REPORTABLE

CASE NO.: SA 32/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

JACOB ALEXANDER	**APPELLANT**
and	
THE MINISTER OF JUSTICE	**FIRST RESPONDENT**
THE CHAIRPERSON OF THE MAGISTRATE'S COMMISSION	**SECOND RESPONDENT**
CHIEF: LOWER COURTS	**THIRD RESPONDENT**
THE PROSECUTOR-GENERAL	**FOURTH RESPONDENT**
MAGISTRATE UANIVI	**FIFTH RESPONDENT**

Coram:	MARITZ, JA, STRYDOM, AJA *et* DAMASEB, AJA
Heard on:	6 October 2009
Delivered on:	9 April 2010

APPEAL JUDGMENT

STRYDOM, AJA:

[1] In terms of the provisions of the Extradition Act, Act 11 of 1996, (the Extradition Act), the United States of America applied to the Minister of Justice (the first respondent) for the provisional arrest of the appellant on the grounds that he had committed extraditable offences in that Country. This application was made in terms of the provisions of sec. 11(1) of the Extradition Act which allow for the issuing of a provisional warrant of arrest in the urgent circumstance of a request for the return of a person, prior to the formal communication, in terms of sec. 7 of the Extradition .Act.

[2] Pursuant to the issue of a provisional warrant of arrest the appellant was arrested in Windhoek on 27 September 2006.

[3] On 3 October 2006 the appellant was brought before a magistrate, Mr. Uanivi, the fifth respondent herein, who remanded the matter in terms of sec 11(8) of the Extradition Act and, according to the same provisions of the Act, granted bail to the appellant.

[4] The arrest of the appellant was provisional pending a formal request to be made by the United States of America (the United States). Sec.11(9) provides that a formal request, in terms of sec. 7 of the Extradition Act, has to be made within 30 days after the arrest of the arrestee to prevent him from being released from custody or, if he was out on bail, to be released from bail.

[5] Pursuant to a formal request by the United States, the first respondent, on 23 October 2006, authorized a magistrate to proceed with an extradition enquiry against the appellant for his extradition to the United States. This authorization was sent, under cover of a letter, to “The Magistrate, Private Bag 13191, Windhoek”.

[6] On 25 April 2007 appellant appeared before magistrate Jacobs who, in terms of the authorization, was scheduled to proceed with the extradition enquiry under sec. 12 of the Extradition Act. For reasons not relevant to the present appeal, an application was launched for the recusal of Mr. Jacobs. The application was successful and the enquiry was postponed to 8 June 2007.

[7] On the extended date the appellant appeared before the Chief: Lower Courts, the third respondent, in order to determine dates for the enquiry to proceed. However, certain points *in limine* were raised on behalf of the appellant and the third respondent ruled that such points had first to be determined before the extradition enquiry could be set down for hearing. As a result the matter was further postponed to 25 June 2007.

[8] Certain correspondence between the legal representatives of the appellant and the Minister followed. From this it was clear that the authorization was not addressed to a specific magistrate by name but merely authorized "a magistrate" to proceed with the enquiry in terms of sec. 12 of the Extradition Act.

[9] Part of the stance of the appellant was that only magistrate Uanivi, who remanded the matter after the provisional arrest of the appellant, could, in terms of the provisions of sec 11(8), proceed with the enquiry for extradition.

[10] A notice of motion and a review application in terms of Rule 53 of the High Court Rules were launched by the appellant whereby the following relief was claimed:

"1. declaring that Mr. UAATJO UANIVI, a magistrate duly appointed as such under the Magistrate's Act, 3 of 2003, is the only magistrate lawfully authorized by the first respondent to conduct an extradition enquiry in terms of section 12 of the Extradition Act No. 11 of l996 ("the Extradition Act") against the appellant ("the extradition enquiry") in respect of a request dated 24 October 2006 by the United States of America for the extradition of the applicant;

2. In the alternative to paragraph 1 above,

2.1 declaring that the Chief: Lower Courts in the Ministry of Justice may not lawfully conduct an extradition enquiry in terms of section 12 of the Extradition Act.

2.2 In the alternative to paragraph 2.1 above,

2.2.1 reviewing and setting aside the decision of the Magistrate's Commission ("the Commission"), dated 1 August 2006, to appoint the Chief: Lower Courts in the Ministry of Justice, Mr. PETRUS UNENGU, to act temporarily as magistrate Windhoek, Otjiwarango (sic) ,Oshakati and Keetmanshoop with effect from 1 August 2006 to 31 July 2007;

2.2.2 reviewing and setting aside the decision of the Commission, dated 31 July 2007, to appoint the Chief: Lower Courts in the Ministry of Justice, Mr. PETRUS UNENGU, to act temporarily as a magistrate for the Central, Oshakati, Rundu, Keetmanshoop and Otjiwarongo regional divisions and every magisterial district division in Namibia with effect from 1 August 2007 to 31 August 2008;

2.2.3 declaring that the Chief: Lower Courts in the Ministry of Justice may not lawfully conduct an extradition enquiry in terms of section 12 of the Extradition Act.

3. Declaring that section 21 of the Extradition Act is inconsistent with the Constitution, and invalid.

4. Ordering the first respondent and such of the second to fifth respondents who oppose this application to pay the costs of this application, jointly and severally, the one paying the other(s) to be absolved, such costs to include those attendant upon the employment of one instructing practitioner and two instructed counsel.

5. Granting further and/or alternative relief."

[11] Paragraph 2.2 of the application, incorporating a review in terms of Rule 53 of the High Court Rules, became necessary when it transpired that the second respondent, the Magistrate's Commission, purporting to act upon the authorization of the first respondent to appoint a magistrate to proceed with the enquiry for the extradition of the appellant, had designated the

Chief: Lower Courts, (the third respondent) to conduct the enquiry.

[12] The application was argued before Parker, J, who, in a reasoned judgment, granted to the appellant the relief sought against the third respondent and declared that the latter may not lawfully be authorized to hold an extradition enquiry in terms of the Act. He consequently set aside the designation of the third respondent to conduct the extradition enquiry (in paragraphs 2, 3 and 4 of the Court's order).

[13] The learned Judge, however, rejected the appellant's application for the appointment of the fifth respondent as the only magistrate authorized to conduct the enquiry (par. 1 of the order). The Court furthermore found that the challenge to the constitutionality of sec. 21 of the Act was not ripe for hearing and was therefore premature (par. 5). The Court made no order as to costs (par.6).

[14] The appeal, argued before us by Mr. Hodes, SC, assisted by Mr. Chaskalson and Mr. Katz, on behalf of the appellant, only concerned three points, namely the Court *a quo*'s refusal to declare the fifth respondent to be the only person authorized to conduct the extradition enquiry and the further finding by the Court that the challenge to the constitutionality of sec 21 of the Act was not ripe for hearing. The appellant also challenged the refusal by the Court to make a costs order in his favour. The appeal is therefore only against paragraphs 1, 5 and 6 of the order by the Court *a quo.*

[15] The first and second respondents opposed the appeal but did not cross-appeal against the Court *a quo*'s finding that the Chief: Lower Courts could not lawfully conduct the extradition enquiry. Ms. Katjipuka-Sibolile represented the respondents.

[16] At the outset the appellant applied for, and was granted condonation, for late compliance with Rules 8(2) and 8(3) of the Rules of the Supreme Court by not timeously putting up security in terms of the Rules and not informing the Registrar of this Court that he had done so. The respondents did not oppose the application. Condonation was granted and the appeal was re-instated.

[17] Before dealing with the arguments raised by counsel it is necessary to look at certain of the provisions of the Act relevant to this appeal and to determine the scheme of the Act. Generally speaking, the process of extradition operates internationally as well as domestically. In this regard the following was stated by Goldstone, J. in *Harksen v President of the Republic of South Africa and Others,* 2000 (2) SA 825 (CC) at para. [4], namely:

> "An extradition procedure works both on an international and a domestic plane. Although the interplay of the two may not be severable, they are distinct. On the international plane, a request from one foreign State to another for the extradition of a particular individual and the response to the request will be governed by the rules of public international law. At play are the relations between States. However, before the requested State may surrender the requested individual, there must be compliance with its own domestic laws. Each State is free to prescribe when and how an extradition request will be acted upon and the procedures for the arrest and surrender of the requested individual. Accordingly, many countries have extradition laws that provide domestic procedures to be followed before there is approval to extradite."

[18] The ease with which criminals can cross borders from one country to the other; the access, in this cyber age, to almost any information which may readily also be used for criminal schemes, have contributed to greater co-operation and understanding between States to find ways to bring these offenders to book and to employ lawful means which would not militate

against constitutions which provide liberal protection of the rights of the individual. It is against this background that the Extradition Act must be seen.

[19] For the purposes of the Act, sec. 3 prescribes the meaning of an “extraditable offence”. This means an act, or an act of omission, committed within the jurisdiction of a country contemplated in sec 4(1) of the Extradition Act, and which constitutes, under the laws of that country, an offence punishable with imprisonment for 12 months or more. In addition, such offence must also be one in terms of the laws of Namibia and likewise be punishable with imprisonment for a period of 12 months or more had it been perpetrated in this jurisdiction. Section 5 of the Extradition Act contains various restrictions which would protect a person to be extradited against return to the requesting country where, *inter alia*, the offence for which he or she is requested to return is of a political nature, or is based on the race, religion, nationality or political opinion of the extraditee. It also protects the person against sentences which would not apply to Namibia, such as the death penalty in regard to which Namibia can require the requesting country to give guarantees not to impose such sentences or not to carry them out. Section 5 of the Extradition Act is in line with protection which in general is afforded to a person to be extradited internationally and is further in line with the Constitution of Namibia.

[20] Section 6 provides for the extradition of Namibian citizens who have committed extraditable offences in other countries. Such persons may either be prosecuted and punished according to Namibian laws or the Minister of Justice (as prescribed in sec. 1 of the Extradition Act) (the Minister) may, in terms of sec 6(3), authorize a magistrate to conduct an enquiry and make a committal in terms of sec. 10 and 12 of the Act. In the latter instance Namibian citizens would enjoy the same protection in terms of the Extradition Act as is afforded to foreigners.

[21] Section 7 sets out the procedure for the making of a formal request in terms of the Extradition Act and sec. 8 provides for the particulars and documents which must support a request by the requesting country. Sec. 9 allows the Minister to ask for further particulars where the information supplied in terms of sec. 8 is considered to be insufficient by the Minister.

[22] Section 10(1) deals with the authorization by the Minister of a magistrate to conduct the enquiry. This authorization by the Minister is done once a formal request is received from the requesting country in terms of sec. 7 of the Extradition Act and the Minister is satisfied that an order for the return of the person so requested can lawfully be made. The documents and information set out in terms of secs. 8 and 9 must accompany the authorization by the Minister. The magistrate so authorized by the Minister must satisfy himself/herself that the external warrant is properly authenticated, and if so satisfied, must endorse the warrant which can then be executed anywhere in Namibia as if it was a warrant issued by that magistrate in terms of the laws of Namibia relating to criminal procedure. (S.secs. (2) and (3).).

[23] The Extradition Act also provides for the issue of provisional warrants of arrest in the instance of urgency. This is provided for in sec. 11 of the Extradition Act. S.secs. (1), (2) and (3) set out the requirements for the issue of such a warrant of arrest and the procedure to be followed. Such application must be made to the Minister who then forwards the application to a magistrate. If the latter is satisfied that the matter is urgent, and that the return of the person is not prohibited under Part II of the Extradition Act, he/she may issue a warrant of arrest in the form as provided for in the laws of Namibia relating to criminal procedure, and it is to be executed in the manner as ordinarily prescribed for warrants of arrest generally in terms of those laws. The magistrate must inform the Minister whether he/she issued a warrant or decided not to, in which case he/she must also furnish his/her reasons for not issuing the

warrant. (S.secs. (4), (5) and (6)).

[24] Sub-sec. (7) is an important provision which has its roots in the Constitution of Namibia (Art. 11) and provides that on arrest the person so arrested shall be promptly informed, in a language that he or she understands, of the grounds for such an arrest and be brought before a magistrate within 48 hours after such arrest, or if that is not reasonably possible, as soon as possible thereafter.

[25] Because of the provisions of s.sec. (7), there may, at the time the person is brought before a magistrate, not yet be a formal request for the return of such person which would enable the Minister to issue an authorization to a magistrate. S.sec. (8) was necessary to empower the magistrate, before whom the person was brought, to remand the person either in custody or on bail as if such person was brought before him for purposes of a preliminary examination or a trial.

[26] Sub-sec. (9) provides for the release of the person arrested from custody or bail, if a formal request for his or her return is not made within 30 days of the arrest of the person.

[27] The magistrate who was authorized by the Minister in terms of sec 10(1) is the person who must conduct the enquiry at the completion of which he must, depending on the evidence put before him, either commit the person to be extradited or discharge him or her. The procedure to be followed and the powers in terms of which the magistrate acts are the same as those where a magistrate holds a preparatory examination where a person is charged with having committed an offence in Namibia. (Sec. 12(1) and (2)).In terms of this latter provision such powers are exercised subject to the Act. From this it follows that, in terms of the provisions of the Extradition Act, only a magistrate authorized by the Minister in terms of sec. 10(1) can

conduct the enquiry. S.Sec. (3) provides for the appearance of the Prosecutor-General, or a person delegated by him or her, at an enquiry or any further proceedings in the High Court. If the evidence tendered by the requesting country is insufficient to enable the magistrate to make a finding of committal, he may postpone the enquiry and ask for further evidence. Such adjournment must be for a specified period. (S.sec. (4).) S.sec. (5) lays down what the magistrate must consider before making a committal. In regard to the evidence put before the magistrate it was laid down in the case of *S v Bigione,* 2000 NR 127 (HC) that it had to conform to the evidentiary regime of Namibia with the result that such evidence had to either be on affidavit or given *viva voce* under oath. This was confirmed by this Court in the matter of *S v Koch,* 2006 (2) NR 513(SC). Once an order for committal is issued a copy of the record must be forwarded to the Minister. (Ssec. (6)). S.sec. (7) provides for the circumstances under which the person requested to be rendered to the requesting State shall be discharged.

[28] Sec. 13 deals with the return of the person committed to the requesting State. This can only take place once it is so ordered by the Minister and only after the expiration of a period of 15 days after the committal. This obviously is to allow the person to be returned, time to launch an appeal to the High Court and if so, until the completion of the appeal to the High Court and the Supreme Court. Sec. 14 provides for an appeal to the High Court. It also provides for certain circumstances by which the High Court can discharge the person committed. Sec. 15 provides for a waiver of the right to have an enquiry by the person whose return has been requested and sec. 16 empowers the Minister to order the return of such a person subject to conditions. Sec. 17 deals with the extradition of persons to Namibia.

[29] Sec. 18(1) provides that no deposition, statement on oath or affirmation, or any document, or any record of any conviction, or any warrant issued in a requesting country, or a

copy or sworn translation thereof, may be tendered under sec. 8 or be received in evidence at an appeal under sec. 14, or at an enquiry, unless such document was properly authenticated in a manner required for foreign documents, or has been certified as the original or as true copies or translations thereof by a judge or magistrate, or an officer authorized thereto by one of them. Such documents, so authenticated, shall be *prima facie* proof of the facts stated therein.

[30] Sec. 19 deals with concurrent requests for the return of a person and provides for certain circumstances which the Minister should consider in determining which of the requests should be proceeded with. Sec. 20 provides for legal representation and, where a person cannot afford to be legally represented, for the Director of Legal Aid to provide such legal representation.

[31] Sec. 21 concerns the issue of bail and provides that once a committal is ordered by the magistrate in terms of sec. 12(5) or 15(2), no person so committed shall be entitled to be granted bail pending the Minister's decision in terms of sec. 16, or pending an appeal noted under sec. 14, or where the return to a designated country is ordered by the Minister. Consequently, once a person was committed, and until he was rendered to such country, such person may not be granted bail.

[32] The sections set out herein before clearly demonstrate the two tier nature of extradition proceedings. On the one hand it contains various provisions of what is required, in terms of the domestic laws, to effect an order for the committal of a person whose extradition was requested by a foreign State. On the other hand it also contains various provisions which demonstrate the duty on the Government of Namibia to render such a person, once committed, to the requesting country.

[33] The first issue argued by the appellant concerns the non-designation by the Minister of the fifth respondent to conduct the extradition enquiry. The argument of the appellant is mainly based on the provisions of sec. 11 of the Extradition Act, and more particularly s.sec. (8) thereof. This s.sec. provides as follows:

> "(8) The magistrate referred to in subsection (7)(b), while awaiting an authorization under section 10(1) from the Minister to proceed with the matter in accordance with section 12, shall remand a person brought before him or her either in custody or on bail as if such person was brought before him or her for a preparatory examination or trial."

[34] Mr. Hodes submitted that the words "while awaiting an authorization under sec. 10(1) from the Minister to proceed with the matter in accordance with section 12" is a clear reference to the magistrate before whom the person to be extradited was brought for purposes of s.sec (7) after execution of the provisional warrant of arrest. Consequently counsel argued that that magistrate was the only magistrate who could conduct the extradition enquiry and who could be designated by the Minister to do so. As the appellant was arrested in terms of the provisions of sec. 11 and brought before Mr. Uanivi, the fifth respondent, who remanded the matter and granted bail to the appellant, therefore, it is argued. Mr. Uanivi is the only magistrate who could conduct the enquiry. It follows, according to appellant, that the first respondent's hands were tied and she could only authorize him to proceed with the extradition enquiry.

[35] Ms. Katjipuka-Sibolele supported the finding by the Court *a quo* that the interpretation contended for by the appellant would lead to an "absurdity so glaring that it could never have been contemplated by the Legislature", and that it "leads to a result contrary to the intention of parliament as shown by the context or by such other considerations as the court is justified in

taking into account". (See *Engels v Allied Chemical Manufacturers and Another,* 1993, (4) SA 45 (Nm HC) at 54 D – E where this excerpt from *Venter v R,* 1907 TS 910 was quoted with approval.)

[36] Counsel for the respondents also denied that a literal reading of the subsection would lead to the interpretation contended for by the appellant and submitted that there was nothing in the language of the subsection which would confine the holding of the enquiry to the magistrate who remanded a person in custody or on bail in terms of sec. 11(8).

[37] Ms. Katjipuka-Sibolele also submitted that sec. 12(2) imported the provisions of the Criminal Procedure Act, Act No. 51 of 1977, in regard to preparatory examinations. Section 138 thereof provides that a preparatory examination may at any time be continued before a judicial officer who was not the judicial officer who commenced the proceedings, and if necessary, can again be continued by the officer before whom the proceedings were commenced. Thus, as I understood counsel, there is statutory provision that an enquiry may be conducted by more than one magistrate. The answer to this submission lies in sec.12(2) which incorporates the provisions of the Criminal Procedure Act in relation to preliminary examinations but subject to the provisions of the Extradition Act. From this it follows that an extradition enquiry can only be held by a magistrate so authorized by the Minister and that magistrates cannot be interchanged as provided for in sec. 138 of the Criminal Procedure Act as was suggested by counsel. However, where a person was brought before a magistrate in terms of the provisions of sec 11(8) of the Extradition Act, i.e. before a magistrate had been authorized by the Minister, the provisions of sec. 138 of the Criminal Procedure Act would find application and more than one magistrate could deal with the matter at this initial stage. Consequently what was stated by me in par. [60] of the *Koch (SC)*-case must be qualified as set out above.

[38] In regard to the finding by the Court *a quo,* and the submissions made by Ms. Katjipuka-Sibolele, that the appellant's interpretation of sec. 11(8) gives rise to a glaring absurdity, Mr. Hodes submitted that if the magistrate, who remanded the person, and who was thereafter authorized by the Minister, became unavailable at a later stage nothing precludes the Minister from issuing another authority to a different magistrate, depending on what stage of the enquiry the first magistrate had become unavailable, to carry on from where the previous magistrate had left off or to start a new enquiry. Counsel relied on the maxim *Lex non cogit ad impossibilia.*

[39] Accepting for the sake of argument that Mr. Hodes' submissions concerning the interpretation of sec 11(8) are correct, then there seems to me no reason, either in terms of the provisions of the Extradition Act or in logic, why the Minister would not be able to authorize a different magistrate where, for good reason, the magistrate who remanded the matter in terms of sec 11(8) should become unavailable to continue the enquiry. Whether it would be necessary to start the enquiry *de novo* would depend on the stage when the magistrate became unavailable. If the unavailability arose after the remand had taken place and the magistrate had been authorized by the Minister, but before the enquiry has started, then the newly appointed magistrate could continue from there. Nothing turns on the issue and execution of the provisional warrant of arrest and it may not even be the same magistrate who issued the warrant that later on remanded the proceedings. If the unavailability arose when the enquiry was already in progress and evidence was presented then it may be that the unavailability of the magistrate may cause the proceedings to recommence from the beginning. If that is the case then the situation under sec. 11(8) will not differ from the instance where the proceedings have started after a formal request in terms of sec. 7.

[40] It seems to me that the learned Judge *a quo* was of the opinion that the unavailability of the magistrate who acted in terms of sec. 11(8) at any stage of the proceedings would result in a nullity of what was lawfully previously done in terms of the Extradition Act and would have to start all over again. If the second magistrate again becomes unavailable the same result would follow notwithstanding the stage at which the proceedings had progressed or not. That in my opinion would be an absurdity so glaring that the Legislature could never have intended such a result. There is also nothing, either in the context of the Extradition Act or in the language of sec. 11(8), which would support such an interpretation. The Minister's power to authorize a magistrate, in terms of the Extradition Act, is unfettered and it is only limited to the authorization of a person who is a magistrate as provided in sec. 1 of the Act.

[41] That is however not the end of the matter because counsel for the appellant submitted that from a reading of sec. 11(8) it followed that only the magistrate who remanded the matter in terms of the section could be designated by the Minister to conduct the enquiry. I do not agree with this submission. In my opinion the absence of the use of a personal pronoun in the sentence "while awaiting..." gives rise to an ambiguity as two possible meanings could be ascribed to the sentence. The one is the meaning submitted by Mr. Hodes, (the first meaning) namely that the sentence refers to the magistrate who remanded the matter, in which case the Minister's power to appoint a magistrate was, in the case of a sec. 11(8) procedure, not unfettered and she was obliged to authorize that particular magistrate by name. Had the sentence read "while <u>he</u> or <u>she</u> awaits an authorization……." (my emphasis), the intention of the Legislature (as contended for by Mr Hodes) might have been less ambiguous, and whatever the reason for such a provision, given my finding that it could not be said to be absurd, the Court would have had to give effect thereto. (See *Caroluskraal Farms (Edms) Bpk v Eerste Nasionale*

Bank van Suider-Afrika Bpk, 1994 (3) SA 407 (AA).)

[42] The second meaning emerging from the sentence "while awaiting……" is that it is not a reference to any specific magistrate but a statement of the law confirming that no further action can lawfully be taken without an authorization by the Minister to a magistrate. It makes it clear that the magistrate acting in terms of sec. 11(8) has only limited powers, namely to remand the person in custody or on bail. The words in the sentence "while awaiting……" do therefore not refer to the magistrate who remanded the matter but refer to a magistrate to be authorized by the Minister.

[43] In *South African Transport Services v Olgar and Another,* 1986 (2) SA 684 (AD), Hoexter, JA, who wrote the judgment of the Court, remarked in similar circumstances as follows:

> "Since a purely textual appraisal of the paragraph in question yields two alternative constructions, regard may properly be had, in considering what is the true construction, to the consequences involved in preferring the one or other. That construction should be adopted which is more consonant with, and is better calculated to give effect to, the intention of the enactment."

(See p. 697 D – F).

See also *S v Hendriks,* 1995 (2) SACR 177 (A) at 183i – 186d.

[44] In considering which meaning should be given effect to a Court is entitled to consider the context of the enactment and any anomalies which may flow from the one or other or both the interpretations.

[45] The source of the Minister's power to authorize a magistrate to conduct an extradition enquiry is secs. 6(3) and 10(1). (Sec. 6(3) is not relevant to these proceedings and I will therefore only refer to sec. 10(1)). Sec. 10(1) provides as follows:

> "10(1) Upon receiving a request made under section 7 the Minister shall, if he or she is satisfied that an order for the return of the person requested can lawfully be made in accordance with this Act, forward the request together with the relevant documents contemplated in sections 8 and 9 to a magistrate and issue to that magistrate an authority in writing to proceed with the matter in accordance with section 12." (My emphasis).

[46] The use by the Legislature of the indefinite article "a" signifies that "a magistrate" could mean any magistrate, as was also submitted by Mr. Hodes. The Minister, authorizing a magistrate to hold an enquiry, is not limited to a particular territorial jurisdiction, (such as a district) nor is the fact that the warrant of arrest, be it a provisional warrant or an external warrant, was executed in a different magisterial district than where the authorized magistrate holds office, an obstacle which would limit the powers of the Minister to authorize a magistrate of her choice. But once a magistrate was authorized it is that magistrate who must conduct the enquiry. That is clear from the provisions of the section unless a situation arises where a magistrate authorized by name becomes unavailable, in which case the considerations referred to herein before find application.

[47] Whereas in terms of sec. 10(1) the Minister's power to authorize a magistrate to hold an extradition enquiry is unrestricted, the question may well be asked for what reason or reasons the Legislature found it necessary, in the event of a sec. 11(8) remand, to restrict the Minister's otherwise wide powers to giving her no choice at all but confront her with a *fait accompli* where she must now authorize the magistrate who by chance, was the magistrate before whom the

person to be extradited was brought in order to comply with sec. 11(7), i.e. the 48 hours clause. There seem to be no reason for doing so and the reason suggested by Mr. Hodes, namely to avoid forum hunting, is hardly something which a Legislature would consider in the legislative process. Moreover, the fact that the Minister was given unrestricted powers in sec. 10(1) to appoint "a magistrate" refutes the argument by counsel. It is inconceivable that the Legislature would give the widest powers to the Minister to appoint a magistrate of her choice on the one hand and then on the other hand curb those powers. Furthermore Mr. Hodes, himself, when presenting his argument, stated that the Minister could, by consistently naming particular magistrates, create a pool of experienced magistrates to deal with extradition matters.

[48] In contrast to the submissions made by Mr. Hodes, there are good and logical reasons why the Minister's power to authorize any magistrate to conduct an extradition enquiry is unrestricted. There is, first of all, the matter of convenience. The warrant of arrest can be executed anywhere in Namibia. (Sec. 11(6)(b)). Logistical and other problems may arise if the person to be extradited is brought for remand before a magistrate in one of the far outlying magisterial districts in Namibia. By giving the Minister a free hand she may authorize a particular magistrate or magistrates repeatedly and thus build up a reservoir of experience and expertise. So far the few cases which had come before our magistrates courts showed that the enquiry in terms of the Extradition Act is not without its pitfalls which, if not avoided, mostly lead to the discharge of an extraditee. (See in this regard the *Bigione* – case, *supra,* and *Koch (SC)* –case, *supra*).

[49] A further indication which strongly militates against the first meaning is that where, in an Act, there is some or other restriction on otherwise wide and unlimited powers one would find other indications, in the Act itself, to show that the power is to be exercised subject to those

restrictions where they would apply. The source of the Minister's power to authorize a magistrate to conduct the extradition enquiry is sec 10(1). Nowhere in the section is there any indication that the wide powers granted to the Minister to authorize any magistrate is subject to a restriction, namely that in the case of a sec. 11(8) remand the Minister is now obliged to give an authorization only to that particular magistrate and cannot authorize any other magistrate. The reference to the Minister's powers in this regard in sec. 12 of the Extradition Act is also without any qualification.

[50] A reading of sec 11(8) clearly shows the reason and purpose of its enactment. As an arrestee must be brought before a magistrate within 48 hours after his or her arrest, or as soon as reasonably possible thereafter, a provisional warrant of arrest will mostly be executed, and the person brought before a magistrate, before a formal request was received by the Minister. As the Minister can only issue an authorization after she has received a request from the country requesting the return of the arrestee, it was necessary, in the absence of that jurisdictional fact, to provide jurisdiction for a magistrate in order to deal with the matter. That was legislatively done by means of sec 11(7)(b) and (8) of the Extradition Act. Without that provision, a magistrate before whom the arrestee was brought would not have been competent to deal with the matter and the reference that the person, brought before a magistrate, must be dealt with as if for a preparatory examination or trial, in my opinion, foresees the possibility that there may be more than one postponement of the matter. This may very well happen where the Minister receives a request for extradition late, but within the period of 30 days, laid down by s.sec. (9), but takes time to consider the request. Bearing in mind the provisions of this sub-section, it seems to me that the initial postponement could not exceed the period of 30 days accorded to a requesting country to make a formal request. There is further no indication in either sec. 11(7)(b) or 11(8) that further postponements could only be dealt with by the

magistrate who presided over the first postponement. Consequently, at the sec. 11(8) stage of the proceedings, more than one magistrate might have dealt with the matter which would cause a dilemma for the Minister who must now decide which magistrate she must authorize. There are many more variations on this theme e.g. it may be difficult to execute the provisional warrant and the formal request in terms of sec. 7 may reach the Minister before an arrest is made. If the Minister now authorizes a magistrate, as she is entitled to do, and the arrestee is brought before a different magistrate, who then postpone the matter, which magistrate must now conduct the enquiry?

[51] Furthermore, from the fact that the Minister can appoint any magistrate to conduct the enquiry it follows that the Minister is not subject to issues of territorial jurisdiction when authorizing a magistrate and this wide power is for no conceivable reason curbed if the interpretation of sec. 11(8), submitted by Mr. Hodes, is followed.

[52] All the contextual indications favour the second meaning of the sentence “while waiting...” and lead to no uncertainty or any anomaly and in fact support the scheme of the Act whereby the Minister is given wide powers in authorizing any magistrate to conduct the enquiry. I am therefore of the opinion that the second meaning given to the sentence starting “while waiting…” is more consistent with the intention of the Legislature as it gives effect to the provisions of the Extradition Act whereby wide powers were granted to the Minister to authorize any magistrate of her choice. It will furthermore ensure the smooth working of the Act and not be subject to the uncertainties created by the first meaning.

[53] Although for different reasons, I have come to the conclusion that the learned Judge *a quo* correctly refused the relief claimed by the appellant in terms of prayer 1 of his Notice of

Motion and that the appeal, concerning this issue, cannot succeed.

[54] However, Mr. Hodes has a second string to his bow. Counsel submitted that if the Court should find that the Minister was not obliged, in terms of sec 11(8), to authorize the fifth respondent to conduct the enquiry there is now no authorized magistrate to conduct the extradition enquiry in terms of sec 12 of the Extradition Act. These submissions are based on the unreported Full Bench judgment by Van Niekerk, J, in which Mainga, J, concurred in the matter of *S v Koch,. (Koch (HC), unreported judgment delivered on 28 October 2004.*

[55] When *Koch's case* came on appeal before the learned Judges of the High Court, counsel for the State argued that the authority issued by the Minister, whereby the magistrate Tsumeb conducted the extradition enquiry, was of no force and effect because the Minister did not authorize a specific magistrate which, so it was submitted, was required by the Extradition Act. This point, as well as one or two others, were raised as points *in limine* but were all dismissed by the learned Judges.

[56] In coming to the conclusion that there was a clear intention on the part of the Minister to authorize the magistrate of Tsumeb to conduct the extradition enquiry, the Court relied on the reference in the body of the authority to the magisterial district of Tsumeb and concluded that "the magistrate" so authorized to hold an enquiry in terms of secs. 10(2) and 12 of the Extradition Act, was clearly the magistrate of the district of Tsumeb. The authority further bore the date stamp of the magistrate of Tsumeb which indicated that the authority was sent to and received by the office of that magistrate.

[57] The authorization, in terms of which the extradition enquiry in regard to the appellant

was to be held, contains no reference to any particular magistrate or magistrate's office in the body of the authorization. It merely authorized "a magistrate" to hold the enquiry in terms of the Extradition Act and was addressed to "The Magistrate, Windhoek." It is common cause that, unlike Tsumeb, there are various magistrates at the Windhoek station. The chequered history of the authorization also shows that there was uncertainty how to deal with it. It first of all landed on the desk of Mr. Jacobs, who is a magistrate, stationed at Windhoek. He, on application, recused himself. Thereafter the second respondent was tasked to designate a magistrate for purposes of holding the extradition enquiry and it then designated the third respondent to deal with the matter. All this seems to me to be a far cry from what was intended by the Legislature, namely that the Minister was given the power to authorize a magistrate.

[58] The stance of the Minister as to what the nature of such an authorization to a magistrate to conduct an extradition enquiry is, and what it should contain, is set out in her answering affidavit. I agree with the Minister that she could, in terms of the Act, lawfully authorize any magistrate to conduct an extradition enquiry. The powers given to the Minister in this regard are as wide as can be. However, by stating that it did not fall within her competence to authorize a particular magistrate by name because such is an administrative matter which must be carried out by the senior magistrate of a particular district or, alternatively, by the Magistrate's Commission, established under the Magistrates Act, she with one stroke of the pen, so to speak, curbed the very wide powers given to her by the Extradition Act to become something so vague as to allow magistrates, especially in the bigger stations, to play musical chairs with an authorization.

[59] This interpretation by the Minister, she asserts, is based on the provisions of the Extradition Act and more particularly on the Magistrates Act, Act No. 3 of 2003. Whilst the

evident reluctance of the Minister to do anything which may be construed as an attempt to interfere with the independence of the Judiciary must be commended, I could find nothing in the Extradition Act which could support the interpretation given to the Act by the Minister. Nor could I find any basis for this interpretation in the Magistrates Act. By authorizing a magistrate the Minister is not thereby interfering with the powers of the Magistrates Commission, which in terms of that Act, is, amongst others, entrusted with the function to appoint magistrates. The authorization is to be addressed to a person who already is a magistrate and he or she is not thereby appointed as such. The authorization is merely the act whereby the magistrate who is to conduct the enquiry is clothed with the necessary jurisdiction, in terms of the provisions of the Extradition Act, to proceed and conduct the enquiry. Such authorization does not interfere with the conduct of the proceedings by the magistrate, and, even if, as was submitted by the Minister, the authorization constitutes administrative action, then that task was entrusted to the Minister by Parliament in enacting sec. 10(1) of the Extradition Act. The constitutionality of the empowering provision is not in issue in these proceedings. Hence, the Minister is obliged to give effect thereto by authorizing a magistrate either by name or by office. In the event that there are more than one magistrate holding offices with the same description in a district, division or region, the magistrate will have to be authorized by name. In the absence of a delegation authorized by statute, the Minister's power cannot lawfully be exercised by anyone else, neither by the Magistrates Commission nor by the head magistrate of a district, division or region.

[60] The authorization under consideration does not identify which of the number of magistrates holding office as such in Windhoek must proceed with the inquiry. Given this deficiency, nothing precludes the Minister from issuing a fresh authorization and I also did not understand Mr Hodes to argue otherwise.

[61] The second ground of appeal concerns the constitutionality of sec. 21 of the Extradition Act. On this issue the Court *a quo* came to the conclusion that the matter was not ripe for hearing and dismissed the relief claimed by the appellant. In this Court Ms. Katjipuka-Sibolile supported the finding by the Court *a quo*. She argued that at this stage of the proceedings it was uncertain whether the matter will continue and that the magistrate would ultimately find that the appellant is liable to be surrendered which would then bring into play the provisions of sec. 21. Counsel submitted that the issue of appellant's entitlement to bail may never arise and consequently the determination of the constitutionality of sec. 21 at this stage would merely amount to the exercise of an academic or hypothetical issue.

[62] In developing her argument, counsel relied on what was stated in cases such as *Ferreira v Levin NO and Others; Vryenhoek and Others v Powell NO and Others,* 1996 (1) SA 984 (CC) at p. 1095 para 199; *Dawood and Another v Minister of Home Affairs; Shalabi and Another v Minister of Home Affairs; Thomas and Another v Minister of Home Affairs,* 2000 (1) SA 997 (CC) at p. 1030 -1031 and *Cabinet of the Transitional Government for the Territory of South West Africa v Eins,* 1988 (3) SA 369 (AD). Reference was also made to various writings, locally as well as overseas. The common theme of these authorities is that a Court of law would not entertain issues which are merely academic or hypothetical and where there was not a real or threatened infringement of a person's rights, be that constitutional rights or otherwise.

[63] Mr. Hodes, on the other hand, submitted that Parliament did not have the power to make laws which would infringe or abridge a fundamental right of an individual protected by Chapter 3 of the Constitution. (See Article 25). It follows therefore that if sec 21 of the Extradition Act is militating against the Constitution that it was invalid from its inception and the issue of its constitutionality was therefore ripe for hearing already at that time and counsel referred to the

decision of this Court in *Myburgh v The Commercial Bank of Namibia,* 2000 NR 255 (SC) at 261E – 264F.

[64] *Myburgh's*-case did not deal with the standing of the parties in the context of Mr. Hodes' argument. In my opinion even where a party attacks an Act of Parliament on the basis that it is unconstitutional, and hence invalid from its inception, that party will still have to show that he or she has standing, i.e. that a right of his or her is infringed by the invalid Act or threatened such right. However the significance of the *Myburgh* case for the present case is this, that if the Court should eventually find that sec. 21 is unconstitutional a party may have had to spend time in prison as a result of an unconstitutional and invalid provision. And that would be the inevitable result if ripeness to hear the matter only exists after the committal of the person to be extradited.

[65] The Court *a quo* did not venture to state when an attack on the constitutionality of sec. 21 would be ripe for hearing but stated that there was not a "scrap of evidence" that a right of the appellant had been infringed or threatened by the section. The Court found that "there was no real likelihood that the enquiring magistrate will commit the applicant to prison, and so the applicant is not immediately in danger of having his right to freedom from arbitrary arrest or detention being trampled over."

[66] Ms. Katjipuka-Sibolile was alert to the danger that if steps are not taken in time a party, such as the appellant, may very well be committed and spend time in prison on a provision which the Court may subsequently find to have been unconstitutional and invalid. Counsel therefore submitted that the attack on sec. 21 would be ripe for hearing once a magistrate was authorized and it was certain that the matter would proceed. She argued that in the present instance there were many uncertainties, such as e.g. that because the authorization of the third

respondent was set aside by the Court *a quo* there was now no designation of another magistrate to conduct the extradition enquiry. Once these uncertainties were laid to rest that would be the time to attack sec. 21.

[67] Section 21 provides as follows:

"**Bail**

21. 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 section 12(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 to a designated country has been ordered by the Minister under section 16.

shall be entitled to bail."

[68] What the section in fact provides is that once a committal is made by the magistrate, whether in terms of sec. 12(5) or 15(2), and whether an appeal was launched against the committal by the magistrate, the person committed has no right to apply for bail and is committed to prison until he or she is removed from Namibia.

[69] The threat of a committal and the thereupon *ex lege* coming into operation of sec. 21 is not dependent in my opinion on the question whether the proceedings will be protracted or not, neither can it be dependent on whether there will be a committal or not in deciding whether the constitutionality of sec. 21 is ripe for hearing. In an instance where a committal is made in terms of the provisions of sec. 15(2) (i.e. where the person whose return is requested waives his rights to an enquiry) the committal may follow on the very day that the extradition enquiry starts.

Whether an enquiry will be lengthy depends on a number of uncertain events. When then will the threat of sec. 21 become immediate in order to give standing to the person, whose rights are threatened by it, to attack it? If Ms. Katjipuka-Sibolile's submission in this regard is accepted it may very well have the result that what will be an immediate threat in one instance may not be so regarded in another instance.

[70] The fact that a person is not yet convicted of an offence does not bar such person, whose rights are threatened by an invalid order, to bring the matter to Court. In *Transvaal Coal Owners Association v Board of Control,* 1921 TPD 447 at 452 Gregorowski, J, stated as follows:

> "If they contravene the order they are liable to fine and imprisonment. If the order is invalid their right and freedom of action are infringed, and it is not at all convincing to say you must first contravene the order and render yourself liable to fine and imprisonment, and then only can you test the validity of the order, and have it decided whether you are liable or not."

The Courts in *Gool v Minister of Justice,* 1955 (2) SA 682 (C) and *Afdelingsraad van Swartland v Administrateur, Kaap,* 1983 (3) SA 469 (C) reached similar conclusions. Compare also *De Reuck v Director of Public Prosecutions, WLD, and Others,* 2002 (6) SA 370 (WLD). Likewise it is not necessary for the appellant to wait until he is committed and imprisoned before he can test the constitutionality of sec. 21.

[71] As set out above the standing of a party to approach a Court to protect him/her against an unlawful interference with his/her rights is dependent on whether his or her rights are infringed or there is a threat of such infringement. In the present instance the extradition proceedings have been set in motion by the provisional warrant and arrest of the appellant and

there is no indication that the matter would not run its course from there. In fact, the present application and this appeal are strenuously opposed by the Minister and the second respondent. Applying the above principles I am satisfied that the appellant's constitutional right to liberty is threatened by the provisions of sec 21 of the Extradition Act. It follows therefore that the Court *a quo* was wrong when it declined to consider the issue of the constitutionality of sec 21 of the Extradition Act on the basis that it was not ripe for hearing.

[72] From the finding above it follows that this Court will have to consider the constitutionality of sec. 21 and I will do so under the following headings, namely – (i) How the granting of bail is treated by other countries once a committal ensues; (ii) whether Article 7 of the Namibian Constitution provides substantive protection to the right of liberty of an individual and (iii) whether the provisions of sec 21 infringes or abridges that right.

(i) *How the granting of bail is treated by other countries once a committal ensues.*

[73] Mr. Hodes referred the Court to various decisions in different countries which dealt with the question of the granting of bail once a person was committed in extradition proceedings. Although in none of these instances, quoted by counsel, there was a specific prohibition to grant bail, as in the present instance, the various legislative enactments also did not contain a specific mandate to grant bail under those circumstances. In each instance the Courts, bearing in mind the importance of the protection of the right to liberty of the person, interpreted the relevant provisions and concluded that a right to be released on bail existed, either because the Court had an inherent jurisdiction to consider and grant bail or that the circumstances would be so unjust that the right to grant bail was a *sine qua non.*

[74] It would be apt to start with the situation in South Africa where many of its laws previously applied to this country and with which we, for many years, shared the Extradition Act , Act 67 of 1962 (RSA). This Act applied to the then South West Africa and, after Independence, to Namibia until the promulgation of Act 11 of 1996. The Act provided for a magistrate to grant bail pending the committal of a person whose return to the foreign country was requested but did not expressly provide for bail after the committal. In the case of *Ex Parte Graham: In Re United States v Graham,* 1987 (1) SA 368 (T) at 372 D-E, Harms, concluded as follows:

> "…….grave injustice could result especially where there are delays caused by appeals or administratively. It would also have the strange result that, had the applicant been charged in the Republic of South Africa, he would have received bail and, as far as I know, once he reaches the United States, he is entitled to bail. Furthermore, the potential sentence can be smaller than the time spent in prison awaiting extradition."

The Court concluded that its jurisdiction to grant bail in appropriate instances was not ousted.

[75] Similarly, as far as the United Kingdom was concerned, Lord Russell stated that the absence of an express statutory provision authorizing courts to grant bail after committal of a person did not oust the courts' jurisdiction to grant bail. In *R v Spilsbury,* [1898] 2 Q.B. 615 at 620 he remarked as follows:

> " If it does (i.e. impliedly oust the courts' jurisdiction), a curious result would follow, for it is clear that the magistrate may remand the defendant pending the inquiry, and the inquiry may extend over a long period of time, and it is also clear that the magistrate may admit the defendant to bail as often as he remands him; it is also conceded, that when the defendant is returned to the

> place to which his return is demanded, the tribunal having jurisdiction in that place can admit him to bail pending the result of the trial; and, this being so, it would be a strange result if there were no jurisdiction to admit him to bail during the period between the making of the order for his return and his return."

[76] In Ireland the Supreme Court laid down that the test for granting bail at the instance of a person committed to return to the country who had requested such return was not more stringent in the case of an extradition than in an ordinary criminal trial. The Court weighed up the duty of the State in each instance and stated as follows:

> " In either case the State's duty must operate in a way that will not conflict with the fundamental right to personal liberty of a person who stands unconvicted of an offence under the law of the State. The right to personal liberty should not be lost save where the loss is necessary for the effectuation of the duty of the State as the guardian of the common good – in the extradition cases the duty normally being to fulfil treaty obligations and in ordinary criminal cases normally to enable the criminal process to advance to a proper trial. If in either case a court is satisfied that there is no real likelihood that the prisoner, if granted bail, would frustrate the State's duty by absconding, I do not consider that bail should be refused on the absconding test."

See *Attorney General v Gilliland,* [1985] I.R. 643 at 646.

[77] Mr. Hodes also referred the Court to the situation in the United States where, in the case of *Wright v Henkel,* 190 US 40 (1903) the Supreme Court established the authority of a judge to grant bail in extradition cases but simultaneously also created a presumption against the granting of bail because of the 'compelling state interest' to ensure the return of the persons to be extradited to the requesting country. In subsequent cases the courts held that bail would only be granted where there was no risk of flight and where special circumstances were present

(See Persily: "International Extradition and the Right to Bail", 34 *Stanford Journal of International Law,* (1998) 407, 426)

[78] In the case of *Paretti v United States,* 112 F.3d l363 (9th Cir 1997) it was argued that the State's duty to comply with its treaty obligations was so overriding that it justified detention pending every extradition irrespective of how negligible the risk of flight was. This argument that courts should differentiate between principles applying to the granting of bail in extradition matters and ordinary criminal matters seemed to be very much the same as was raised before the Irish Supreme Court in the case of *Attorney General v Gilliland, supra.* It is not surprising that the 9th Circuit Court rejected the argument in very similar terms as that of the Irish Supreme Court. The Court dealt with the argument at 1383 as follows:

> "The problem with the government's argument is the implicit premise that its interest in the enforcement of extradition treaties is materially different from and greater than its interest in the enforcement of our own criminal laws. In the last analysis, the purpose of extradition treaties is to strengthen our hand in enforcing our own laws through the cooperation of other countries in apprehending fugitives. Yet the government implicitly argues that the law enforcement interest served by extradition treaties is somehow different from and greater than its interest in enforcing our domestic laws. The government fails to suggest any difference, and we can fathom none. If the government's interest in avoiding all risk of flight pending an extradition hearing justified detention without bail, then it stands to reason that the same interest would also justify pre-trial detention in domestic criminal cases. Yet if Parretti had been arrested on charges of violating our own laws against business fraud, and was neither a flight risk nor a danger to the community, it would be unthinkable that he could be held without bail pending trial."

[79] A reading of the above cases shows that in none of the countries referred to there was a

blanket ban on the granting of bail as provided for in sec. 21 of our Extradition Act. The cases further underline the importance of the liberty of the individual and the protection thereof by the courts against arbitrary detention. It must therefore be concluded that the granting of bail after committal of a person is not a rare phenomenon, and that in certain jurisdictions it is stated that the State's duty to surrender a person committed to the requesting State, is no higher than the State's duty in criminal matters to ensure the presence of the person charged to bring the matter to trial.

(ii) *Whether Article 7 of the Namibian Constitution provides substantive protection of the right of liberty of an individual.*

[80] In this regard the Court, during argument by counsel, requested further argument on the question whether Article 7 provides substantive protection to liberty of the individual. Both parties were granted time to provide the Court with further written argument on this issue. The instructive notes by both parties have now been received.

[81] Because of the international character of human rights a study of comparable provisions in other jurisdictions, as well as the interpretation thereof, is not only relevant but provides this Court with valuable material which may assist this Court in its own interpretation of a particular Article in its Constitution, always with due regard to any grammatical or contextual differences which may exist between Constitutions used as a comparable study.

[82] In the supplementary notes of the appellant reference was made to various other jurisdictions with more or less, or similar, provisions as our Article 7. It was first of all submitted that the question whether the Constitution of Namibia provided substantive protection for the

fundamental right to liberty, could not be answered without reference also to Article 11(1) of the Constitution. These Articles provide as follows:

> "Article 7 Protection of Liberty
> No persons shall be deprived of personal liberty except according to procedures established by law.
>
> Article 11 Arrest and Detention
> No persons shall be subject to arbitrary arrest or detention."

[83] It was submitted that in protecting liberty through Article 7 and Article 11(1), the bifurcated structure of the liberty guarantee in the Namibian Constitution is also present in Article 9(1) of the *International Covenant on Civil and Political Rights* ("the ICCPR") and the South African Constitution, namely sec. 12 thereof. These sections respectively provide as follows:

> "9(1) (ICCPR)
> Everyone has the right to liberty of person. No-one shall be subjected to arbitrary arrest or detention. No-one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law."

Sec. 12 of the South African Constitution.

> "(1) Everyone has the right to freedom and security of person, which includes the right –
> (a) Not to be deprived of freedom arbitrarily or without just cause;
> (b) Not to be detained without trial."

[84] It was pointed out that the ICCPR was ratified by the Namibian government on 28

November 1994 in terms of Article 63(2)(e) of the Constitution, and is therefore part of the law of Namibia according to Article 144 of the Constitution and should therefore be given effect to. (See in this regard *Government of the Republic of Namibia v Mwilima and Others,* 2002 NR 235 (SC), at 259E-H and 269C-G.)

[85] It was argued that in so far as both sections 9(1) of the ICCPR and sec 12 of the South African constitution afford protection against arbitrary arrest and detention they have been interpreted to provide substantive protection for personal liberty. Although the two sections are not couched in precisely the same language as our Arts. 7 and 11(1), the protection given to a person is, in each instance, very much the same and the interpretations given thereto are therefore relevant.

[86] In the case of *Van Alphen v The Netherlands, Human Rights Committee Communication,* No. 305/1988 23 July 1990 para 5.8, The Human Rights Committee stated as follows in regard to sec. 9(1) of the ICCPR:

> "The drafting history of Article 9, paragraph 1, confirms that 'arbitrariness' is not to be equated with 'against the law', but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances. Further, remanding in custody must be necessary in all the circumstances, for example to prevent flight, interference with evidence or the recurrence of crime. The State party has not shown that these factors were present in the instant case. …….. The Committee therefore finds that the facts as submitted disclose a violation of Article 9, paragraph, of the Covenant."

See also *Mukong v Cameroon,* Human Rights Committee Communication No. 458/1991 21 July 1994 at para. 9.8 and *Kracke v Mental Health Review Board and Others (General),* [2009] at

paras. 621-666.

[87] In regard to sec. 12(1) of the South African Constitution the Constitutional Court stated as follows:

> "It can therefore be concluded that s 12(1), in entrenching the right to freedom and security of the person, entrenches two different aspects of the right to freedom referred to above. The one that O'Regan J has, in the above cited passages, called the right not to be deprived of liberty 'for reasons that are not acceptable' or what may also conveniently be described as the substantive aspect of the protection of freedom is given express entrenchment in s 12(1)(a), which protects individuals against deprivation of freedom 'arbitrarily or without just cause'. The other, which may be described as the procedural aspect of the protection of freedom, is implicit in s 12(1) as it was in s 11(1) of the interim Constitution.
>
> The substantive and procedural aspects of the protection of freedom are different, serve different purposes and have to be satisfied conjunctively. The substantive aspect ensures that the deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so…"

(See *De Lange v Smuts NO and Others,* 1998 (3) SA 795 (CC) at paras 22- 23).

[88] Counsel for the appellant further argued that a comparable study of other constitutional provisions in Countries such as India, Ireland and the European Convention on Human Rights, with provisions very similar to that of the Namibian Constitution, show that Article 7 should be interpreted to have its own substantive content.

[89] Article 21 of the Constitution of India provides as follows:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

[90] It was pointed out that until the late 1970's, Article 21 was interpreted restrictively. In the case of *A K Gopalan v Madras,* 1950 SCR 88, the Supreme Court of India held that Article 21 and, more particularly, the phrase "procedure established by law" meant simply that a deprivation of life and personal liberty had to be effected in terms of a properly promulgated law. However, in the decision of *Maneka Gandhi v India* AIR, 1978 SC 597 the decision in *A K Gopalan* was overturned and the Supreme Court held that there was a substantive content to the right in Article 21. At p 674 of the judgment the following was stated:

"The passage of reasonableness, which legally as well as philosophically, is an essential element of equality or non-arbitrariness pervades Article 14 (the equality clause) like a brooding omnipresence and the procedure contemplated by Article 21 must answer the best of reasonableness in order to be in conformity with Article 14. It must be 'right and just and fair' and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all and the requirement of Article 21 would not be satisfied."

[91] Building on its decision in *Maneka Gandhi* the Indian Supreme Court now gives full substantive content to Article 21. In the case of *Jolly George Verghese and Another v Bank of Cochin* the Supreme Court struck down legislation providing for the civil imprisonment of debtors, on the grounds that such legislation was incompatible with the guarantee of personal liberty in Article 21.(The reference to the above case is [1980] INSC 19 (4 February 1980); 1980 SCR(2) 913.)

[92] Article 40.4.1 of the Irish Constitution provides as follows:

"No citizen shall be deprived of his personal liberty save in accordance with law."

Similarly to the Courts in India, the Irish Courts interpreted Article 40.4.1 to create a substantive guarantee of personal liberty. In the case of *Gallagher v Director of the Central Mental Hospital, supra,* the following was said in paragraph 1:

> "It is well settled that the expression 'in accordance with law' in Article 40.4 does not mean simply in accordance with the statutory provisions; adopting the words of Henchy J in *King v Attorney-General* (1981) IR 233, it means
>
> "without stooping to methods which ignore the fundamental norms of the legal order postulated by the Constitution."

[93] Likewise Article 40.4.1 has been applied by the Irish High Court to strike down a statute providing for civil imprisonment for failure to pay judgment debts. In *McCann v Judges of Monahan District Court and Others* [2009] IEHC 276 the following was said:

> "Adopting an analytical approach to the question whether s 6 violates the guarantee of personal liberty contained in Article 40.4. the core question is whether s 6 constitutes a disproportionate interference with the right to liberty. That question may be answered by applying the well-established proportionality test first enunciated by Costello J, in *Heaney v Ireland* [1994] 3 I.R. 593 in the following terms (at p 607):
>
> > 'In considering whether a restriction on the exercise of rights is permitted by the Constitution, the courts in this country and elsewhere have found it helpful to apply the test of proportionality, a test which contains the notions of minimal restraint on the exercise of protected rights and of the exigencies of the common good in a democratic society. This is a test frequently adopted by the European Court on Human Rights…… and has recently been formulated by the Supreme Court of Canada in the following terms. The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free

and democratic society. The means chosen must pass a proportionately test. They must:

be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;

impair the right as little as possible, and

be such that their effects on rights are proportional to the objective.

> Having in place an effective statutory scheme for enforcement of contractual obligations, including the payment of debt, is unquestionably a reasonable and legitimate objective in the interests of the common good in a democratic society. The means by which effectiveness is achieved may reasonably necessitate affording a creditor a remedy which entitles him or her to seek to have a debtor imprisoned, but such means will constitute an infringement of the debtor's right to personal liberty guaranteed by Article 40.4.1 unless they pass the proportionality test."

[94] Article 5 of European Convention provides as follows:

> "Right to liberty and security
>
> (1) Everyone has the right to liberty and security of the person. No-one shall be deprived of his liberty save in the following cases and in accordance with the procedure prescribed by law:
>
> (a)……."

[95] In regard to decisions by the European Court on Human Rights we were referred to the following cases, namely, *Conka v Belgium,* (2002) EHRR 54, *Winterwerp v The Netherlands,* (1979) 2 EHRR 387 and *Bozano v France,* (1987) 9 EHRR 297. Interpreting the words "in accordance with the procedure prescribed by law", the Court in the *Conka*-case, *supra*, at para. 39 said the following:

> "Where the 'lawfulness' of detention is in issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the purposes of Article 5, namely to protect the individual from arbitrariness."

[96] It was pointed out that the European Court's jurisprudence on the phrase "in accordance with a procedure prescribed by law" in Article 5(1) is linked to its jurisprudence in respect of Article 8(2) which protects the fundamental right to family life from interference otherwise than "in accordance with law". Commenting on how this jurisprudence affected English law after the incorporation of the European Charter under the Human Rights Act of 1998, Lord Hope of Craighead stated the following in the House of Lords:

> 16. …….Article 8(2) declares that there shall be no interference with the exercise of the right except such as in accordance with the law and is necessary on various grounds in a democratic society. In the present context it is to the phrase 'in accordance with the law' that the issue is directed.
>
> 17. The principle of legality requires the Court to address itself to three distinct questions. The first is whether there is a legal basis in domestic law for the restriction. The second is whether the law or rule in question is sufficiently accessible to the individual who is affected by the restriction, and sufficiently precise to enable him to understand its scope and foresee the consequences of his actions so that he can regulate his conduct without breaking the law. The third is whether, assuming that these two requirements are satisfied, it is nevertheless open to criticism on the convention ground that it was applied in a way that is arbitrary, for example, it has been resorted to in bad faith or in a way that is not proportionate.
>
> 18.The European Court has not identified a consistent or uniform set of principles when considering the doctrine of proportionality: see *Richard Clayton, Regaining a Sense of Proportion: The Human Rights Act and the Proportionality Principle [2001] EHRLR 504, 510. But there is a general international understanding as to the matters which should be considered where a question is raised as to whether an interference with the fundamental right is proportionate. These matters were identified in the Privy Council case of De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 by Lord Clyde. He offered the three stage test which is to be found in the analysis of Gubbay CJ in *Nyambirai v National Social Security Authority* [1996] LRC 64 where he drew on

jurisprudence from South Africa and Canada: see also *R (Daly) v Secretary of State for the Home Department* [2001] UKHL 26; [2001] 2 AC 532, 5478B per Lord Steyn. The first is whether the objective which is sought to be achieved is sufficiently important to justify limiting the fundamental right. The second is whether the means chosen to limit that right are rational, fair and not arbitrary. The third is whether the means used impair the right as minimally as is reasonably possible. In *R (SB) v Governors of Denbigh High School* [2006] UKHL 15; [2007] 1 AC 100 para 26, Lord Bingham of Cornhill summed the matter up succinctly when he said that 'the limitational interference must be directed to a legitimate purpose and must be proportionate in scope and effect."

(See *A S (Somalia) (FC) and Another v Secretary of State for the Home Department,* [2009] UKHL 32 at paras 16 to 18).

[97] Lastly, reference was made to sec. 7 of the Canadian Charter of Human Rights which guarantees the right to life, liberty and security of the person and "the right not to be deprived thereof except in accordance with principles of fundamental justice". Although the wording is not as close to that of the Namibian Constitution as the Constitutions referred to above, its significance lies therein that, because of the fundamental importance of liberty, the Canadian Courts concluded that it provides substantive protection for that right, even though the provision was not expressly framed in the terms of a substantive guarantee. In this regard *Hogg, Constitutional Law of Canada, 5th edition (loose leaf), Vol. 2 at 47-20* stated that the drafters of the Canadian Charter intended the term "fundamental justice" to refer only to procedural fairness, and a concept akin to natural justice. Nevertheless the section was interpreted by the Courts as having a substantive component and that sec. 7 of the Charter does contain a substantive guarantee of personal liberty. (See *Re B C Motor Vehicle Act,* [1985] 2 SCR 486; *R v Hess,* [1990] 2 SCR 906; *Levis v Tetrault,* [2006] 1 SCR 420 and *R v Brown* [2002] 2 SCR 185.)

[98] In their supplementary notes the respondents now conceded that Article 7 does not only deal with procedure but that it also provides for a substantive right which guarantees personal liberty. Counsel based their concession on the authorities quoted by the appellant as well as a decision of a Full Bench of the High Court of Namibia in the matter of *Julius v Commanding Officer, Windhoek Prison and Others; Nel v Commanding Officer, Windhoek Prison and Others* 1996 NR 390 (HC). In this case the applicants challenged the provisions of sec. 65 of the Magistrates Courts Act, Act 32 of 1944, as unconstitutional. Sec. 65 of the Magistrates Act provided for civil imprisonment of a debtor for failure to pay a judgment debt. In declaring those parts of sec. 65 which provided for civil imprisonment without complying with the provisions of Arts. 7 and 12 (fair trial provisions) unconstitutional, the Court stated that an Act which limits the fundamental rights of an individual, where this was permissible, must itself also stand up to the scrutiny of the Constitution. (p. 395). In regard to the content of the right guaranteed by Art. 7, the Court concluded at 395C as follows:

> "Thirdly art. 7 does not deal with procedure only but also with a substantive right, namely the right to liberty, which, as previously set out, must be afforded a wide and purposive interpretation to play its role together with the other rights and freedoms to form and to support the values enshrined in the Constitution. This substantive right must also be protected by the procedures that are to be followed."

[99] In my opinion the concession made by the respondents is undoubtedly correct. This I say not only because of the authorities quoted above, which overwhelmingly and convincingly support such an interpretation, but because the Constitution itself makes that clear. There can be no doubt that most, if not all, of the fundamental rights and freedoms were inspired by and are pervaded with the dignity of the individual as a human being. (See *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia and Others, Case No. SA 52/2008,* an unreported judgment of this Court delivered on 14/12/2009.) Not only is this clear from the

Preamble to the Constitution but Art. 8(1) specifically states that the dignity of all persons shall be inviolable. This must be seen against a background history where a majority of the people of Namibia were subjected to stereotyping and discriminated against on the grounds of ethnicity and race. Based thereon ordinary dealings such as to travel freely in Namibia, to carry on a work or profession of one's choice and to be present in certain parts of towns and cities at certain times were not only prohibited but in many instances visited with arrest and detention and coupled with forceful repatriation. (See in general legislation such as the Native Administration Proclamation, 1922; the Native Administration Proclamation, 1928; the Natives (Urban Areas) Proclamation, 1951 and Regulations published under Government Notice No. 65 of 1955.)

[100] The criminalization of ordinary day to day activities, which activities we today accept as natural, carried with it the seeds of humiliation and affront to a person's dignity as it deprived that person of many of his or her personal rights and further carried with it the possibility of arrest and detention. Dealing with the rights of convicted persons, Corbett, JA, stated that it had to be accepted that a convicted prisoner retained all his basic rights and liberties –

> "Of course, the inroads which incarceration necessarily make upon a prisoner's personal rights and liberties…….are very considerable. He no longer has freedom of movement and has no choice in the place of his imprisonment. His contact with the outside world is limited and regulated. He must submit to the discipline of prison life and to the rules and regulations which prescribed how he must conduct himself and how he is to be treated while in prison. "

(See *Goldberg and Others v Minister of Prisons and Others,* 1979 (1) SA 14 (A) at 39 C-E and *Minister of Justice v Hofmeyr,* 1993 (3) SA 131 (A).)

[101] It is very much in the realm of personal rights that a person's dignity and his worth as human being manifested itself and it is against the background history that the Constitution must be interpreted so as to afford to its subjects the full measure of the protection of the rights set out in Chapter 3 of the Constitution. (See *Government of the Republic of Namibia v Cultura, 2000,* 1993 NR 328 (SC) at 340 C – E; *Ex Parte Attorney-General: In re The Constitutional Relationship between the Attorney-General and the Prosecutor-General,* 1998 NR 282 (SC) at 290 H-I and *Minister of Defence v Mwandingi, 1993 NR 63 at 71F-H.)*

[102] For the above reasons I have concluded that Art. 7 of the Constitution contains a substantive right to the liberty of the person.

(iii) *Whether the provisions of sec. 21 infringes or abridges that right.*

[103] The finding above that Art. 7 separately and/or in conjunction with Art. 11(1) provides a substantive right to the liberty of a person is relevant to the above question.

It raises the issues whether sec. 21 is just and fair, proportionate to the mischief it wishes to address and is not arbitrary. The Namibian Constitution is a modern instrument providing amply for first and second generation human rights. In the interpretation of these rights in various decisions by this Court, as well as the High Court of Namibia, accepted that the Constitution had to be interpreted purposively and liberally so as to afford to the people of Namibia the full measure of the protection of those rights. (See in this regard the cases referred to in para. [94] above.)

[104] Section 21 prohibits the granting of bail once a committal order was made by the magistrate. In its sweep it holds at ransom Namibian citizens as well as foreigners and draws no distinction between instances where the fear for flight by the person to be extradited is minimal or non-existent and instances where fear for flight would be a legitimate reason to

detain such person and refuse bail.

[105] In his founding affidavit the appellant pointed out that until a committal was made, the person whose return was requested could apply and could be granted bail. Once a committal was made sec. 21 prohibited the granting of bail. This, so it was said, had to be viewed against the right of the person to be extradited to appeal to the High Court and further to the Supreme Court. Furthermore, the High and Supreme Courts have jurisdiction under sec. 14(2) of the Extradition Act to discharge the requested person on grounds which are not available to the magistrate who committed the person. Consequently, the appellant submitted that sec.21 is inconsistent with Articles 7 and 11(1) of the Constitution because it deprives persons of liberty without providing the safeguard of judicial oversight through the regulation of bail, and that it accordingly provides for arbitrary detention. It was further submitted that sec. 21 of the Extradition Act also militated against the constitutional principle of the separation of powers and was further also inconsistent with the provisions of Art. 10 of the Constitution.

[106] Appellant furthermore submitted that none of the above limitations of fundamental rights effected by sec. 21 was capable of justification under the Constitution. It was further pointed out that Parliament did not comply with the provisions of Art. 22 of the Constitution in relation to sec. 21 and it was therefore not now open to the respondents to seek to justify these limitations.

[107] In her answering affidavit the Minister, first of all, raised a point *in limine* to the effect that the issue of bail may never arise and that the issue was therefore academic. I have already dealt with this point and have found that the issue was not academic and, therefore, that it was ripe for hearing. In regard to the allegations made by the appellant, the Minister submitted that the disentitlement to bail must be seen against the duty of the State to surrender the person

requested once a committal was made and the fact that extradition was essentially a sovereign act by the State. The purpose of sec. 21 was clearly spelled out by the Minister when she submitted that the purpose achieved by the section was to surrender the requested person and to make sure that that person was available for surrender. The Minister further alleged that Art. 10 of the Constitution was not applicable as extradition proceedings were *sui generis* and were therefore not on par with criminal proceedings and a comparison in this regard was not possible. In regard to Art. 7 of the Constitution, the Minister stated that the Article itself provided the qualification and that the Extradition Act provided for that qualification namely, by the order of the magistrate, and the requested person was therefore deprived of his liberty pursuant to a lawful order by a judicial officer.

[108] Ms. Katjipuka-Sibolile first of all submitted that Articles 7 and 11 of the Constitution do not contain the right to bail. Both Articles provide for the deprivation of a person's liberty on condition that such deprivation occurs in accordance with procedures established by law and as it does not follow that the disentitlement to bail will result in applicant's detention being arbitrary or in contravention of procedures established by law it follows that there is no violation of the appellant's constitutional rights under the articles

[109] If I understood Ms. Katjipuka-Sibolile correctly she submitted that Art. 7 did not provide a substantive right of liberty to a person and as long as the deprivation was in accordance with a procedure established by law there was no deprivation of the right. This was also the basis on which the Minister dealt in her answering affidavit with Art. 7 of the Constitution. For the reasons set out hereinbefore this argument must be rejected, also in the light of the fact that it was now conceded by the respondents that Art. 7 contains a substantive right. (I must point out that this concession was only made after the Court had invited the parties to submit further

written argument as to whether Art. 7 contained a substantive right to liberty of the person and that this argument by Ms. Katjipuka-Sibolile was presented before the concession was made.)

[110] Secondly counsel pointed out that the nature of bail, as a legal concept in Namibia, postulated that it was a power granted to the court as opposed to a person's right to bail. That, so counsel submitted, was also the position under the Extradition Act where it provided for bail in secs. 11(8) and 12(2). Counsel's submission is undoubtedly correct and no person in criminal or extradition cases has the unqualified right to be released on bail. That power is in the hands of the court. However, every person has the right to apply for bail and that is the issue with which we are concerned here and it is that right which sec. 21 abrogates by prohibiting the granting of bail after committal of a person.

[111] With reference to the case of *S v Hendriks,* 1992 NR 382 (HC), Ms. Katjipuka-Sibolile pointed out that applying the various provisions of the Criminal Procedure Act, Act 51 of 1977, the Court there came to the conclusion that the power to release on bail was circumscribed by the Act and that there was no room, outside those powers, to resort to the inherent jurisdiction of the Court in order to grant bail. In the *Hendriks*-case, *supra,* the accused's application for leave to appeal against his conviction to this Court was refused by the High Court. He thereupon applied for bail pending the outcome of a petition for leave to appeal to the Chief Justice. It was in this regard that the Court, applying the provisions of the Criminal Procedure Act, Act No. 51 of 1977, came to the conclusion that it had no power to do so. Miss Katjipuka-Sibolile submitted that the principles therein laid down should also apply to extradition cases.

[112] The *Hendriks* – case must be distinguished from the present matter as the Court there was not called upon to consider its powers in the context of the provisions of the Constitution -

and more particularly Articles 7 and 11(1) thereof and the substantive guarantee to liberty of the person. In the light of the cases cited herein before where such power was found to exist, notwithstanding any explicit statutory provision for that, I am satisfied that it is correct, more so, where there are constitutional provisions which the Court must interpret and apply.

[113] Ms. Katjipuka-Sibolile further submitted that it was implicit in those instances where the courts had to exercise their inherent jurisdiction, because there was no explicit provision to grant bail, that those courts have accepted that the power to grant bail could lawfully be abolished and that they would have given effect thereto if the various enactments, with which they dealt, prohibited the granting of bail. Reference in this regard was made to excerpts from the judgments of *R v Spilsbury, supra, Ex Parte Graham: In re USA v Graham, supra and Veenendal v Minister of Justice,* 1993 (2) SA 137(TPD). In these cases it was stated that if the Legislature wanted to prohibit the granting of bail it would have said so and because there was no explicit prohibition of the granting of bail the Courts could exercise their inherent jurisdiction and grant bail. However, all three cases, referred to by counsel, were given under different constitutional dispensations. *Spilsbury,* which was reported in 1898, was given long before acceptance in the United Kingdom of the European Charter into English law under the Human Rights Act in 1998. That all changed after acceptance of the European Charter into English Law. See the statement by Lord Hope of Craighead, after such acceptance, in the case of *A S (Somalia) (FC) and Another, supra,* and cited herein before. Furthermore both *Ex Parte Graham* and *Veenendal* were decided before there was an interim constitution or a final constitution in South Africa providing for a Chapter on Human Rights. So, what was stated in those cases was correct, given the constitutional dispensation under which these statements were made, where Parliament reigned supreme and was not subject to a Constitution containing Human Rights.

[114] The duty of the State requested to render an individual to another State is therefore twofold, firstly to comply with its own domestic laws which will prescribe the procedure to be followed and the requirements necessary to conduct an extradition enquiry and to make a committal. Secondly, and once a committal ensues, there is a duty on the requested State to render the individual to the requesting State. Considering the explanation given by the Minister that sec. 21 was enacted in order to ensure that the Namibian State would be able to comply with this duty, there can be little doubt as to the purpose and meaning of the section.

[117] That the right to liberty is at stake in extradition matters was stated by Lord Hope of Craighead in *In re: Hilali,* [2008] UKHL 3 at para. [30] and that was also the *ratio* of the cases referred to herein before. There can in my opinion not be any doubt that that is so. Once a request for extradition is acted upon, the individual involved is arrested, and if not granted bail, is kept in detention in Namibia until he or she is surrendered to the requesting State. If bail is granted at an earlier stage, arrest and detention will follow once a committal is made. It was pointed out that such detention was of an indeterminate period and could continue for years. This is what happened in the matter of *Koch, supra.* Bearing in mind that there may be administrative delays and that the requested individual has a right of appeal to the High Court as well as to the Supreme Court, it follows that delays of substantial periods would be the order of the day.

[118] The right to liberty is one of the cornerstones on which a democratic society is built. Without such right there is no protection for the individual against arbitrary arrest and detention. The importance of the right to liberty was acknowledged in decisions in Namibia and also in decisions prior to independence. (See, *inter alia, Katofa v Administrator-General for SWA and*

Others, 1985 (4) SA 211 (SWA) at 220I-221D; *S. v Acheson* 1991 NR 1 (HC) at 10A-C; *Djama v Government of the Republic of Namibia,* 1992 NR 37 (HC) at 44F-J,.and *Julius v Commanding Officer, Windhoek Prison and Others; Nel v Commanding Officer, Windhoek Prison and Others, supra.)*

[119] Where an Act of Parliament encroaches upon a fundamental right the question whether that is at all permissible must be answered on whether such limitation is authorized by the particular article and on Art. 22 of the Constitution. Where the Article does not permit any limitation it is said that the protection is absolute. An example of this is to be found in *Ex Parte Attorney-General: In re Corporal Punishment,* 1991 (3) SA 76 (NmS); 1991 NR 178(SC) at 187I-188B where the Court stated that the obligation of the State in regard to Art. 8 was "absolute and unqualified."

[120] Article 22 provides as follows:

> "Article 22 Limitation upon Fundamental rights and Freedoms
>
> Whenever or wherever in terms of this Constitution the limitation of any fundamental rights or freedoms contemplated by this Chapter is authorized, any law providing for such limitation shall:
>
> (a) be of general application, shall not negate the essential content thereof, and shall not be aimed at a particular individual;
>
> (b) specify the ascertainable extent of such limitation and identify the Article or Articles on which authority to enact such limitation is claimed."

(As was pointed out by Mr. Hodes, and noted earlier in this judgment, there was no compliance with the provisions of Art. 22(b) in the enactment of sec. 21 of the Extradition Act.)

[121] Article 7 is not absolute as it authorizes deprivation of liberty "according to procedures established by law". However, where such limitation is authorized it should not go further than what is necessary to achieve the object for which the limitation was enacted. This much is clear from the wording of Art. 22, which prohibits a limitation which negates the essential content of the right.

[122] Wherever the Constitution permits a limitation of a constitutional right the test whether such limitation is permissible in terms of the Constitution is whether the limitation constitutes a disproportionate interference with, in this instance, the right of liberty, as guaranteed by Art. 7. The proportionality test has been applied in various jurisdictions as well as in Namibia. (See the cases referred to above and *S v Vries,* 1998 NR 316 (HC) and the *African Personnel Services*-case, *supra.*) Although its application as to what must be considered was not always similarly worded, the effect of what is to be considered is clear. In the case of *Heaney v Ireland,* [1994] 3 I.R. 593 the Court referred with approval to the test as applied in Canada and by the European Court of Human Rights. Circumscribing what is necessary, the Court stated as follows:

> "The objective of the impugned provision must be of sufficient importance to warrant overriding a constitutionally protected right. It must relate to concerns pressing and substantial in a free and democratic society. The means chosen must pass a proportionately test. They must:
>
> (a) be rationally connected to the objective and not be arbitrary, unfair or based on irrational considerations;
>
> (b) impair the right as little as possible; and
>
> (c) be such that their effects on rights are proportional to the objective"

[123] In considering how the jurisprudence of the European Court of Human Rights affected questions of English law after their acceptance of the European Charter under the Human Rights Act of 1998, Lord Hope of Craigwell, referring to the proportionality test as applied in

various jurisdictions, extracted the following three principles, namely:

> "The first is whether the objective which is sought to be achieved is sufficiently important to justify limiting the fundamental right. The second is whether the means chosen to limit that right are rational, fair and not arbitrary. The third is whether the means used impair the right as minimally as is reasonably possible."

(See: *A S (Somalia) (FC) and Another v Secretary of State for the Home Department, supra,* at paras. 16 to 18)

[124] In regard to the onus to proof I find no reason to distinguish this case from what was said by this Court in the matter of *African Personnel Services, supra,* namely that the person complaining that a constitutional freedom of his or her has been breached, must prove such breach. Once this onus is discharged it is for the party relying on a permissible limitation to prove that the limitation falls within the scope of what is permitted in terms of the Constitution. (See *African Personnel Services, supra,* at para. [65] and the cases there cited.)

[125] The cases cited herein before clearly established the right of a person to be extradited to apply for bail up to the stage when he or she is surrendered to the requesting State. In terms of our Extradition Act the person whose extradition is requested is entitled to apply for bail at all stages of the proceedings up and until a committal order is made. It follows also as a matter of logic that deprivation of that right impacts on the right to liberty of the person committed who, as far as sec. 21 goes, is now deprived of liberty until he or she is surrendered to the requesting state. I am therefore satisfied that the appellant has proven that sec. 21 of the Extradition Act constitutes a breach of his constitutional right to liberty and that he is an aggrieved person as contemplated in Art. 25 of the Constitution.

[126] Where the Constitution allows a limitation of a constitutional right, as is the case in this instance, such limitation must be proportional in the sense as set out herein before. The State's duty to surrender a person to a requesting State, after his or her committal, is sufficiently important for the State to take measures which will enable it to fulfill that duty. This duty operates on the international plain and is an undertaking to surrender a requested person to the requesting State once a committal was achieved. One such measure to ensure compliance with the Government's duty is, in appropriate instances, to deprive the person of his or her liberty. It therefore also follows that such measure would serve a legitimate objective which is rationally connected to the purpose of the limitation.

[127] However, in order to pass the test of proportionality the limitation of the constitutional right must also be fair and not arbitrary and the means used must impair the right as minimally as is reasonably possible. It is in this regard that the absolute prohibition, on the application and granting of bail after committal of a person, provided for in sec. 21, falls short and cannot be said to be constitutional. The provision is unfair and arbitrary because it does not distinguish between instances where there is little or no fear that the person to be extradited may flee and so be unavailable for the State to comply with its duty to surrender him or her, and instances where there is a legitimate fear that this may happen and where the only way to secure his or her presence would be to deprive him or her of their liberty. Denial of a right to apply for bail would be particularly harsh on Namibian citizens. This denial of the right to apply for bail, and to be granted bail in appropriate circumstances, must further be seen against the factor that detention after committal may be for an indefinite time and may, in certain circumstances, continue for years rather than weeks or months. This delay may be caused by administrative problems and is inevitable where the person to be extradited avails him or herself of the right to

appeal to the High Court and further to this Court. Sec. 3(1) of the Extradition Act prescribes that an extraditable offence is one which constitutes, under the laws of the requesting country, an offence which is punishable with imprisonment of a period of 12 months or more. It is not far- fetched to see that an unconvicted person may, as a result of the provisions of sec. 21, be held in prison for periods far longer than the actual imprisonment he or she may receive if convicted in the requesting country.

[128] All the above instances referred to pinpoint the unfairness and the arbitrariness of the provisions of sec. 21. Primarily it stems from the fact that the Legislature, by enacting the section, did not consider and take into consideration the fact that circumstances among various persons may differ from one person to the other and that there may be instances where the State, in order to comply with its duty to surrender a requested person, does not require detention by such person – at least not until the surrender is imminent. Although it is accepted that the right to liberty will have to give way where circumstances require the incarceration of a person to be extradited in order that the Namibian State can comply with its duty, by enacting a blanket prohibition on the granting of bail, in the circumstances set out in sec. 21, the essential content of the right to liberty was completely negated and the Namibian State's duty to surrender a requested person to the requesting State, after his or her committal, completely trumped the constitutional right. This is not permissible and the effect of sec. 21 on the constitutional right goes much further to impair the constitutional right than what is reasonably necessary. By allowing the granting of bail in those circumstances which are appropriate, the duty of the State to surrender a person to be extradited after his or her committal is safeguarded and left in the hands of the Court which, with reference to the evidence before it, can determine whether to grant or refuse bail in particular circumstances instead of putting up a blanket prohibition against the granting of bail which unfairly , and in a most arbitrary manner, subjects

the liberty of a person to the operation of a provision in an Act which does not distinguish between when it is necessary to keep the person in prison and when it is not appropriate to do so.

[129] The only attempt made by the Minister to justify the blanket prohibition of sec. 21 was based on the duty of the State to surrender a person to be extradited after his or her committal. For the reasons set out above this duty by the state cannot override the constitutional right to liberty completely and it must therefore be rejected.

[130] It is of course so that the fear for flight in the instance of a person to be extradited will always be a factor to be considered by a Court in deciding whether to grant or refuse bail. After all such person may be a fugitive before justice and this factor will always be relevant to the issue of bail. However, there will no doubt also be instances where the evidence overshadows the fear for flight and where it will be necessary and appropriate to grant bail.

[131] As a person surrendered to a requesting State is so surrendered in custody, any bail granted after the committal of such person must contain conditions which will give effect to – and allow the implementation of -the provisions of sec. 16 (3) and (4)(a) of the Extradition Act.

[132] For the reasons set out herein before I have come to the conclusion that sec. 21 of the Extradition Act is unconstitutional and must be struck down. The result of this finding is that the right to apply for and to be granted bail after the committal of a person in terms of the Extradition Act, where the circumstances indicate that the granting of bail is appropriate, is not based on the inherent jurisdiction of any Court but is a constitutional right available to any person to be extradited after his or her committal in terms of the Extradition Act.

[133] Because of the conclusion which I have reached it is not necessary to deal with the further arguments on behalf of the appellant based on Art. 10 of the Constitution and that art 21 constitutes an interference with the independence of the judiciary.

[134] The only issue remaining is that of costs. As previously stated the Court *a quo* did not grant the appellant costs in the High Court. Two reasons were given by the learned Judge namely, that the appellant was not substantially successful in that Court, having only succeeded on one of the issues applied for, and because the application, being in the nature of a criminal case, it was not usual to grant costs in criminal cases. As far as the first reason is concerned the appellant was forced to come to Court in order to set aside the designation of the Chief, Lower Courts, to hold the enquiry, which was a substantial issue. Nevertheless this Court has found that the appellant should also have succeeded in his challenge to the constitutionality of sec. 21 of the Extradition Act. The appellant was therefore substantially successful in that Court and is entitled to be awarded his costs.

[135] The second reason is in my opinion not a valid reason, in the circumstances of this case. In this matter the appellant had to come to Court to get redress on important issues, one of which was the striking down of a provision in the Extradition Act as unconstitutional. To be able to do so the appellant had to launch an application, which is a civil procedure, and which was strenuously opposed by some of the respondents. In the circumstances I can see no reason why the appellant, having been successful, should not be awarded his costs.

[136] Mr. Hodes requested the Court, in the event of the appellant being successful, to grant costs on the basis of three instructed counsel. In my opinion the appellant would be entitled to

the costs of appeal of one instructing counsel and two instructed counsel. The costs of three instructed counsel will only be awarded by a Court in exceptional circumstances. In the present matter the record consisted of only three volumes and the issues argued, although important, were not as intricate and difficult so as to justify the labours of three counsel.

[137] It therefore follows that the appeal against the refusal of the Court *a quo* to declare that Magistrate Uanivi is the only magistrate authorized by the first respondent to conduct the extradition enquiry against the appellant must fail but is allowed in regard to the constitutional challenge of sec. 21 of the Extradition Act and the Court *a quo's* refusal to grant the appellant his costs in that Court. Consequently the following order is made:

1. Paragraph 1 of the order made by the Court *a quo* is hereby confirmed.

2. Paragraphs 5 and 6 of the order made by the Court *a quo* are hereby set aside and the following orders are substituted therefore, namely:

> "5. It is declared that sec. 21 of the Extradition Act, Act 11 of 1996, is unconstitutional and is hereby struck down.
>
> 6. The first, second and third respondents jointly and severally, the one paying the others to be absolved, shall pay the applicant's costs, such costs to include the costs of one instructing and two instructed counsel"

3. The first and second respondents jointly and severally, the one paying the other to be absolved, is ordered to pay the appellant's costs of appeal, such costs to include the costs of one instructing counsel and two instructed counsel.

_____

STRYDOM, AJA

I agree,

_____

MARITZ, JA

I agree,

_____

DAMASEB, AJA

Counsel for the Appellant:	Mr. Hodes, SC, assisted by Mr. Chaskalson and Mr. Katz,
Instructed By:	Metcalfe Legal Practitioners
Counsel for the Respondents:	Ms. U. Katjipuka-Sibolile
Instructed By:	Office of the Government Attorneys