CASE NO.: SA 13/2005

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

HANS-JURGEN GUNTHER KOCH **APPELLANT**

and

THE STATE **RESPONDENT**

CORAM: Strydom, A.J.A., Chomba, A.J.A. *et* Damaseb, A.J.A.

HEARD ON: 29/09/2006 and 07/10/2006

DELIVERED ON: 29/11/2006

APPEAL JUDGMENT

STRYDOM, A.J.A.: [1] Appellant is a German citizen permanently residing in Namibia. Since December 1999 he has resided on his farm, La Rochelle, in the Tsumeb district. By letter dated the 2nd October 2002, the German Ambassador requested the Minister of Justice for the extradition of the appellant.

[2] By means of this letter the Minister was informed that an international warrant

for arrest had been issued by the Munich Municipal Court for the arrest of the appellant pending his extradition to Germany. The letter further informed the Minister that the appellant, through a borrowing and lending scheme, fraudulently obtained money from various municipalities by falsely representing to such municipalities that the money so obtained was for short term loans and either pocketed the money or used it to pay off long-term loans in order to utilize the redemption on interest so generated. When the scheme collapsed it left seven local authorities with a shortfall totaling DM 84.148.o47, 04. (Converted into N$ at the rate then applicable, it came to N$420 million.)

[3] The letter continued to set out that the appellant was also accused of falsifying documents by altering cheques and transfer slips and that the appellant, over a period of four years, committed offences in terms of the German tax laws by evading payment of tax in the amount of DM4.812.742,00 (approximately N$ 24 million.)

[4] The letter was also accompanied by sworn statements, together with sworn translations thereof, which, so it was claimed, provided clear evidence of the offences committed. The letter also set out the various statutory enactments in terms of which it was alleged the offences were committed. Lastly certain undertakings were given which purported to be in line with the provisions of sec. 5 of the Namibian Extradition Act, Act No. 11 of 1996 (the Extradition Act).

[5] This letter set in motion the proceedings for the extradition of the appellant.

The Minister of Justice (the Minister) authorized the Magistrate of the district of Tsumeb to hold an enquiry in accordance with sec 12 of the Act. It is common cause that the appellant was arrested on 14 October 2002 by members of the Namibian police and brought before the magistrate on 16 October 2002. On this occasion the appellant was denied bail. A formal bail application was again brought on 6th November but met with the same fate. These proceedings took place before magistrate Amutse.

[6] The extradition enquiry commenced before magistrate Namweya, the magistrate for the district of Tsumeb, on 19th March 2003. (How it came about that magistrate Amutse was replaced by magistrate Namweya is not clear). On this occasion the State handed in its documentary evidence and the matter was then postponed to enable the defence to study these documents. Apart from the documentary evidence, no other evidence was placed before the court by the State.

[7] On the resumption of the proceedings on 29th July 2003 the defence raised various points *in limine* mostly dealing with the admissibility of the documents handed in previously by the State. All these points were rejected by the learned magistrate and the matter was further postponed till 1st September 2003 when the appellant gave *viva voce* evidence and was cross-examined by the prosecutor. Judgment was delivered on the 4th September 2003 whereby the appellant was committed to

prison awaiting the Minister's decision in terms of sec. 16 of the Extradition Act.

[8] Notice of appeal against his committal by the magistrate was delivered on 17th September 2003. This appeal was to the High Court of Namibia as provided by sec. 14 of the Extradition Act. When the matter was heard the State, in turn, raised certain points *in limine*. The Court, after considering judgment, dismissed these points and filed its reasons on the 28th October 2004. The appeal proper was then heard during October/November and was dismissed in separate judgments delivered by the judges on 22 July 2005.

[9] Notice of an appeal, alternatively a review, to this Court, was given by the appellant on 3rd August 2005. Notwithstanding this notice the Minister attempted to extradite the appellant to Germany seemingly because he was of the opinion that no further right to appeal existed. This action prompted the appellant to apply for an urgent restraining order which in turn resulted in an agreement by the parties to retain the status *quo* and for both to apply for leave to appeal and to cross-appeal to this Court.

[10] During this application the State argued that the Extradition Act limited the right to appeal to the High Court and that no provision was made for a further appeal from that Court to the Supreme Court. Mainga, J, agreed with the State and struck the matter from the roll. Van Niekerk, J, found that an appeal lies from the High Court to

the Supreme Court in extradition matters and further found that no leave to appeal, in such instance, was necessary, and consequently also struck both applications from the roll.

[11] The matter before us was argued over two days. Mr. Botes, assisted by Mr. Cohrssen, appeared on behalf of the appellant. They appeared throughout the proceedings, starting with the enquiry, for the appellant. Mr. Small represented the Respondent (the State). He did not appear at the enquiry but only became involved when the proceedings moved to the High Court for the various hearings in that Court. The Court is indebted to Counsel for their full and helpful arguments.

[12] Act 11 of 1996, so far as could be determined, only on one previous occasion formed the subject of judicial interpretation and that was in the case of *S v Bigione***,** reported in 2000 NR 127, when the said Bigione appealed against his committal for extradition to Italy. A Bench of two Judges allowed the appeal. An important finding by that Court was that sec. 18 of the Extradition Act must be interpreted against the evidential regime applicable to Namibia and that evidence placed before the magistrate holding the enquiry must be admissible and, as far as written evidence was concerned, be in the form of sworn or affirmed statements or depositions.

[13] At this stage it would be convenient to first deal with the cross-appeal by the respondent, the State, because if the Court should find that there is no right of appeal to the Supreme Court then that would be the end of the matter. The second issue

raised by the cross-appeal was whether the evidence given at bail proceedings formed part of the evidence of the enquiry. The question must be determined at this stage so that the Court, if the appeal proceeds, must know what evidence is relevant.

[14] The first point, namely the jurisdiction of this Court to hear the appeal, was raised by the respondent at the time when both parties thought it wise to apply for leave to appeal to this Court. The Court *a-quo* was divided on this point. Mainga, J, agreed that no further appeal was possible whereas Van Niekerk, J, concluded that there was a right to appeal directly to this Court. Both Judges in helpful and well reasoned judgments set out what the law was in their opinion. Mainga, J, concluded that the Extradition Act did not provide for any appeal to the Supreme Court on the basis that no such specific provision was made in the Act. In fact, according to the learned Judge, certain provisions of the Act excluded such possibility and the possibility that such provision could be implicated into the Extradition Act.

[15] The main contentions of Mr. Small were, firstly, that there was no express provision which provided for further appeals to the Supreme Court, which would have been necessary if that was the intention of the Legislature. Secondly that there were clear indications in the Act itself which excluded such an intention. Reference to various provisions of the Act was made by Counsel.

[16] Whether an appeal lies to the Supreme Court will depend on an interpretation of the Extradition Act and the High and Supreme Court Acts, Acts 16 and 15 of 1990.

[17] Before embarking on this task it is perhaps necessary to set out the scheme implemented by the Extradition Act. Sec. 4 of the Extradition Act states that extradition of persons may only take place in regard to those countries which have entered into extradition agreements with Namibia or countries which have been specified by the President by proclamation in the *Gazette* for purposes of this Act. It is common cause that the Federal Republic of Germany is such a country specified in the Gazette. (See Proclamation 22 of 2001).

[18] Extradition proceedings are set in motion by a request from a country for the return of a person or persons. (Sec. 7). Such request must be accompanied by certain particulars and documents as prescribed by Sec. 8. If the Minister is satisfied that the return of a person can lawfully be made in accordance with the Act he forwards the request and documents to a magistrate and issues to that magistrate an authority in writing to hold an enquiry. One such document which accompanies the request is an external warrant of arrest and if the magistrate is satisfied that the warrant is duly authenticated, he endorses the warrant which can then be executed anywhere in Namibia. (sec. 10).

[19] The next step is the holding of an enquiry in terms of sec. 12 of the Extradition Act. Sec. 12 provides for the procedure applicable at such an enquiry and further authorises the Prosecutor-General, or anyone delegated by her, to appear at the enquiry or at any proceedings in the High Court under the Extradition Act.

Sec. 12 grants to the magistrate the same powers which he or she would have had at a preparatory examination so held, including the power to commit the person and to grant bail.

[20] Sec. 12 (5) sets out what the magistrate must consider in deciding whether to commit or discharge a person. Once the magistrate is satisfied that there was due compliance with the sub sec. he commits the person. Once a person is committed he or she is kept in prison to await the Minister's decision in terms of sec. 16 of the Extradition Act. Sec. 21 provides that no bail shall be granted to a person committed by the magistrate.

[21] Section 14 of the Act provides for an appeal to the High Court and it is necessary to set out the section in full:

> "14. (1) Any person or the government of the requesting country concerned may, within 14 days from the date of an order made in terms of section 12, appeal to the High Court against that order, and the High Court may, upon such appeal, make such order in the matter as it thinks the magistrate ought to have made.
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> (2) In considering an appeal under subsection (1) the High Court may order the discharge of the person who has been committed to prison under section 12(5) if it is of the opinion that, having regard to all the circumstances of the case, it would be unjust to return such person by reason of -
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> (a) the violation of any provisions of Part II
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> (b) the trivial nature of the offence concerned;

(c) the lapse of time since the commission of the offence concerned or since the person concerned became unlawfully at large, as the case may be; or

(d) the accusation against the person concerned not having been made in good faith or in the interest of justice."

[22] It is correct, as was argued by Mr, Small, that no express mention was made of an appeal to the Supreme Court of Namibia but neither was there an express exclusion of such an appeal. The question remains whether, bearing in mind also the provisions of other legislative Acts, such as Acts l5 and 16 of 1990, it can be found that such an appeal is possible or not. The relevant provisions in these acts are sec. 18 of Act 16 of 1990 and sec. 14 of Act 15 of 1990. They provide as follows:

[23] The relevant part of sec. 18 is:

"18(1) An appeal from a judgment or order of the High Court in any civil proceedings or against any judgment or order of the High Court given on appeal shall, except in so far as this section otherwise provides, be heard by the Supreme Court.

(2) An appeal from any judgment or order from the High Court in civil proceedings shall lie -

(a) in the case of that court sitting as a court of first instance, whether the full court or otherwise, to the Supreme Court, as of right, and no leave of appeal shall be required;

(b) in the case of that court sitting as a court of appeal, whether the full court or otherwise, to the Supreme Court if leave to appeal is granted by the court which has given the judgment or has made the order, or in the event of such leave being refused, leave to appeal is granted by the Supreme Court."

[24] The relevant part of sec 14 of the Supreme Court Act states as follows:

> "14(1) The Supreme Court shall, subject to the provisions of this Act or any other law, have jurisdiction to hear and determine any appeal from any judgment or order of the High Court and any party to any such proceedings before the High Court shall if he or she is dissatisfied with any such judgment or order, have a right of appeal to the Supreme Court.
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> (2) The right of appeal to the Supreme Court –
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> (a) …..
> (b) shall be subject to the provisions of any law which specifically limits it or specifically grants, limits or excludes such right of appeal, or which prescribes the procedures which have to be followed in the exercise of that right."

[25] Of importance now is the nature of an enquiry in terms of the Extradition Act. In this regard the parties were also *ad idem* that it is neither civil nor criminal in nature but that it is something *sui generis* which has to be dealt with by the dictates of its own provisions. I therefore agree with Mr. Cohrssen, but for the provisions of sec 14 of the Act, no appeal would lie to any of the Courts of Namibia. The committal by the magistrate in the extradition proceedings is not appealable in terms of the provisions of the Magistrate's Court Act, as the magistrate did not act as a court. (See sec. 83 read with sec. 48 of the Magistrate's Court Act, Act 32 of 1944 as amended). The committal is also not a conviction by a lower court or a decision given in favour of an accused by a lower court in terms of the Criminal Procedure Act, Act 51 of 1977.

(See sec. 309 and 310). Legislation was therefore necessary to create an appeal to the High Court. That was achieved by sec 14 of the Extradition Act. Sec. 14 did not set up, for purposes of appeals in extradition matters, some sort of a special court. In terms of the section an appeal lies to the High Court and when that Court pronounces upon the appeal it does so as the High Court of Namibia established in terms of Act 16 of 1990 with the powers set out in the Act. Its pronouncement is a judgment or order which judgment or order would be subject to appeal to the Supreme Court as any other order or judgment given by the Court unless, by statute, such appeal is excluded. For purposes hereof I will accept that such exclusion can also be by implication.

[26] Whether there is such an exclusion can, so it seems to me, only exist in terms of the provisions of the Extradition Act or the provisions of the Supreme or High Court Acts and more particularly the relevant sections referred to above and set out in sec. 14 and sec. 18 of those Acts.

[27] Because of the origin of this appeal, being an enquiry which can neither be characterised as civil nor criminal, it seems to me that one would be hard put to find that an appeal from the decision of the High Court to the Supreme Court can be brought under sec 18(1) of Act 16 of 1990. However I need not decide the issue as I am of the opinion that sec. 14(1) of Act 15 of 1990 is wide enough to include an appeal such as the present.

[28] Sec. 14(1) grants a right of appeal from any judgment or order from the High Court to any party to such proceedings. The right of appeal is only limited subject to the provisions of the Act itself or any other law. No provision of Act 15 of 1990 disavows the right of appeal in this instance and the only other possibility left would be the Extradition Act.

[29] Mr. Small, in his able argument, submitted that sec. 14 did not create any substantive right to appeal. By comparison Counsel referred the Court to sec 21 of Act 59 of 1959 of South Africa whereby the jurisdiction of that Court of Appeal was set out and pointed out that the section, which started with the words “In addition to any jurisdiction conferred upon it by this Act”, left no doubt that it was intended to be a substantive provision granting wide jurisdiction to that Court.

[30] The full text of sec 21(1) is as follows:

> In addition to any jurisdiction conferred upon it by this Act or any other law, the appellate division shall, subject to the provisions of this section and any other law, have jurisdiction to hear and determine an appeal from any decision of the court of a provincial or local division.

[31] Although the wording of this section differs to a certain extent from that of sec 14(1) of Act 15 of 1990 the effect thereof, by granting a right of appeal from **any decision** of a provincial or local division, subject to the same constraints as the

Namibian Act, is very much the same. I do not think that Courts in South Africa would have interpreted the section any differently if the words "**In addition to any jurisdiction conferred upon it by this act or any other law"** were not a part of the section. It is not these words which determine the jurisdiction of the Court but the words "**an appeal from any decision of the court of a provincial or local division".**

[32] Mr. Small further relied on the case of *S v Absalom*. That case is in my opinion relevant because it demonstrates the wide powers given under section 21 of the South African Act and, by comparison, its equivalent, sec. 14 of the Namibian Act. In that case the Appeal Court decided that a person, whose application for condonation for the late filing of his notice of appeal from his conviction and sentence in a magistrate's court, was unsuccessful in the High Court, had a right of appeal to the Appellate Division because of the wide import of sec. 21. Because no provision was made in the Criminal Procedure Act for such an appeal sec. 21 was the means whereby an aggrieved party could appeal to the Appellate Division. The Court, Grosskopf, JA, invoked sec. 21(1) of that Act and concluded that the appellant did not need leave to appeal in order to get before the Appeal Court.

[33] In Namibia the position is the same and in terms of sec 14(1) of Act 15 of 1990, a right of appeal lies directly to the Supreme Court without necessarily first applying for leave to appeal. (See *S v Absalom***,** 1989 (3) SA 154 (AD).

[34] It is correct, as was argued by Mr. Small, that the jurisdiction of the Supreme Court set out in sec. 14 is also subject to certain limitations where such limitations are brought about by other legislation, or by the section itself. See *S v Deli*, 2001 NR 286 (SC) at 293 C-E. However where no such limitation by any other legislation exists, and where such appeal lies to the Supreme Court in terms of the provisions of sec. 14(1), the aggrieved party has an unlimited right of appeal.

[35] It is then necessary to determine whether the Extradition Act grants, limits or excludes such right.

[36] Mr. Small contended that an appeal to the Supreme Court is excluded because there is no specific grant of such a right by the provisions of the Extradition Act and because various provisions clearly exclude such a right. The sections of the Extradition Act relied upon by Counsel are sections. 12(3), (5), 13, 14 and 16. To this can be added sec 21(b).

[37] I have already pointed out that there is no specific grant or exclusion, in the sense of a provision stating that a further appeal shall lie, or not lie, to the Supreme Court, set out in the Extradition Act. Furthermore that, but for the provisions of sec. 14, there would be no appeal to any of the Courts of law in Namibia . Sec. 14 is therefore the source for any appeal to the Courts.

[38] In her judgment Van Niekerk, J, referred to various legislative Acts where no specific provision was made for appeals from provincial or local divisions of the Supreme Court of South Africa to the Appellate division but where it was notwithstanding found that a right of appeal, either directly or with leave, lay to the Appellate Division. See such cases as *Ex parte Crous,1938 AD 334; Oryx Mining and Exploration (Pty) Ltd v Secretary for Finance,* 1999 NR 80 (SC) **(**also reported in 1991 (4) SA 873 (NmSC) and *S v Thornhill,* 1998 (1) SACR 177 (CPD)**.** The learned Judge *a quo* pointed out that in the latter case the Cape Supreme Court (the equivalent of our High Court) was dealing with the South African Extradition Act, which, in its sec 13, is very similar to our sec 14 as it only provided for an appeal from the magistrate, holding the enquiry, to the provincial or local division of the Supreme Court. Dealing with an application for bail pending the outcome of an appeal against his committal by a magistrate, and the dismissal of that appeal by the Provincial Division of the Supreme Court, the Court, albeit *obiter*, was satisfied that a right of appeal existed to the Appellate Division.

[39] In my opinion the above cases at least refute Mr. Small's contention that no appeal lies to the Supreme Court unless there is a specific grant of such a right in terms of the Extradition Act.

[40] The learned Judge *a quo* also referred to certain cases where it was concluded that the right to appeal to the Supreme Court of South Africa (Appellate Division) was excluded by the wording of the Legislative Acts which granted a right of appeal

from a Minister or Institution to the Provincial or Local Division of the Court of jurisdiction.

[41] These cases are: *The Minister of Labour v. Building Worker's Industrial Union, 1939 AD 328; Minister of Labour and Another v Amalgamated Engineering Union, 1950 (3) SA 383 AD* and *Munisipaliteit van Windhoek v Ministersraad van Suidwes Afrika en 'n Ander, 1985 (2) SA 907 (AA).*

[42] In each of the above cases the relevant legislation allowed for an appeal, in the first two cases from a decision of the Minister of Labour, and in the latter case from the Council of Ministers, to the Provincial or Local Division with jurisdiction. In the latter case the appeal lay to the Supreme Court (S.W.A. Division). On further appeals to the Appellate Division that Court decided, on the wording of the various legislative Acts, that appeals were limited to the Provincial or Local Divisions of the Courts of jurisdiction. As a result the matters were struck from the roll.

[43] In the first two cases the Appellate Division was called upon to interpret sec. 77 of the Industrial Conciliation Act, Act No. 36 of 1937. In the *Building Workers* case, Centlivres, JA, who wrote the judgment, stated the following at p 332 - 333:

> "That section, after providing for an appeal from the Minister to any Division of the Supreme Court, enacts that the decision of the Division to which appeal is made 'shall for the purposes of the Act be deemed to be the decision of the Minister'. Section 16(2) says the Minister's decision on an

> appeal from the Industrial Registrar shall for the purposes of the Act be deemed to be the decision of the Registrar. From all this it follows that the decision of a Provincial or Local Division given on appeal from a decision of the Minister under sec. 16 is deemed to be the decision of the Minister, which decision is in turn deemed to be the decision of the Registrar for the purposes of the Act…… Had the Legislature intended that there should be a further right of appeal from a decision given by a Provincial or Local Division under s 77 it would have enacted that the decision of the Court hearing the further appeal should be deemed to be the decision of the Minister. This it has not enacted.
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> The language of sec. 77 is clear and unambiguous. It precludes all notion of a further appeal to any other tribunal for it says unmistakenly that the decision of the Division to which the appeal is made – in this case the Transvaal Provincial Division – shall be deemed to be the decision of the Minister. From this it follows that the decision of any other tribunal can have no legal effect."

[44] This interpretation of sec. 77 was again applied in the *Amalgamated Engineering* - case with a similar result.

[45] In the *Munisipaliteit van Windhoek*-case, *supra,* section 77 of Ord. 35 of 1952 provided that where an appeal is made to the Supreme Court of South West Africa from a decision of the Council of Ministers, the decision of the Court shall be deemed to be the decision of the Council of Ministers. With reference to Proclamation 222 of 1981, the predecessor to Act 16 of 1990, and more particularly section 14 (1) and 14 (2)(c) thereof, which latter section provided that any right to appeal was subject to "any law which specifically limits that right", the Appellate Division, applying its reasoning in the two Labour matters, concluded that the Ordinance limited the right of appeal to the Supreme Court of South West Africa.

[46] That a deeming provision, such as contained in the relevant legislation of the three mentioned cases, brought finality, as far as the right to appeal was concerned, is now settled law. It was because of the absence of similar or other provisions in the Tax Act, Act 24 of 1981, indicating that an appeal to the Supreme Court of South West Africa was final, that the Supreme Court of Namibia came to the conclusion that a further appeal lay from the Full Bench of the High Court to the Supreme Court of Namibia. That was after the Full Bench had dismissed an appeal from a Special Tax Court. See the *Oryx Mining*-case, *supra.* Mahomed, AJA, (as he then was) stated as follows on p 87J - 88B:

> "Secondly, the element of finality suggested in s 77(2) of the Industrial Conciliation Act by the deeming provision, attaches to the decision of the Division of the Supreme Court to which the appeal is made in terms of s 77 (a Provincial Division). In the case of the Income Tax there is no corresponding provision which attaches finality to the decision of the Division of the Supreme Court to which an appeal is made in terms of s 76. All that s 73(18) states is that any decision of the Special Income Tax Court in terms of s 73 shall (subject to the provisions of s 76) be final. The Legislature could easily have said, if such was its intension, that the decision of the Court to which appeal is made in terms of s 76(2), shall be final."

[47] I agree with Van Niekerk, J, and Mr. Cohrssen that if it was the intention of the Legislature to limit appeals to the High Court only it would have said so. In fact nothing in sec. 14 can be construed as constituting the High Court the final court of appeal in matters under the Extradition Act. The order made by the Court on appeal from the magistrate is not deemed to be that of the magistrate and the Court is free

to make any order it thinks the magistrate ought to have made.

[48] In the absence of any contrary indications it can be accepted that the Legislature was aware of these four decisions, more particularly those originating in Namibia. The Extradition Act was promulgated subsequent to all the above cases and it can therefore be accepted that the Legislature was aware of the import of these cases. By not in any way limiting the right of appeal in sec. 14, it can be accepted that the Legislature intended that further appeals should lie to the Supreme Court. (See *Ex parte Minister of Justice: In re Bolon, 1941 AD 345 at 359-60* and *Die Munisipaliteit van Windhoek*–case, *supra, at p 920 E-F).*

[49] A clear indication that the Legislature was aware of the import of cases such as the *Windhoek Munisipaliteit*-case, *supra,* is to be found in the Immigration Control Act, Act 7 of 1993. Mr. Small found support for his contention that there should be specific provision to appeal to the Supreme Court in Sec. 47 of the Immigration Control Act, and more particularly ss (5) and (6) thereof. However a reading of these sections shows precisely the opposite.

[50] Section 47 (1) provides that a tribunal may of its own motion, or shall at the request of a person affected by an application made in terms of sec. 44 or of an immigration officer, reserve a point of law for decision by the High Court. Ss. 4(a) empowers the High Court to call for further information from the tribunal or person concerned and to give its decision by also taking into consideration the further

information supplied (if any). (Sub. Sec 4(b))

[51] Ss. (4) (c) then provides as follows:

> "(c) Any decision of the High Court under paragraph (b) setting aside the decision of a tribunal shall, for all purposes, where the tribunal had, by the decision so set aside, refused the granting of an application for authorization for the removal of a person from Namibia under section 44, be deemed to be a decision of the tribunal concerned authorizing the removal of that person from Namibia under that section." (My emphasis)

[52] The Legislature clearly realised the effect of the deeming clause set out in ss. 4(c) and, because it intended to allow a further appeal to the Supreme Court, created that appeal by specifically providing therefor. See ss. (5) and (6) of sec 47. This was necessary in the light of the decisions referred to above.

[53] Mr. Small, in his heads of argument, also referred to other examples to show that an appeal to the Supreme Court, in instances like these, is only possible if there is a specific enactment to that effect. In this regard Counsel referred to sec 76(2) of the Income Tax Act, Act 24 of 1981 and sec. 21 of the Labour Act, Act No 6 of 1992.

[54] Counsel is correct in so far as there would not have been any appeal to the Courts of Namibia, and not only the Supreme Court, if it were not for the specific enactments. This is so because Act 24 of 1981 and Act 6 of 1992 both created

special courts which were not ordinary Courts of law. In order to allow for appeals to the ordinary Courts such enactment was necessary and in that regard the various sections of the Acts played the same role as sec. 14 played in regard to the Extradition Act. In the case of the Tax Act and the Labour Act the said provisions were the bridging clauses to bring such appeals within the ambit of the ordinary courts of law and the reference to the Supreme Court was to nominate that Court as the Court of Appeal, instead of the High Court. In each instance the Supreme Court was substituted for either the High Court or the Full Bench.

[55] The reference to other sections of the Extradition Act does in my opinion not take the matter any further. If it were the intention of the Legislature to limit appeals to the High Court it would have said so by introducing a deeming provision or by stating that such an appeal would be final. And the place where this would be done would be sec. 14. The other sections referred to by Mr Small must be read against the background that the Legislature was aware of the state of the law and intended that aggrieved parties should have a right of appeal to the Supreme Court.. The reference only to sec. 14 of the Extradition Act in some of these sections is because sec. 14 is the source of the appeal in terms of the Extradition Act. Once an appeal was heard other Acts, namely the High Court Act and/or the Supreme Court Act, provide for a further appeal to the Supreme Court.

[56] As to the possibility that the Extradition Act by implication excludes further appeals to the Supreme Court in lieu of the sections referred to by Mr. Small, seems

to me not to be the case. In the course of his judgment in the matter of *Rennie NO v Gordon and Another NNO,* 1988(1) SA 1 A at p. 22 D – H Corbett, JA, (as he then was) dealt with this issue and stated:

> "Over the years our Courts have consistently adopted the view that words cannot be read into a statute by implication unless the implication is a necessary one in the sense that without it effect cannot be given to the statute as it stands."

[57] In my opinion there is no need to read words into the Extradition Act which would exclude further appeals to the Supreme Court in order to give effect to the statute.

[58] I have therefore come to the conclusion that in terms of the Extradition Act appeals in terms of sec. 14 of the Act are not limited to the High Court only but that aggrieved parties have a right of appeal to the Supreme Court.

[59] I turn now to the cross-appeal of the State. The cross-appeal was filed late in terms Rule 5(3) of the Rules of the Supreme Court. However an application for condonation was filed and because of the importance of this matter to the respective parties we allowed Mr. Small to address us on this issue.

[60] The cross-appeal concerns two points, which were taken *in limine* by the State when the matter came on appeal from the committal of the magistrate to the High

Court. The two points raised were, firstly, that the record of proceedings was not complete. In this regard Mr. Small mainly submitted that the bail proceedings before magistrate Amutse were part of the enquiry which was held before magistrate Namweya, and should therefore have been included in the record of appeal. The second point was that the proceedings were a nullity because magistrate Amutse was the magistrate authorized to hold the enquiry and that magistrate Namweya could therefore not take over the proceedings. This second point was not argued before us but Counsel reserved the right to rely on certain aspects thereof in so far as it may support his contention in regard to the record. This latter point was dismissed by Van Niekerk, J, in a well reasoned judgment with which I agree. As the State is seemingly in agreement with that judgment, except for the limited way indicated by Mr. Small, I need not add anything more.

[61] It is trite that an appellant is responsible for placing the full record of proceedings in the lower Court before the Court of Appeal. Failure to do so may have dire consequences for an appellant. As was pointed out by Counsel it may cause an appeal to be postponed or to be struck from the roll.

[62] After the request for the extradition of the appellant was received by the Minister of Justice, the latter authorized the magistrate of Tsumeb in terms of sec 10 (1) of the Extradition Act to hold an enquiry. From the record it seems that bail proceedings were first conducted and that these proceedings were held before magistrate Amutse who denied bail.

[63] Thereafter, and on the 19th March 2003, the matter came before magistrate Namweya who was informed by the prosecutor that this was the start "of the actual enquiry". On that occasion the documents forming the record of the proceedings were handed in and the matter proceeded to its conclusion on the 4th September 2003. No attempt was made by the State, at any stage during the proceedings, to hand in the record of the bail proceedings. From a reading of the record it is clear that all the parties regarded the bail proceedings as separate proceedings not forming part of the formal extradition enquiry. That lead was followed by the magistrate who did not rely, for any of his findings, on evidence given at the bail proceedings.

[64] Given this background a contention that the evidence given during the bail proceedings should form part of the record, on which this Court must now determine the appeal, is by itself a stumbling block which would not be easily overcome. No explanation could be given by Counsel, why, if it were the view of the State that the evidence at the bail proceedings formed part of the enquiry, no attempt was made to make those proceedings part of the enquiry. However Mr. Small did not contend that the record of the bail proceedings should be accepted into the enquiry purely for its evidentiary value, if any.

[65] The submission of Mr. Small is based on sec. 10(1) -10(4) and 12(1) and 12(2) of the Extradition Act. Sec. 10(1) provides for the authorization by the Minister of

Justice to a magistrate to hold an enquiry and the procedure to bring such person before the magistrate. According to sec 12(1) it is the authorized magistrate who shall hold the enquiry and sec 12(2) determines that such enquiry shall proceed in the manner in which a preparatory examination is held in the case of a person charged with having committed an offence in Namibia. It is indeed sec 12(2), as was submitted by Mr. Small, which enables the magistrate presiding at the enquiry, to grant or refuse bail.

[66] As I understood Counsel the fact that only the magistrate who is authorized to hold the enquiry can deal with any of the issues, including bail, it follows that the enquiry starts as soon as the magistrate is seized with the matter. Consequently it must be accepted that evidence given at bail proceedings form part and parcel of the enquiry.

[67] I do not agree with Counsel. The nature of the proceedings in the bail application and in the enquiry differs markedly from one another. The result is that much of the evidence given in the one would be irrelevant to the other. As was pointed out by Mr. Cohrssen, bail proceedings, whether as part of criminal proceedings or in terms of the Extradition Act, are also conducted by different rules of evidence. Bail proceedings may contain highly prejudicial matter, such as hearsay evidence and evidence of previous convictions or evidence of a propensity to commit crimes.

[68] Furthermore Sec. 12(5) of the Extradition Act sets out what the magistrate, holding the enquiry, should satisfy himself about before committing a person. These are:

> "(a) the offence to which the request in question relates is an extraditable offence;
>
> (b) the country requesting the return of the person concerned is a country contemplated in section 4(1);
>
> (c) the person brought before him or her at the enquiry is the person who is alleged to have committed such extraditable offence in such country or to be unlawfully at large after conviction for an extraditable offence in such country;
>
> (d) in the case of a person being accused of having committed an extraditable offence, the evidence adduced would be sufficient to justify the committal for trial of the person concerned if the conduct constituting the offence had taken place in Namibia; and
>
> (e) the return of the person concerned has been requested in accordance with this Act and that the return of that person is not prohibited under Part II."

[69] The above requirements clearly illustrate what the enquiry is about and have little or no relevance to proceedings for bail. What is more, an application for bail can be made at any time during the enquiry it need not always be before the start of the enquiry. It may even be after the conclusion of the enquiry and whilst the magistrate is considering whether to commit or not to commit the person. As was pointed out by the Court *a quo* with reference to sec. 138 of the Criminal Procedure Act, Act 51 of 1977, the magistrate hearing the bail application may not be the magistrate holding the enquiry, as in fact happened in this instance.

[70] There is further nothing in the Extradition Act to indicate that it was the intention of the Legislature that evidence given in bail proceedings should form part of the evidence given at the enquiry. I am therefore of the opinion that the bail proceedings do not form part of the enquiry and that it does not matter whether and at what stage of the proceedings such application was brought and whether it was brought before the same magistrate or before a different magistrate, bail proceedings remain a separate proceeding and is not part of the enquiry.

[71] I have consequently come to the conclusion that the cross-appeal cannot succeed and it is dismissed.

[72] This brings me to the appeal by the appellant. The attack against the committal of the appellant by the magistrate and the dismissal of the appeal by two Judges of the High Court is based on multiple grounds which can conveniently be divided into two main grounds, namely the lack of authentication and consequent inadmissibility of documents and whether the evidence given constituted a *prima facie* case which justified the committal of the appellant.

[73] Although an enquiry for the extradition of a person strongly resembles a criminal trial it is neither that nor a civil matter. According to the cases it must be seen as *sui generis.* (See *Geuking v President of the Republic of South Africa and*

Others, 2003 (1) SACR 404 (CC) at 416). The magistrate holding the enquiry is not called upon to find either guilt or innocence or to find what defences were or could be established on behalf of the person to be extradited. After the enquiry the magistrate must satisfy himself as to the requirements set out in sec 12(5) of the Act and if so satisfied he **shall** issue an order for the committal of such person to prison awaiting the decision of the Minister.

[74] The Act itself provides what documents can be placed before the magistrate. This is set out in section 8 of the Act which reads as follows:

> "8(1) Notwithstanding the terms of any extradition agreement which may be applicable, a request made under section 7 shall be accompanied–
>
> (a) by the full particulars of the person whose return is requested and information, if any, to establish that person's location and identity;
>
> (b) by the full particulars of the offence of which the person is being accused or was convicted and in respect of which his or her return is sought, a reference to the relevant provisions of the law of the requesting country which were breached by the person and a statement of the penalties which may be imposed for such offence;
>
> (c) by a statement or statements containing information which set out *prima facie* evidence of the commission of the offence contemplated in paragraph (b) by the person whose return is requested;
>
> (d) by the original or an authenticated copy of the external warrant issued in relation to the person whose return is requested; and
>
> (e) …..

(2) …..

(3) Any document referred to in subsection (1) which is not drawn up in the English language shall be accompanied by a sworn translation thereof in that language."

[76] Furthermore sec. 18 of the Act sets out the formal requirements for the acceptance of such documents as evidence in the enquiry. This section provides as follows:

"18(1) No deposition, statement on oath or affirmation taken, whether or not taken in the presence of the person whose return has been requested, or any document , or any record of any conviction, or any warrant issued in a requesting country, or any copy or sworn translation thereof, may be tendered under section 8 or be received in evidence at an appeal under section 14 or an enquiry, unless such deposition, statement, affirmation, document, record or warrant, or any copy or sworn translation thereof –

(a) has been authenticated in the manner in which foreign documents may be authenticated to enable them to be produced in any court in Namibia or in the manner provided for in the extradition agreement concerned; or

(b) has been certified as the original or as true copies or translations thereof by a judge or magistrate, or by an officer authorized thereto by one of them, of the requesting country concerned.

(2) Any -

(a) record of conviction and sentence by a court of competent jurisdiction;

(b) statement by a competent judicial or public officer of the law of a requesting country; or

> (c) deposition, statement, or affirmation which has been made, sworn or affirmed by any person,
>
> which has been authenticated or certified in the manner contemplated in subsection (1) shall on its production in an appeal under section 14 or in any enquiry be *prima facie* proof of the facts stated therein.

[77] Section 18 is couched in peremptory language and no documents originating from a foreign country are to be received in evidence by either the magistrate holding the enquiry or any court on appeal unless such documents are authenticated in the manner prescribed by our rules or certified in the manner set out in the section.

[78] It was pointed out by Mr. Botes, who argued this part of the appeal, that this issue is dealt with by High Court rule 63 and that that rule and the magistrate's court rules concerning authentication are essentially the same. The authentication, which is a process of verification of signatures appearing on foreign documents, is fully dealt with in the said rules. In certain instances the Court is relieved from requiring strict compliance with the Rule. That would be in instances where the Judge or magistrate is satisfied by other evidence that the signature appended is the signature of the person purported to have signed the document. This relaxation of the Rule does however not mean that the Judge or magistrate can do away with authentication altogether.

[79] It is common cause between the parties that at the enquiry before the

magistrate no *viva voce* evidence was tendered by the State. The prosecutor was content to hand up a bundle of documents containing, *inter alia,* the warrant of arrest, depositions of witnesses and statements. It is further common cause that none of these documents were authenticated in terms of either the magistrate's court rules or rule 63 of the Rules of the High Court.

[80] However, all the foreign documents contained what is called an Apostille which, so it was found by the Court *a quo*, substantially complied with the Rules of Court in regard to the authentication of the said documents. The use of Apostille came about in the following way.

[81] Part of the documents handed in at the enquiry was a letter from the Ministry of Foreign Affairs, Information and Broadcasting and a notification from the Ministry of Foreign Affairs of the Kingdom of the Netherlands, who is the depositary of the Convention Abolishing the Requirements of Legalisation for Foreign Public Documents, (the Convention), that the Republic of Namibia has acceded to the Convention with effect from 30 January 2001.

[82] The purpose of the Convention, as stated in its name, was to simplify proof of foreign documents and the authentication thereof for use in countries which have acceded to the Convention. The provisions of the Convention, in so far as they are relevant to these proceedings, are as follows:

“Article 1

The present Convention shall apply to public documents which have been executed in the territory of one Contracting State and which have to be produced in the territory of another Contracting State.

For the purposes of the present Convention, the following are deemed to be public documents:

(a) documents emanating from an authority or an official connected with the courts or tribunals of the State, including those emanating from a public prosecutor, a clerk of a court or a process-server;

Article 2

Each Contracting State shall exempt from legislation documents to which the present Convention applies and which have to be produced in its territory. For the purposes of the present Convention legalisation means only the formality by which the diplomatic or consular agents of the country in which the document has to be produced certify the authenticity of the signature the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears.

Article 3

The only formality that may be required in order to certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which it bears, is the addition of the certificate described in Article 4, issued by the competent authority of the State from which the document emanates.

Article 4

The certificate referred to in the first paragraph of Article 3 shall be placed on the document itself or on an 'allonge', it shall be in the form of the model annexed to the present Convention.

It may, however, be drawn up in the official language of the authority which issues it. The standard terms appearing therein may be in a second language also. The title 'Apostille (Convention de La Haye du 5 octobre 1961)' shall be in the French language.

Article 5

When properly filled in, it will certify the authenticity of the signature, the capacity in which the person signing the document has acted and, where appropriate, the identity of the seal or stamp which the document bears.

The signature, seal and stamp of the certificate are exempt from all certification.

Article 6

Each Contracting State shall designate by reference to their official function, the authorities who are competent to issue the certificate referred to in the first paragraph of Article 3.

It shall give notice of such designation to the Ministry of Foreign Affairs of the Netherlands at the time it deposits its instrument of ratification or of accession or its declaration of extension. It shall also give notice of any change in the designated authorities.

Article 14

The present Convention shall remain in force for five years from the date of its entry into force in accordance with the first paragraph of Article 11, even for States which have ratified it or acceded to it subsequently

If there has been no denunciation, the Convention shall be renewed tacitly every five years.

Article 15

The Ministry of Foreign Affairs of the Netherlands shall give notice to the States referred to in Article 10, and to the States which have acceded in accordance with Article 12, of the following:

(a) the notifications referred to in the second paragraph of Article 6;

(b) the signatures and ratifications referred to in Article 10;

(c) …..

(d) the accessions and objections referred to in Article 12 and the date on which such accessions take effect;”

[83] All the documents originating from the requesting country, namely Germany, were purportedly authenticated by the affixing of an Apostille to the statement or document as provided for by Article 4 of the Convention. All documents were in the German language but sworn translations of the contents thereof were made and provided by the requesting country. Also in regard to these sworn translations an Apostille was added seemingly to authenticate the capacity and the signature of the sworn translator. However none of the apostilles were translated. As far as the requesting country was concerned, they acted in terms of Article 4, which permitted Germany to draw up the Apostilles in its official language. When the documents were handed in at the enquiry the Apostilles in the German language were left untranslated.

[84] The documents tendered by the State at the enquiry consisted of the following:

(i) A warrant of arrest (Exhibit E) which provided the information required by sec. 8(a), (b) and (d).

(ii) A document emanating from the department of Public Prosecutions Munich II (Exhibit F) and signed by one Reichenberger, described in the document as a public prosecutor. The document is not under oath and contains excerpts of the relevant German law. It was tendered in

terms of sec. 8(b) and/or sec. 18(2)(b) of the Act.

(iii) Various documents titled "written record" which are depositions of a number of interviews held with witnesses by Judges in closed sessions. These statements were tendered in terms of sec. 8(c) of the Act.

[85] The above documents were attacked by appellant's Counsel on various grounds. It was submitted that the official language of Namibia, in terms of its Constitution, is English. Consequently the language of the Court is English and any other language must be properly translated in order to be accepted by the Court. Counsel therefore submitted that the Apostilles should have been translated and failure to have done so meant that none of the documents were properly authenticated. Counsel further submitted that there was no evidence that the Federal Republic of Germany acceded to the Convention or was still a Contracting State. This is important because only Contracting States could legalise documents in terms of the Convention. Mr. Botes also submitted that the document styled 'certificate' by the Public Prosecutor Reichenberger was not sworn to and neither was there evidence to qualify him as an expert in German law. Lastly Counsel submitted, in the alternative, that none of the documents were public documents and should therefore not have been accepted by the Court.

[86] I will deal with the last submission first. Counsel's reference to cases such as *Northern Mounted Rifles v O'Callaghan*, 1909 TS 174,17 and *Ontwikkelingsraad Oos-Transvaal v Radebe & Others,* 1987 (1) SA 878 (T) shows in my opinion that Counsel is approaching this issue on the basis of the rules of evidence applicable to

public documents proper. However that is not the scheme of the Convention. The Convention contains in Article 1 a deeming clause by which documents, which are in essence not public documents, are now deemed to be such for the purposes of the Convention. In *S v Rosenthal, 1980* (1) SA 65 (AD) it was stated that the words "shall be deemed" used in a statute are to predicate that a certain subject matter shall be regarded or accepted for the purposes of the statute as being of a particular, specified kind whether or not the subject matter is ordinarily of that kind.

[87] Nevertheless Mr. Botes referred to the fact that the documents recording evidence which persons gave before a Judge in a closed session can by no stretch of the imagination be a public document and nor were such documents intended to be public documents as the interviews were conducted behind closed doors which militates against any notion of calling it public. If the rules relating to public documents proper are applied then Mr. Botes is right. However this is clearly an instance where the deeming clause, contained in Article 1 of the Convention, applies. In terms thereof documents emanating from an authority or official connected with the courts or tribunals of the State, including those emanating from a public prosecutor or a clerk of a court shall be deemed to be public documents. To my mind there can be no doubt that these documents were coming from an authority or an official connected with the courts or tribunals of the State, in this instance Germany, or from a public prosecutor or a clerk of a court.

[88] But said Counsel bearing in mind the meaning of the word emanate, the

documents containing the interviews with witnesses emanated from the persons who were interviewed and not from an authority or an official connected with the courts or tribunals of the State. In this regard Counsel referred to the New Shorter Oxford English Dictionary, at page 802, where the following is stated regarding the meaning of the word emanate, namely **"come (as) from a source; issue, proceed (from)".** Counsel then submitted that the source of these depositions are the witnesses themselves and not an authority or official connected to the courts or tribunals of Germany.

[89] It seems to me that the meaning ascribed to the word ‘emanate’, by Counsel is too narrow. Used in a wider sense these documents did emanate from officials as provided for by the Convention. I can see no reason why the word connot mean ‘as coming from a source, being an authority or official connected with the courts etc.’ or that the documents emanated in the sense that it was issued by such an authority. After all the source from which the documents were sent, as I understand Article 1 of the Convention, was the clerk of the court or an official connected to the Court, and in that sense the documents emanated as provided for by the deeming clause. The purpose of the Convention was to, as far as possible, simplify the proof and authentication of documents emanating from authorities and officials connected with the courts. Giving the word ‘emanate’ the meaning contended for by Counsel would greatly narrow down the ambit of the Convention which would not be permissible bearing in mind the purpose and wording of the Convention.

[90] I am therefore satisfied that this ground of appeal cannot succeed.

[91] At the enquiry, the magistrate, and again on appeal, before two Judges of the High Court, the Apostilles, whereby certain signatures were allegedly authenticated, were accepted although these instruments were in the German language and were not translated either by a sworn translator or otherwise. How this came about was the subject of much debate before us.

[92] Before dealing with the reasons for this acceptance of German Apostilles in a Court in Namibia it is necessary to look at our law in this regard. **Article 3(1)** of the Constitution provides that English shall be the official language of Namibia. Following upon this it was accepted, correctly in my opinion, that all proceedings in any Court had to be in English. When a witness testified in Afrikaans, which was understood by some of the Judges or whether the witness testified in Oshiwambo, which is understood by other of the Judges, it was necessary to employ an interpreter to interpret such evidence into English. As far as documents are concerned, rule 60(1) of the High Court of Namibia provides:

> "60(1) If any document in a language other than the official language of Namibia is produced in any proceedings, it shall be accompanied by a translation certified to be correct by a sworn translator."

[93] Sections 29(1) and (2) of the High Court Act, Act 16 of 1990, dealing with commissions rogatoire, letters of request and documents of service originating from

foreign countries, require that if such instrument is received by the Permanent Secretary for Justice, and it is in any other language than English, that it then be accompanied by a translation into that language.

[94] In the case of *MFV Kapitan Solyanik Ukrainian-Cyprus Co and Another v Namack International (Pty) Ltd,* 1990 (2) SA 926 (NM HC)**,** a Full Bench of the Namibian High Court accepted a rejection by the Judge of first instance, of affidavits containing *jurats* which were in Ukrainian and were untranslated. In this regard Hannah, J, who wrote the judgment of the Court, stated as follows:

> "The affidavits which the appellants now seek to place before this Court differ in two material respects from the documents which were rejected as evidence by the Court *a quo*. In the first place the *jurat* at the end of each affidavit is in English whereas in the earlier documents what purported to be the *jurat* was in a foreign language and had not been translated. In the second place the *jurat* is in proper form whereas, as we now know, the purported *jurat* in the earlier documents was in reality no *jurat* at all. Obviously this latter fatal defect could only have been detected once a translation had been made and the first question I have to ask is why the appellant's legal representatives did not notice that the *jurat* had not been translated when the documents were first received. (p 932I – 932B).
>
> But the position before Frank J was that the appellants could not show that there had been any compliance with Rule 6. They could not show that the written statements had been attested at all. (p 934I – J)."

[95] I am mindful of the fact that in the above case no Convention existed but the Court accepted that documents in a foreign language should be translated. Apart from the fact that that is required by our Constitution and other legislation, it is also necessary to enable the Court to understand what has been written in the foreign language in order to determine its admissibility and compliance with the dictates of

our law.

[96] In regard to translations the Extradition Act, sec. 8(3), requires that all the documents set out in the section, in so far as those documents are not drawn in the English language, shall be accompanied by a sworn translation thereof. In my opinion the Apostille forms an important part of the documents received in terms of sec. 8 of the Extradition Act.

[97] The importance of the Apostille is clear from the provisions of sec. 18 which forbid the acceptance of any of the documents unless such documents, together with any translations thereof, are properly authenticated in the manner in which documents may be authenticated in terms of the Rules of Court or has been certified in the way as set out in sec. 18(1)(b). It seems to me that it is in the first instance the State which must ensure that there is proper authentication of the documents before handing them in at an enquiry. Secondly the Act expressly enjoins the magistrate, who holds the enquiry, not to accept such documents unless they are authenticated and lastly the section forbids the receipt of such documents in an appeal in terms of sec. 14.

[98] How then did it come about that the untranslated Apostilles were accepted by the State, the magistrate and the Judges of the High Court?

[99] After the documents were handed in at the enquiry by the State and after argument the magistrate dismissed the various points *in limine* raised by the defence.

One of these points concerned the untranslated Apostilles. The State took its stand on the provisions of Article 4 of the Convention and argued that because the State issuing the Apostille was permitted to do so in its official language, the receiving State was obliged to accept the untranslated Apostilles. After the magistrate gave his Ruling certain clarifications were sought by both parties. The Magistrate candidly admitted that he did not understand German and stated that he would only work on the English documents. After being pressed he stated that as far as the Apostilles were concerned he agreed with the stand taken by the State. On his own admission it is clear that it was impossible for the magistrate to understand the Apostilles and to execute the duty placed upon him by sec. 18. The magistrate nevertheless concluded that the State complied with the provisions of the Act and committed the appellant.

[100] On appeal in the High Court the matter was heard by Mainga and Van Niekerk, JJ. Both Judges wrote judgments and although both dismissed the appeal their reasoning was not always the same.

[101] In regard to the Apostilles Mainga, J, pointed out that strict authentication was not necessary in terms of the provisions of Rule 63 of the Rules of the High Court. The learned Judge found that there was compliance with the provisions of Rule 63, if not completely then sufficiently. As far as the untranslated apostilles were concerned the Learned Judge also accepted the provisions of Article 4 of the Convention and pointed out that on accession the Convention became the law of

Namibia.

[102] Van Niekerk, J. stated that the issuing of the Apostilles in terms of the Convention is clearly an official act to which the presumption *omnia praesumuntur rite esse acta* applies if there was proper designation by the Contracting State. Furthermore that the Court may assume that the authorities in Namibia are aware with which States it has contracted under the Convention. Again , because the Minister has given authority to proceed in terms of sec. 12 of the Extradition Act and because the Minister is enjoined by sec 10(1) of the Extradition Act to satisfy himself that an order for the return of the person requested can lawfully be made in terms of the Act, the Court can assume that the Minister must have been satisfied that the requesting State, by virtue of being a party to the Convention, was entitled to rely on the attached Apostilles.

[103] By comparing the English version of the Apostille attached to the Convention with the untranslated German versions on the documents handed in, the learned Judge was able thereby to follow the numbered sequence on the English version and compare it with the untranslated German versions and could conclude that they were in order. In the alternative the Learned Judge was satisfied that the Apostilles had been translated. That is assuming that the corresponding German words actually mean what they appear to mean and reading these words in context with the completed inserted parts of the different Apostilles, the assumed version makes perfect sense, bearing in mind that the filled in parts consist of words which occur in

the sworn translation. However, where, in the individual cases some untranslated words appear, they are either easily understood or not of real significance, e.g. where the date is set out in words. The learned Judge stated that the Court was therefore able to understand the German Apostilles and the Court concluded that there was substantial compliance with Rule 63.

[104] From the above it seems that Article 4 of the Convention played a conclusive role for the Court *a quo*, as well as the magistrate, in coming to the conclusion that it was not necessary to translate the Apostilles into English. This finding presupposes that, as far as Namibia is concerned, it is bound to accept the untranslated Apostille and, as far as its own law and practice are concerned, is released from translating the Apostille into English. It must mean that even where the Apostille is in a language which is not understood that the fact that it is couched in the form of an Apostille would be sufficient and the magistrate and the Courts would have to accept it as proper authentication of any document. Mr. Small was constrained to accept that this would be the result. The further consequence would be that no effect could be given to the peremptory provisions of sec. 18 regarding the authentication of documents because the magistrate or Court will not be in a position to determine whether there was proper authentication in terms of the Apostille . To accept this proposition will have, so it seems to me, a far-reaching effect which would not be according to the dictates of our law and which was also not intended by the Convention.

[105] To comply with the provisions of the Convention itself the receiving country must be able to determine in what capacity the person whose signature was being authenticated acted and, where appropriate, what is the identity of the seal or stamp affixed to the Apostille. It should also be able to determine whether the person so certifying is a person designated by the Country from which the document emanates as set out in Article 6 of the Convention. These issues fall squarely within the principles decided in the *MFV Kapitan Solyanik*–case, *supra***.** Surely Article 4 of the Convention cannot mean that a person, whose extradition is requested, may not challenge an untranslated and unintelligible Apostille affixed to documents whereby application is made for his extradition. If a challenge is possible, and there is no reason why not, all the more the magistrate holding the enquiry should be placed in a position to be able to fulfil his or her duty in terms of sec. 18 of the Extradition Act.

[106] I can therefore not agree with the meaning ascribed to Article 4 of the Convention by the magistrate and the Court *a quo*. A reading of the Article also does not support the contention by Mr. Small and the findings of the Court *a quo* and the magistrate. The language of the second paragraph of the Article authorises the Country issuing the Apostille to draw it in its official language and consequently oblige the receiving Country to accept it untranslated. Nothing further is stated which could be interpreted as also relieving the receiving Country from complying with its own laws. There is no reference in the Article to the Country receiving the document and if it were intended for Article 4 to bear the meaning contended for by the State, and seemingly accepted by the Court *a quo* and the magistrate, the Article

would have said so or would have contained language clearly spelling out such an intention.

[107] The reason why the Country issuing the Apostille is not required to translate it, so it seems to me, as was set out by Van Niekerk, J, is that one will then run into a never-ending series of Apostille upon Apostille whereas for the receiving Country it would be a simple matter which would only require the attention of a sworn translator.

[108] In regard to the Apostilles Van Niekerk, J, assumed that the Minister, when he instructed the enquiry in terms of sec 12 of the Extradition Act, was satisfied that the requesting Country, by virtue of being a party to the Convention, was entitled to rely on the Apostille. I have no problem to find that the requesting Country could accept that it could rely on its Apostille. It was Namibia which had the duty to comply with the laws of our Country and which had not. Sec. 18 of the Extradition Act spells out the duties of the magistrate and the Court as regards authentication of the documents which duty cannot be performed by relying on an assumption.

[109] The presumption *omnia praesumuntur rite esse acta* can in my opinion also not assist the State. Authentication is not a simple formality which can be presumed.

[110] Evidence of authentication must be placed before the Court to satisfy the Court in this regard. Where the Apostille is in a language, other than the official language,

it must be translated to enable the magistrate, who does not know German, and the Judges of the High and Supreme Courts, where the matter may go on appeal, and who may also not know the foreign language, to be able to fulfil their duty in terms of sec. 18 of the Extradition Act.

[111] Van Niekerk, J, also embarked on a comparison of the English version of the Apistolle, annexed to the Convention, with the untranslated German issue and by a process of comparison arrived at a translation of the Apostille. Secondly the learned Judge applied the translation of certain of the words, where those words were translated as part of the contents of the documents, to understand the Apostille. However in both these instances some working knowledge of the German language was necessary. Because of the history of Namibia some of us know some German and would in all probability be able to get by. That cannot be said of all presiding officers and, as previously pointed out the magistrate who held the enquiry candidly admitted that he did not know German. He was therefore not able to fulfil his duties in terms of sec. 18 of the Act and should *mero motu* either have rejected the documents or called for translations.

[112] The fact that some judicial officers may have some knowledge of a foreign language can in my opinion not save the situation. The acceptance of, as in this case, an untranslated authentication in a foreign language, cannot depend on whether a particular presiding officer understands the foreign language or not. If this is allowed it will lead to arbitrary application of the law where in one instance

untranslated documents are “lawfully” accepted and in the other instance “lawfully” rejected.

[113] It follows therefore that I am of the opinion that the documents tendered by the State at the enquiry were not properly authenticated and that the magistrate should not have accepted the documents with the untranslated apostilles.

[114] It was found by the Court *a quo* that it could accept that Germany was a Contracting State to the Convention. Reference was *inter alia* made to Article 144 of the Namibian Constitution which provides that "**the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia**."

[115] From this it follows that the terms of the Convention are part of the law of Namibia and legally bind Namibia against other Contracting States except for objections or denunciations in terms of the Convention.

[116] From the Convention itself it is clear that it is a multilateral agreement where States which have not yet acceded to its terms may join at any time, (Article 12), or may object to the accession by any other State, (Article 12), or may denounce the accession by any new State, (Article 14). The Convention itself allows for a situation which, vis-à-vis the Contracting States, may change from time to time by

new States joining the Convention etc.

[117] When Mr. Small was asked whether some form of proof should not have been placed before the magistrate, holding the enquiry, that Germany was a Contracting State to the Convention, his answer was that the Convention was part of the law of Namibia and as to which States acceded to its terms could easily be determined by going on the internet.

[118] It seems to me that Mr. Small was of the opinion that because the Convention was part of the law of Namibia the handing in of the Convention also proved which States were bound by it. Although I agree with this proposition as far as the terms of the Convention are concerned, the Convention itself is silent as to which States have acceded to its terms and to what extent such accession was. The act of accession by another State is not part of the law of Namibia and whether the Convention is binding on a State, remains, as far as Namibia is concerned, a matter to be proved. Ironically the State found it necessary to prove Namibia's accession to the Convention by handing in the necessary documentation. Why it did not think it necessary to do so in regard to a foreign State is a mystery.

[119] To have proved that Germany was a Contracting State to the Convention would have been as easy as it was to prove that Namibia was such a State. I say so because in terms of Article 15 of the Convention all relevant information such as signatories to the Convention and accessions thereof, who was designated by a

specific country to issue Apostilles, any objections or denunciations, were given notice of by the Ministry of Foreign Affairs of the Netherlands to Namibia. Facts such as these come before a Court or, in this case before the magistrate, because they are so notorious that the Court or magistrate could take judicial notice thereof or they are placed before the Court or magistrate by evidence. None of the parties even suggested that the magistrate or the Court should have relied on judicial notice to find that Germany was a Contracting State to the Convention. For obvious reasons I agree that this was not an instance where the Court could take judicial notice. It is certainly not a notorious fact whether Germany is, or is not, a Contracting State. However a short affidavit by a person under whose control the information is, seemingly some or other official in the Ministry of Foreign Affairs, would have sufficed.

[120] From what is set out above it follows that the appeal must succeed.

[121] However there are other findings by the Court *a quo* which may result that magistrates holding enquiries may accept inadmissible evidence or, in instances where there are multiple charges, that proof of some of the charges may be sufficient to commit a person on all the other charges although there may be no *prima facie* evidence in regard to that charges.

[122] As previously set out the provisions of the Extradition Act are mainly uncharted

waters for the Courts of Namibia. Against this background the case of *S v Bigione*, *supra,* laid down important principles which, so it seems to me, were not always given effect to by the Court *a quo.* The first issue to which I want to refer is the Court's interpretation of sec 12(5)(d) of the Extradition Act. This section provides as follows:

> "(5) If at any enquiry the magistrate concerned is satisfied, after hearing the evidence tendered at such enquiry, that -
>
> (d) In the case of a person being accused of having committed an extraditable offence, the evidence adduced would be sufficient to justify the committal for trial of the person concerned if the conduct constituting the offence had taken place in Namibia;
>
> the magistrate shall issue an order committing that person to prison to await the Minister's decision under s 16 with regard to that person's return to the requesting country."

[123] The meaning of the words "sufficient evidence" was discussed by the Court in the *Bigione*-case, *supra,* and the Court concluded that those words mean *prima facie* evidence. The learned Judge referred to the case of *Harksen v President of the Republic of South Africa and Others,* 1998 (2) SA 1011 (C) 1042C-D where that Court dealt with sec. 10(1) of the South African Extradition Act which required sufficient reason for a committal and where it was found to mean a *prima facie* case. The Court also referred to other authorities which were of a similar opinion and then concluded –

> "Further reinforcement for the view that s 12(5)(b) of the Act requires a magistrate to find that a *prima facie* case has been made out if a committal order is to be made is to be found in s 8 of the Act."

[124] Sec. 8 provides for the documents which must accompany a request for extradition of a person to another country and para. (c) provides for statements containing information which set out a *prima facie* case. It is important to note that this section does not only require *prima facie* evidence of the commission of the extraditable offence but also *prima facie* evidence that the offence was committed by the person whose extradition is requested.

[125] The learned Judge, Hannah, J, then considered the meaning of sec. 18(2)(c) of the Extradition Act which stated that a deposition, statement or affirmation made, sworn or affirmed, and duly authenticated or certified, shall on its production be *prima facie* proof of .the facts stated therein. At page 131F-H the Court said the following:

> "On a plain reading of para (c) it must mean any deposition which has been made, any statement which has been sworn, or any affirmation which has been affirmed by any person. In my view, there is no room for finding that the provision includes a statement which is neither sworn nor affirmed or which is not a deposition. We therefore find that the Act itself stipulates, in the case of written evidence, what would amount to *prima facie* proof or *prima facie* evidence and, in my opinion, it would be a very exceptional case indeed where anything less than what is stipulated could be held to amount to that degree of proof or to fall within that class of evidence."

[126] The Court further continued at p131I-J to 132A as follows:

> "Mr. Horn, for the respondent, sought to uphold the magistrate's finding by

> inviting the Court to have regard to the material which was initially placed before the magistrate, namely the written summary of the investigations and the 'observations' of the Judge who carried out the preliminary investigations but I am of the view that the magistrate was correct when he rejected that material. I agree with Mr. Potgieter that in assessing whether there was sufficient evidence to commit for trial in Namibia the magistrate had to consider the evidential regime in this country. He was required to examine the evidence in the light of Namibian laws including whether the evidence was admissible under our laws."

[127] I respectfully agree with the law as set out in the case of *Bigione*. The evidential regime in Namibia is that evidence is either given *viva voce* or, where it concerns written evidence, by deposition or statements which are either sworn or affirmed. Furthermore the evidence must be admissible evidence. Whether there is sufficient or *prima facie* evidence to commit a person cannot be determined on inadmissible evidence, such as hearsay evidence. By that I do not mean to say that a statement which contains inadmissible evidence must be rejected in *toto.* In this regard I agree with Van Niekerk, J, as to the Court's function and evaluation of evidence. However the inadmissible evidence cannot be considered in determining whether there is a *prima facie* case made out for committal.

[128] Our Extradition Act is very much cast in the mould of the English Extradition Act of 1870 and it would therefore be useful to look at decided cases in that jurisdiction. In the case of *Beese and another v Governor of Ashford Remand Centre and another,* [1973] All ER 689 at 692b*,* a decision of the House of Lords, the words 'sufficient evidence' were interpreted to mean '*prima facie* evidence of guilt'

which, in my opinion not only means proof of the commission of the crime but also *prima facie* proof of the commission of that crime by the person. (See also *R v Governor of Pentonville Prison ex parte Narang*, [1878] AG 247 at p 258H and see generally *Halsbury's Laws of England,* 4th Edition, Vol. 18 paras 225ff).

[129] This brings me to the unsworn statement by the prosecutor, Mr. Reichenberger. This statement was given in terms of sec. 18(2)(b) of the Extradition Act as a statement of a competent judicial or public officer of the law of a requesting country. As such the statement is evidence by an expert in the law of the requesting country as to what the law of that country is, in order to enable the magistrate, holding the enquiry, to determine whether the crime was an extraditable one.

[130] The Court *a quo* accepted the unsworn statement and accepted that Reichenberger was a competent person to give such evidence because of his description as a public prosecutor and because the document emanated from the Department of Public Prosecutions in Munich. Apart from the description as a public prosecutor nothing further was set out to qualify the said Reichenberger as an expert in German criminal law.

[131] The basis on which the unsworn statement was accepted by the Court *a quo* was because it was found that sec. 18(2)(b) authorised the acceptance of an unsworn

statement and that the section therefore changed the evidential regime in Namibia and was therefore part of that regime.

[132] In coming to its conclusion that the statement in the section need not be sworn the Court referred to sec. 18(2)(c) which authorizes the acceptance of an authenticated **deposition, statement, or affirmation which has been made, sworn or affirmed by any person.** Because the statement in ss (b) was not qualified by the words 'sworn or affirmed' and because it was set out in a different subsection and not in ss. (c) the Court concluded that the statement need not be sworn or affirmed.

[133] In my opinion the Court *a quo* read too much into the fact that the requirement for a statement in ss. (b) was express and separate from the requirement set out in ss. (c). The reason why there was an express reference to a statement under ss. (b) by an expert in the law of the requesting country, was because of the provisions of sec. 3(1) of the Extradition Act. This section provides as follows:

> "3(1) For the purposes of this Act "extraditable offence" means an act, including an act of omission, committed within the jurisdiction of a country contemplated in section 4(1) which constitutes under the laws of that country an offence punishable with imprisonment for a period of 12 months or more and which, if it had occurred in Namibia, would have constituted under the laws of Namibia an offence punishable with imprisonment for a period of 12 months or more."

[134] The section introduces the double criminality principle and because of that,

expert evidence of the law of a foreign country was necessary. Sec. l8(2)(b) complies with this requirement and authorises the acceptance of a statement by a competent person proving what that foreign law is. The use of the word 'statement' in the different subsections is in my opinion not to be construed as an indication that the Legislature also intended to change the evidential regime in Namibia by accepting evidence in unsworn statements. As was pointed out by Hannah, J, in the *Bigione*-case, *supra*, the Act itself stipulates what would be *prima facie* evidence and it would be a very exceptional case where anything less than a sworn or affirmed statement or a deposition could be held to amount to *prima facie* proof or evidence.

[135] As to the question whether Reichenberger was a competent person to state the German law it is so that his description as public prosecutor intimates that he is a person practising criminal law in Germany. In the case of *Mahomed v Shaik,* 1978 (4) SA 523(N) at page 528A it was stated that it was the function of the Judge to decide whether an expert witness is properly qualified to be of assistance to the Court. That being so it seems to me that the safer option would be to also prove the expert witness's qualifications, if any, and state his experience and the capacity in which he gained that experience. In the present instance Reichenberger no more than set out the various statutory provisions relevant to the charges and, but for the form in which he made his statement , could have been accepted. I also agree with the Court *a quo* that his failure to annex the very provisions of the statute would not be cause to reject his evidence. It would however be a salutary practice to do so where the law of the foreign country is based on statutory provisions.

[136] One further aspect needs to be addressed and that is the issue whether the magistrate, in a case such as the present with multiple charges, needs to be satisfied in respect of each charge that a *prima facie* case was made out before he can commit the person on that particular charge. That, so it seems to me, is what the Extradition Act requires.

[137] Looking at the provisions of the Extradition Act, it is in my opinion inherent in the specialty clause contained in sec 5(4) of the Extradition Act that at the enquiry a person shall only be committed in respect of those charges where there is *prima facie* proof of the commission of the offence by the person whose return is requested. This section provides that no person shall be detained, charged or punished for an offence by the requesting country other than the offence in respect of which the person's return was sought or a lesser offence proved by the facts. This section grants important rights to the person whose return is requested and cannot be circumvented by an *omnibus* committal. It is furthermore clear that the magistrate must also have regard to the other provisions of sec. 5 and that a committal cannot be made unless the magistrate is satisfied that one or other of the provisions of this section does not prohibit the return of the person. The requesting country can only try a person on those charges in respect of which he was extradited by the country returning him.

[138] It is further a matter of logic that, given the provisions of the Extradition Act, a

magistrate holding an enquiry will only commit a person where there is sufficient evidence and this presupposes a consideration of each charge in respect of which the return of the person is requested. (See *R v Governor of Brixton Prison, Ex parte Gardner*, [1968] 1 All ER 636 at 640B.*)*

[139] In the present instance the Court *a quo* was satisfied that there was *prima facie* proof in regard to all 203 charges of fraud, 4 charges of forgery and 12 charges of tax evasion. A very complete and full warrant of arrest was issued setting out not only the charges to be brought against the appellant but also what the evidence was going to be. However what is set out in the warrant of arrest is not evidence which can be considered in determining whether there was *prima facie* proof of the commission of the offences by the appellant. I, however agree with Van Niekerk, J, that that does not mean that the warrant is of no significance. It obviously served the purpose of informing the magistrate of what the charges were, which were brought, and it also determined the offences in terms of which a return was sought by the requesting country.

[140] In regard to the fraud charges, our law, as seemingly also the law of Germany, requires that there must in each instance be proof of a misrepresentation made by the accused to the other party with the intention to defraud as a result of which such party acted to his prejudice or potential prejudice. (See *S v Huijzers,* 1988 (2) SA503 (AA). Notwithstanding the claim in the warrant of arrest that the appellant made these representations in each instance no such evidence was placed before the

magistrate at the enquiry. Except for an affidavit by one Lipps, of the Ortenau municipality, and which does not take the matter any further, affidavits of none of the other municipalities, to whom it was alleged misrepresentations were made by the appellant, were put in at the enquiry. To prove fraud there should at least have been evidence by municipality A that it was represented to it by the appellant that Municipality B wanted to borrow money on a short time loan, and an affidavit by B that it did not do so, or such allegations which would be necessary to substantiate the elements of the crime of fraud in each of the charges.

[141] In dealing with this part of the case the Court *a quo* relied mainly on the evidence of the witness Lipps and the investigating officer, Schöttl. I could find no evidence of a fraudulent misrepresentation in the evidence of Lipps. His was also the only evidence by a member of a municipal community. Bearing in mind the fact that all the fraud charges are alleged to originate from such communities it is indeed surprising that no evidence was put before the magistrate from the other communities. It seems to me that they would have been the only people who could testify to the misrepresentations made by the appellant and to the potential, or actual prejudice suffered by such communities. Reliance was placed on the evidence of Schöttl to fill this gap. He obviously could not give any admissible evidence in regard to the misrepresentations made, obviously because he had no knowledge thereof other than what was told to him.. Even if this was a pyramid scheme evidence of a misrepresentation was still necessary. In this regard sight must not be lost of the fact that the charges are fraud charges and not theft of money and that we do not

know whether a conviction of theft is a competent verdict on a charge of fraud in German law or even a lesser offence in terms of that law. The witnesses Auer, Wiendl and Wieland only filled in the background to the commission of the crimes and raised some suspicion about the dealings of the appellant.

[142] As far as the forgery charges were concerned it was claimed in the warrant that the forgeries were made by the appellant. No such evidence was put before the enquiry except that Schottl stated that the changes were made by appellant. Whether this is an assumption or based on some evidence is not clear. Again he could only make such claim on what was told to him by other witnesses. In our law evidence would be necessary to prove that it was the accused that made the forgeries. Me. Pornbacher merely pointed out the changes made to the documents. This was an instance where I agree with Mr. Botes that copies of these documents should have been put before the enquiry. (See *R v Governor of Pentonville Prison: Ex Parte Kirby*, 1979(2) All ER 1094 at 1100 b - c.)

[143] Comparing the Warrant of Arrest and affidavits concerning the tax offences with the ‘certificate’ given by the expert Reichenberger as to the German law on this point, it seems that there is no relationship between what the German authorities intended to charge the appellant with and what was set out by Reichenberger. .

[144] In the Warrant of Arrest it is alleged that the appellant, being a registered tax payer, failed to submit to the inland revenue office the required income and trade tax

returns for 1993 – 1996 as a result whereof assessments were made by the inland revenue office which were less than what he should have paid.

[145] It was secondly alleged that the actual income of the appellant from financial advisory services plus withdrawals were much more than what was assessed by the inland revenue office for tax purposes due to his failure to submit returns.

[146] It was lastly alleged that the appellant failed to submit to the inland revenue office income and trade tax returns for the period 1997 and 1998 and because of his earnings from financial advisory services and personal withdrawals the estimated liability to pay tax was as set out in the schedule in the warrant.

[147] The request for the return of the appellant, and to substantiate the allegations made in the Warrant of Arrest, Reichenberg referred to sections 369 and 370 of the Taxation Code of Germany which, according to him, would be the statutory provisions on which the appellant would be charged. These sections provide as follows:

> "Section 369 Taxation Codes: Tax Offences
>
> (1) Tax offences (Customs offences) are:-
>
> (1) Actions which are punishable according to the laws on taxation,
>
> (2) The import, transport, or export without permission of items into, through, or out of a different country,

(3) Forgery of stamps, and the preparations therefore, insofar as the offence relates to taxation marks.

(4) Aiding and abetting a person who has committed an offence as defined under the numbers 1 to 3 above.

(2) The general laws governing criminal law are valid with respect to taxation offences unless the legal regulations in the taxation laws lay down different arrangements.

Section 370 Taxation Code: Tax evasion

(1) Any person who

1. makes false or incomplete statements to the Inland Revenue Office or to any other authority about **objects** that are liable to taxation,

2. contrary to his/her obligations does not inform the Inland Revenue Office about **objects** that are liable to taxation, or

3. contrary to his/her obligations does not use taxation marks or taxation stamps, thereby reducing his/her taxes or gaining unjustifiable tax advantages for himself/herself or a third party,

shall be .punished with a prison sentence of up to five years or a fine."

[148] Ss. (2) provides that an attempt to commit these offences would also be punishable. Ss. (3) defines those actions which would be regarded as particularly serious and prescribes a sentence of six months and up to ten years imprisonment in those instances where a person commits an offence in terms of sections 369 or 370 and the evidence proves that it falls within the definition of ss. (3). Ss. (4) further

defines the meaning of words such as "reduce", "tax advantages", "unjustifiable tax advantages", etc. as used in ss. (3).

[149] It must be clear from a reading of the Warrant, and the affidavits supporting it, that it bears no relation to the provisions which the expert Reichenberger set out in his unsworn statement. Sections 369 and 370 clearly deal with matters pertaining to customs and excise tax as set out in the heading to sec. 369. Reichenberger either made a mistake and quoted the wrong provisions or there are no other provisions in terms of which the appellant can be charged. Either way the magistrate could not have found that there was evidence proving *prima facie* the offences set out under sections 369 and 370 of the Taxation Code. If these were not the provisions under which Germany intended to charge the appellant then, without expert evidence of what the German law is in this regard, it would be impossible to apply the double criminality principle (Sec. 3(1)) because we do not know what the German law is and neither can we, for the same reason, apply the speciality principle (Sec. 5(4)). That being the case a committal on these charges was not possible.

[150] From the above it follows that for the reasons set out the appeal must succeed. However, I find it necessary to make some comment in regard to the requirement of our Extradition Act that a committal can only follow upon a finding by the magistrate that there was sufficient or *prima facie* evidence to commit. This requirement places a heavy burden on the State and on the resources of the State. What is supposed to be a relatively simple and speedy procedure, because it is only an enquiry and not

a trial where guilt or innocence play a part, inevitably develops into an all out fight and the making of a last stand to attempt to avoid the consequences of criminal behaviour in another country. This is made possible by the requirement of a *prima facie* proof before committal. In this battle the State is at a disadvantage because it must mainly make do with evidence on affidavit drawn up in another country which may not always be *au fait* with legal procedures and the dictates of our law. At a time where white-collar crime is on the increase we do not want Namibia to be seen as a haven for such criminals.

[151] In our opinion the Legislature should take steps to address the situation. In crimes of fraud, where there may be hundreds of charges, as was illustrated by the present case, the possibility of some mishap occurring at the time of the enquiry is a reality. Once this happens the chances that it can be set right at a later stage is almost non-existent.

[152] One way to ensure that the enquiry is limited to what is really relevant, from Namibia's point of view, is to allow as an option of proof of a *prima facie* case the submission of a certificate by the prosecuting authority of the requesting country stating that it has sufficient and *prima facie* proof of the commission of the crime by the person whose return is requested. This was done by South Africa and was found not to be unconstitutional by its Constitutional Court. (See sec. 10(2) of Act 67 of 1962 and *Geuking v President of the Republic of South Africa, supra.)*

[153] For the above reasons I have come to the conclusion that the magistrate should have discharged the appellant.

[154] In the result the following order is made:

1. The cross-appeal of the Respondent, the State, is dismissed.

2. The appeal of the appellant is allowed and it is ordered that the appellant be discharged.

_____
STRYDOM, A.J.A.

I agree.

_____

CHOMBA, A.J.A.

I agree.

_____

DAMASEB, A.J.A.

/mv

DAMASEB, A.J.A. : [1] I have read in draft the judgment of Strydom A.J.A. For the reasons that he gives in that erudite work, and with which I am in respectful agreement, I too would allow the appeal and discharge the appellant. For the reasons he gives I would also dismiss the State's cross-appeal.

[2] This is a case of great national importance and the consequences of the Court's finding are far-reaching yet ineluctable in the light of the state of the law as we find it and so ably explained by my Brother. I have opted to say something albeit only very briefly in view of the importance of the issues raised by this appeal. I will confine my remarks to two issues only: Firstly, as regards the question of the right of appeal to this Court and, secondly, the requirement that a requesting state must furnish sufficient evidence to establish a *prima facie* case in order for the magistrate to make a finding committing a person for extradition.

[3] The facts of this long-drawn out litigation are fully set out in the judgment of Strydom A.J.A and there can be no productive purpose in my repeating them here.

[4] I was greatly concerned about whether or not there was an appeal to this Court as I set about considering the result in this appeal. What concerned me most was whether Parliament, by implication, did not intend that no appeal lie beyond the High Court by virtue of the combined effect of the provisions contained in s14 (1) and s21 of the Extradition Act, no. 11 of 1996. Section 14(1) states:

> ''Any person or the government of the requesting country concerned may, within 14 days from the date of an order made in terms of section 12, appeal to the High Court against that order, and the High Court may, upon such appeal , make such order in the matter as it thinks the magistrate ought to have made.''

[5] Subsection (2) of s14 then sets out the powers enjoyed by the High Court in considering an appeal from the magistrate who held the inquiry. There is no mention in this provision of a further appeal to the Supreme Court; thus inducing the superficially attractive argument that no appeal was intended to the Supreme Court from a judgment of the High Court made in terms of s14 of the Extradition Act. This line of reasoning assumes some respectability if one considers s21 which says:

> ''No person –
>
> (a) committed to prison under section 12(5) or 15(2) to await the Minister's decision in terms of section 16;
>
> (b) committed to prison under section12(5) to await the Minister's decision in terms of section 16 and who has appealed against the committal order in question in terms of section 14 ; or
>
> (c) whose return has been ordered by the Minister under section [16 shall be entitled to bail.'' (My underlining for emphasis)

[6] What the legislature sought to achieve through s21 is to limit a person's right to bail once a person has been committed to await extradition. The question therefore arises, if an appeal to the Supreme Court is founded not on s14 of the Extradition Act, but on sections 14 and 18 respectively of the Supreme Court Act 1990 and the High Court Act 1990 as found by Strydom A.J.A (and I agree); considering that those provisions do not limit the right to bail, would a person who appeals to the Supreme Court from the decision of the High Court be entitled to apply to the Supreme Court to be admitted to bail? There is, I apprehend, no facile answer to that question and I would rather not express any view on it at this point in time. It may very well be that my concern is not justified. This, no doubt, is some basis for saying an appeal to the Supreme Court was not intended. That, however, is not the only reasonable interpretation that can be placed on the

scheme of the extradition Act. I am unable to find that the Extradition Act excludes an appeal to the Supreme Court. As must be clear from the judgment of Strydom A.J.A, it would not be unconstitutional for the Legislature to limit or restrict an appeal to the Supreme Court from a decision of the High Court in terms of s14 of the Extradition Act, but it chose not to do so in terms clear enough to put the matter beyond doubt. If Parliament wants to achieve that result it should say so clearly.

Prima facie case

[7] The consequence of the requirement that a magistrate should only on the basis of *prima facie* evidence pointing to the commission of an offence in the requesting country commit for extradition a person whose extradition is sought, is that only evidence admissible according to the law of Namibia must be relied upon in establishing if such a *prima facie* case has been made out. Strydom A.J.A correctly concludes that inadmissible evidence cannot establish a *prima facie* case and that the evidence relied upon *in casu* does not constitute admissible evidence. The severity of this requirement has been recognised elsewhere. As was said by Mokhtar Sidin J in the Malaysian case of *PP v Lin Chien Pang* [1993] 2 MLJ 37 at 40:

> ‘’ To me it is no good for the requesting state … merely to say that the fugitive criminal had committed an offence or offences in the US and thereby the requested state, in this case Malaysia, must accept that an offence or offences had been committed.’’

In that case the only evidence relied upon to justify an extradition was that of an accomplice. In Malaysia, like in Namibia, an accomplice's evidence needs corroboration. The Malaysian Court refused extradition as the accomplice's evidence was uncorroborated. I agree with Strydom A.J.A that the standard in the Namibia Extradition Act (i.e. a *prima facie* case) may be too high. Parliament will do well to consider if that is desirable, but while it stands, the Courts of this land must enforce it.

[8] At the risk of being repetitive, but for the avoidance of doubt, I wish to stress that I too would allow the appellant's appeal and dismisses the respondent's cross appeal for all of the reasons given by Strydom A.J.A.

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DAMASEB, A.J.A.

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