed to address letters to the Speakers, requesting them to provide him with a copy of any written mandate given to the heads of the delegations who voted, and if no written mandate was given, to indicate on what date any oral mandate was given, by whom it was given, to whom it was given and what the mandate was. The Speakers were also requested to indicate in writing if no mandates were given.

[62] The affidavit added that only four of the Speakers of the nine provinces had replied. The Speaker of the Mpumalanga Provincial Legislature and the Speaker of the Western Cape Provincial Parliament had indicated that no mandate, whether written or oral, had been conferred on the delegation. The Speaker of the North West Provincial Legislature had stated that such information had no bearing on Mr Stratton's rights or his legal representatives' interest in protecting or pursuing those rights. The Speaker of the Free State Legislature had denied

receipt of the court documents in respect of Mr Stratton's application for direct access.

[63] Mr Stratton sought to join the Speakers at this stage. This he said was to ensure that the mandates issue would be fully and properly considered, thereby preventing an unnecessary application from having to be brought at a later stage to challenge the validity of the South Africa/Australia Extradition Treaty.

[64] On Wednesday 17 December 2008, shortly before judgment in the present matter was to be delivered, Mr Quagliani lodged a similar application for the joinder of the Speakers. He submitted that Mr Stratton's matter was in many respects identical to his, albeit the South Africa/Australia Extradition Treaty was different. Further that his matter should not be determined before the question of mandates had been fully explored in Mr Stratton's matter.

[65] Ngcobo J and Skweyiya J, in their capacity as recess duty Judges, decided that delivery of this judgment should be postponed to Wednesday 21 January 2009. This would afford the full Court an opportunity to consider the applications. Directions were issued in terms of which Mr Quagliani was to lodge a formal application for postponement of the delivery of the judgment pending the finalisation of the application for joinder, no later than Monday 5 January 2009.

Parties were informed that they could respond no later than Tuesday 13 January 2009. The costs of the postponement were reserved.

[66] Pursuant to these directions, Mr Quagliani lodged a formal application for the postponement of the judgment in this matter on Monday 5 January 2009. He also sought leave to adduce new facts in the appeal. He stated that he was bringing a joinder application on the strength of Mr Stratton's application, which had revealed that at least two provinces had not conferred mandates on their delegations to vote either in favour of or against the South Africa/Australia Extradition Treaty.

[67] Mr van Rooyen, cited as sixth respondent in the application for the postponement of delivery of the judgment, lodged an affidavit in which he supported the application for postponement, stating that, in terms of *Doctors for Life*,[43] the Court can re-open the matter if fairness and justice require.[44]

[68] On Tuesday 13 January 2009 the State Law Advisor (acting on behalf of the President, the Minister and the Director of Public Prosecutions, Pretoria High

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[43] Above n 27.

[44] Mr van Rooyen re-stated arguments made on his behalf at the hearing, and added that the Stratton affidavit showed that at least two of the provinces had not provided mandates for the Australian Treaty, strengthening the supposition that no mandates had been given in respect of the USA Agreement which had been approved in the same session of Parliament. He quoted from an article by Professors Murray and Simeon stating that provincial delegations were remiss in not getting mandates for approval of international agreements ("From Paper to Practice: The National Council of Provinces after its first year" (1999) 14 *SA Public Law* 95 at 128).

Court) responded, vehemently opposing the postponement applications. He stressed that the extradition not only of the applicants, but also of other fugitives from the law, has been delayed for years now.

[69] The Chairperson of the NCOP also entered the fray and vigorously opposed the application for postponement.

[70] To say that the application for postponement of delivery of this judgment is remarkable would be a gross understatement. New evidence on appeal is only admitted in very rare circumstances. In *Metrorail*[45] this Court emphasised that for such evidence to be admitted a reasonably sufficient explanation for the failure to tender the evidence earlier in the proceedings had to be offered, finality was important, and that evidence tendered had to be weighty and material. Admitting new evidence on appeal would thus be done sparingly and only in exceptional circumstances.[46] The admission of new evidence during an appeal hearing is likely to be permitted even more rarely, as the litigant will need to show why the evidence was not tendered earlier. This application has been lodged long after the appeal hearing, and just before judgment was to be delivered. Only the most exceptional circumstances could justify the admission of the supplementary material sought to be tendered here. Such circumstances simply do not exist.

[45] *Rail Commuters Action Group v Transnet Ltd t/a Metrorail* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC).

[46] Id at para 43.

[71] No explanation at all is given for the delay. Moreover, the evidence sought to be admitted by Mr Stratton is hearsay in the present proceedings. It has no direct bearing on the validity of the Agreement, and falls far short of carrying decisive weight on issues in the present matter. In addition, the need for finality is particularly strong. The proceedings have dragged on for years. The status of the Agreement in the present matter, as well as the status of similar agreements, must be clarified as soon as possible. The freezing of extraditions to and from many countries has been harmful to law enforcement and has had a negative effect on South Africa's international relations.

[72] It should also be stressed that no question of fundamental rights has been placed in issue. The applicant's basic rights to fair treatment continue to be protected by the Act and the Constitution. Nor is there any suggestion of there having been legislative foul play. Indeed the Agreement was manifestly in the public interest and was approved of unanimously. And far from providing a lifeline for the applications, *Doctors for Life* expressly excludes any opportunistic reliance on alleged defects in long past legislative proceedings, a matter that has been dealt with above.[47]

[47] Above [29]-[31].

[73] In these circumstances, the application for the postponement of the delivery of judgment as it was about to be handed down, can only be described as inappropriate. Legal representatives are entitled, even obliged, to defend the interests of their clients with vigour and panache. Yet there must be limits to their ingenuity. Stretching the bounds of appropriate forensic procedure beyond breaking point is not permissible. The delays and inconvenience that have been caused in this matter are unacceptable. In *Metrorail* O'Regan J pointed out that—

> "it has become a regrettable practice in this Court that affidavits are tendered on appeal often only days before an appeal hearing, if not on the day of the appeal itself. This is an unacceptable practice which must be discouraged. The late filing of affidavits in circumstances which do not meet the stringent test for admission set out in this judgment will not be permitted by this Court. Attorneys should take care to consider the test for the admission of late affidavits and satisfy themselves before filing the affidavits that they do qualify for admission in terms of the rules of this Court and the principles elucidated in this judgment."[48]

[74] The application for the postponement of the delivery of the judgment and for the joinder of the Speakers of the provincial legislatures must accordingly be dismissed. The question of the wasted costs of 17 December 2008 and the costs occasioned by the application for a postponement of the delivery of judgment dated 5 January 2009 are reserved. The parties, if they so wish, may lodge affidavits with this Court by no later than 9 February 2009, on the question of

[48] Above n 45 at para 47.

what order, if any, this Court should make concerning the reserved question of wasted costs occasioned by the postponement of 17 December 2008 and the costs of the application, including the question whether a punitive costs order is appropriate in the circumstances.

Order

[75] I make the following order:

1. In the matter of *President of the Republic of South Africa and Others v Quagliani and Others,* CCT 24/08:

   a) Leave to appeal directly to this Court is granted.

   b) The appeal succeeds.

   c) The order of the Pretoria High Court, case number 28214/06, is set aside and replaced with the following order:

   "The applications are dismissed."

2. In the matter of *Goodwin v Director-General of the Department of Justice and Constitutional Development and Others,* CCT 52/08:

   a) Leave to appeal directly to this Court is granted.

   b) The appeal against the decision of the Pretoria High Court, case number 21142/08, is refused.

3. The application for a postponement of the delivery of this judgment dated 5 January 2009 is dismissed. Costs of that application, and the wasted costs of 17 December 2008, are reserved.

4. Save for the reserved costs referred to in paragraph 3, no order is made as to costs in either matter.

Langa CJ, Moseneke DCJ, Madala J, Mokgoro J, Ngcobo J, O'Regan J, Van der Westhuizen J and Yacoob J concur in the judgment of Sachs J.

Counsel for Quagliani:	Advocate D Melunsky and Advocate M Du Plessis instructed by Errol Goss Attorneys.
Counsel for Van Rooyen and Brown:	Advocate P Hodes SC and Advocate A Katz instructed by Davout Wolhuter and Associates.
Counsel for the Intervening Parties:	Advocate RT Williams SC and Advocate K Pillay instructed by the State Attorney, Johannesburg.
Counsel for the Government:	Advocate PJJ de Jager SC and Advocate MD Mohlamonyane instructed by the State Attorney, Pretoria.
Counsel for Goodwin:	Advocate H Epstein SC and Advocate A Katz instructed by Wertheim Becker Inc.