



SUMMARY

Case No.: A 210/2007

JACOB ALEXENDER

and

THE MINISTER OF JUSTICE AND OTHERS

Heard on: 2008 June 16-17

Delivered on: 2008 July 2

PARKER, J

Statute -

Interpretation of – Section 10 (1), read with s 11 (7) (a) and (b), s 11 (8) and s 12 (1), of the Extradition Act (Act No. 11 of 1996) – Minister may not authorize a specific magistrate by name in terms of s 12 of Extradition Act to conduct extradition enquiry proceedings under that Act – To insist that a magistrate who remands claimed person in custody or admits him or her to bail must be the only magistrate to be authorised to conduct extradition enquiry proceedings in respect of the claimed person will undoubtedly lead to such unjust and absurd results that cannot be countenanced by the Legislature – Conclusion based on rule of construction that there is presumption against absurdity and that a statute must be interpreted so as to make it workable – Court declaring 5th respondent is not the only magistrate that can lawfully be authorised by Minister of Justice to hold enquiry proceedings in respect of applicant.

- Statute -** Interpretation of – Golden rule of construction – Words of a statute must be given their ordinary, literal and grammatical meaning and effect given to such meaning unless such literal construction would lead to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent – Interpretation of “Chief: Lower Courts” in s 1 of the Magistrates Act, 2003 (Act No. 3 of 2003) – Court giving the defining words their ordinary, literal and grammatical meaning – Court therefore finding that the Chief: Lower Courts is a public servant in terms of the Public Service Act (Act No. 13 of 1995) and not a magistrate in terms of the Magistrates Act.
- Administrative Law** - Magistrates Act (Act No. 3 of 2003) – Whether the Magistrates Commission has power under the Act to select particular magistrates to hold extradition enquiry proceedings in terms of s 12 of the Extradition Act (Act No. 11 of 1996) – Court finding that in terms of the Extradition Act only the Minister of Justice has the power to authorize magistrates to hold such enquiry proceedings – Court holding that the Magistrates Commission acted *ultra vires* when it assigned Mr. Unengu, Chief: Lower Courts, to hold extradition enquiry proceedings in respect of the applicant – Court reviewing and setting aside Magistrates Commission’s decision.
- Constitutional Law** – Human Rights – right to liberty (Article 7 of the Constitution) and right to freedom from arbitrary arrest or detention (Article 11 (1) of the Constitution) – Court holding that those rights are derogable – Hence, what the Constitution outlaws is deprivation of right to liberty not according to procedures established by law, and in terms of Article 11 (1) arrest or detention that is arbitrary, not just arrest or

detention per se or simpliciter – Court finding that constitutional derogation of right to freedom from arbitrary arrest or detention also found in Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR), and Article 6 of the African Charter on Human and Peoples’ Rights.

Constitutional Law – Human Rights guaranteed by the Constitution – Enforcement of in terms of Article 25 (2) of the Constitution – Applicant must show he or she is an aggrieved person and also that a right has been infringed or its infringement is threatened in relation to him in order to be entitled to approach the Court for redress – Court explaining the meaning of “threatened”.

Constitutional Law – Separation of powers and independence of the judiciary – Court finding that these principles are firmly embedded in Namibia’s constitutionalism – Court explaining that independence of judiciary comprises institutional independence and individual independence – Position of Chief: Lower Courts in the Ministry of Justice — Court finding therefore that Chief: Lower Courts cannot lawfully hold extradition enquiry proceedings in terms of the Extradition Act (Act No. 11 of 1996) without offending the principles of separation of powers and independence of the judiciary – Court declaring that Chief: Lower Courts, cannot lawfully hold such enquiry proceedings.

Constitutional Law – Legislation – Section 21 of Extradition Act (Act No. 11 of 1996) – Validity of – Court finding that applicant’s rights under Articles 7, 10 and 11 (1) were not threatened when applicant launched the application – The mere fact that s 21 exists on the statute books is not

a good enough ground to entitle applicant to approach the Court for relief – Enquiring magistrate in terms of s 12 of Extradition Act may or may not commit applicant to prison to await the decision of his surrender to requesting State – Court finding that determination of constitutionality or otherwise of s 21 in respect of applicant is premature and not ripe for determination – Court therefore refusing to declare s 21 of the Extradition Act unconstitutional in respect of the applicant.

Constitutional Law – Legislation – Section 11 (7) of Magistrates Act (Act No. 3 of 2003) – Validity of – Section providing for appointment of temporary magistrates – Court holding that s 11 (7) of Magistrates Act for all intents and purposes not different from Articles 83 (2) and 83 (3) which permit appointment of acting Judges of the Supreme Court and High Court, respectively – Court finding section 11 (7) not inconsistent with the Constitution because it does not offend independence of the judiciary – Court declaring s 11 (7) constitutional and valid.



IN THE HIGH COURT OF NAMIBIA

In the matter between

JACOB ALEXANDER

Applicant

and

THE MINISTER OF JUSTICE

1st Respondent

**THE CHAIRPERSON OF THE
MAGISTRATES COMMISSION**

2nd Respondent

THE CHIEF: LOWER COURTS

3rd Respondent

THE PROSECUTOR GENERAL

4th Respondent

MAGISTRATE UAATJO UANIVI

5th Respondent

CORAM: PARKER, J

Heard on: 2008 June 16-17

Delivered on: 2008 July 2

JUDGMENT:

PARKER, J.:

Introduction

[1] In this matter, application is made, on notice of motion, by the applicant in which he has prayed for orders in the following terms:

1. declaring that Mr. Uaatjo Uanivi, a magistrate duly appointed as such under the Magistrates Act, 3 of 2003, is the only magistrate lawfully authorised by the first respondent to conduct an extradition enquiry in terms of section 12 of the Extradition Act No. 11 of 1996 (“*the Extradition Act*”) against the applicant (“*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 Magistrates 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 for the regional and district divisions of Windhoek, Otjiwarongo, 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.
- 2A. Reviewing and setting aside the decision of the Magistrates Commission dated 25 April 2007 to appoint the Chief: Lower Courts in the Ministry of Justice, Mr. Petrus Unengu, to 'handle' the Applicant's 'extradition matter'.
- 2B. To the extent that it is necessary for the relief sought in prayers 2 and 2A above, declaring section 11 (7) of the Magistrates Act 3 of 2003 to be inconsistent with the Constitution and invalid.
- 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 the 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 legal practitioner and two instructed counsel.
- 5. Granting further and/or alternative relief.

[2] What all this means is as follows. If I refuse to grant the relief sought in prayer 1, I must go on to consider whether to grant the relief sought in 2.1. However, if I grant the relief sought in 1, I need not bother myself with 2.1. Second, if I refuse to grant the relief sought in 2.1, I must go on to consider whether to grant all the relief sought in prayer 2.2. But if I grant the relief sought in 2.1, I need not concern myself with prayer 2.2. Accordingly, if I grant the relief sought in 1, I need not bother myself with 2.1 and 2.2. Third, the relief sought in prayers 2A, 2B, 3, 4 and 5 stand on their own: irrespective of whatever decision I take in respect of prayers 1, 2.1 and

2.2, I must consider 2A, 2B, 3, 4 and 5, except that I ought to consider 2B only to the extent that it is necessary for 2.1 and 2.2 and 2A.

[3] In determining the present application, I have taken under advisement submissions by counsel, including the authorities that have been referred to me, and the applicable statutory provisions. My respectful view is that it seems to me that this application, despite the fact that it has been argued extensively and I have been referred to a plethora of cases, falls within an extremely short and narrow compass.

[4] I note that the 4th and 5th respondents did not file answering affidavits; neither do I see notices of their intention to oppose the application.

Relief sought in prayer 1: the s 11 (8) (of the Extradition Act) argument

[5] The holding of extradition enquiry proceedings in respect of the applicant (the claimed person) in terms of the Extradition Act are pending. The proceedings were initiated by a request for the provisional arrest of the applicant. The applicant was arrested pursuant to the request for his provisional arrest and brought before Magistrate Uaatjo Uanivi (the 5th respondent) who admitted the claimed person (the applicant) to bail in terms of s 11 (8) of the Extradition Act. Meanwhile an authorization under s 10 (1) of that Act was being awaited from the Minister of Justice (the Minister) (1st respondent) for the matter to be proceeded with in terms of s 12 of the Act. The Magistrates Commission (2nd respondent) appointed Mr. Unengu, Chief: Lower Courts (the 3rd respondent) to act as a temporary magistrate in terms of s 11 (7) of the Magistrates Act for the period 1 August 2007–1 August 2008. Indeed, this was the fifth such temporary appointment of the 3rd respondent under the Magistrates Act.

[6] Having received a formal request in October 2006 from the United States of America (the requesting State) for the extradition of the applicant, the Minister, in terms of s 10 (1) of the Extradition Act issued an authorization, authorizing *a magistrate* to proceed with enquiry proceedings aimed at making a finding as to the return of the claimed person to the requesting State. The enquiry proceedings were scheduled to commence on 25 April 2007 before Magistrate Jacobs, but the learned Magistrate ‘recused’ himself: the reason for so ‘recusing’ himself is irrelevant to the present enterprise. The 3rd respondent was then assigned to conduct the enquiry proceedings. This is the basis of the relief sought in prayer 1. The gravamen of the applicant’s challenge in 1 is this: it is the 5th respondent who admitted the applicant to bail as aforesaid, and therefore it is only the 5th respondent who can be lawfully authorized to hold the enquiry proceedings for committal of the applicant in terms of the Extradition Act.

[7] The provisions that are relevant to the determination of prayer 1 are as follows:

Section 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.

Section 11 (7) (a) and (b)

Any person arrested under subsection (6) shall in accordance with Article 11 of the Namibian Constitution be –

- (a) informed promptly in a language that he or she understands of the grounds for such arrest; and

- (b) be brought before *a magistrate* within 48 hours of his or her arrest or, if it is not reasonably possible, as soon as possible thereafter.

Section 11 (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.

Section 12 (1)

Where the return of a person has been requested under this Act and the Minister has under section 6 (3) or 10 (1) authorized *a magistrate* to proceed with such matter, such person shall, subject to section 15, be brought before that magistrate who shall hold an enquiry with a view to make a finding as to the return of such person to the country concerned.

- [8] I append, hereunder, the authorization document issued by the Minister:

REPUBLIC OF NAMIBIA

ISSUED IN TERMS OF SECTION 10 (1) OF THE EXTRADITION ACT, ACT NO. 11 OF 1996

AUTHORITY TO PROCEED IN ACCORDANCE WITH SECTION 12 OF THE EXTRADITION ACT, ACT NO. 11 OF 1996

WHEREAS THE MINISTER OF JUSTICE OF THE REPUBLIC OF NAMIBIA has received an extradition request made under section 7 of the aforesaid Act from the United States of America for the surrender of Jacob Alexander alias Kobi to the United States of America.

NOW THEREFORE, and acting under the provisions of sections 10 (1) of the Extradition Act, Act No. 11 of 1996, I hereby authorize *a magistrate* to proceed with this matter in accordance with the provisions of section 12 of the Extradition Act, Act No. 11 of 1996. I herewith forward to you the request and three sets of documents contemplated in section 8 and 9 of the said Act, the original set of documents is properly and duly sealed and it is for the Magistrate, and the other two sets for the State and the Respondent respectively.

Signed at Windhoek on this 23rd day of October 2006.

[Signed]
MRS. PENDUKENI IIVULA ITHANA, MP
MINISTER OF JUSTICE
REPUBLIC OF NAMIBIA

The authorization document was enclosed in a letter addressed to the “The Magistrate of Windhoek”.

[9] The authorization document (s10 (1)-authority) does not refer to any magistrate by name. I respectfully accept the 1st respondent's contention that the Extradition Act does not say that the Minister must identify a specific magistrate and also put his or her name down in the authorization document. I also accept the 1st respondent's evidence that she forwarded the s 10 (1)-authority to the Magistrate of Windhoek (I take that to mean the head of magistrates of the Windhoek Magistrate's Court.) for him or her to assign the enquiry proceedings to a magistrate of the Windhoek Magistrate's Court to hold the enquiry proceedings. The applicant's contention is that since the 5th respondent admitted the applicant to bail it is only the 5th respondent who must in law be authorized to hold the enquiry proceedings in terms of s 12 of the Extradition Act.

[10] As this Court observed in *Koch v The State* Case No.: CA 12/2004 (HC) (Unreported) at p 8, "There is no provision in the Act which requires that the Minister must authorize a specific magistrate by name. On the other hand there is also no provision which states that he (or she) may not do so." In my respectful view, I think the intention of the Legislature in those relevant provisions I have referred to above is that the Minister may not authorize *a particular magistrate by name* in the authorization document to hold extradition enquiry proceedings under the Extradition Act.

[11] The reason is not far to seek; and, in my opinion, the applicant's contention can therefore, with respect, be *reductio ad absurdum* in the following way. The Minister may authorize a specific Magistrate X, who had remanded the claimed person in custody or admitted to bail, by name, and by the time the authorization document gets to the Magistrate's Court in question, Magistrate X has died, or has

resigned, or has been dismissed. In that event, going by the contention of the applicant, the claimed person must be re-arrested – whether he or she is in custody or out on bail – for Magistrate Y to remind the claimed person in custody or admit him or her to bail the second time. The Minister would once more issue a s 10 (1)-authority, authorizing a specific Magistrate Y by name. By the time the second s 10 (1)-authority arrives at the Magistrate’s Court in question Magistrate Y has died, or has resigned, or has been dismissed. In that event, going by the contention of the applicant, the claimed person must be re-arrested the third time – whether he or she is in custody or out on bail – for Magistrate Z to remind the claimed person in custody or admit him or her to bail the third time. The Minister would once again issue a s 10 (1)-authority, authorizing Magistrate Z by name. There is no guarantee that the named Magistrate Z in the Magistrate’s Court in question will not meet any of the fate that befell Magistrate X and Magistrate Y. If Magistrate Z does suffer a similar fate as X and Y, the claimed person must be re-arrested the fourth time – whether he or she is in custody or out on bail – for Magistrate A to remind the claimed person in custody or admit him or her to bail the fourth time. The Minister would once more issue a s 10 (1)-authority, authorizing Magistrate A by name, who, in human experience, cannot be immune to what came upon Magistrate X, Magistrate Y and Magistrate Z. If Magistrate A is not so immune as I have said and suffers a similar fate as Magistrate X, Magistrate Y, Magistrate Z, the process of re-arresting and re-remanding in custody or re-admitting admitting to bail and the Minister’s appointments must go on unceasingly in that fashion until hopefully a particular magistrate who remands the claimed person in custody or admits him or her to bail does not suffer any of the fate that befell Magistrate X, Magistrate Y, Magistrate Z, and Magistrate A.

[12] With the greatest deference, the glaring absurdity of the applicant's contention – forget about its sheer ludicrousness – even looms large where the Magistrate's Court in question has only one Magistrate. Accordingly, in my view, where the Magistrate's Court in question has only one magistrate, the Minister may issue the s10-authority to the magistrate of that court, without a name, i.e. in virtue of being the holder of an office, e.g. the magistrate of Tsumeb, as was done in *Koch* (HC) supra. But in a case where the Magistrate's Court in question has more than one magistrate, a s 10 (1)-authority must be issued to *a magistrate*, without a name, only; it cannot be issued to a magistrate in virtue of being the holder of an office, as I will demonstrate shortly. The Magistrate designated in terms of s 11 (2) (b) of the Magistrates Act as the head of that Magistrate's Court, having more than one magistrate, will then decide which particular magistrate on his or her staff should hold the enquiry proceedings.

[13] I am fortified in my view, as regards the Windhoek Magistrate's Court, by the essence of the following passage from *Koch* (HC) supra, at p 8:

One can well imagine that the Minister may, e.g. in the case of a person sought to be extradited who resides in the magisterial district of Windhoek, issue an authorization in terms of the Act to the Chief Magistrate of Windhoek. The magistracy in this district (Windhoek District) is large, consisting of several magistrates. The Chief Magistrate would then allocate the matter to one of the magistrates on his or her staff. *The Minister may very well not even know who that particular individual is.* (My emphasis)

[14] In sum, in my opinion, the arrangements I have described above in respect of a Magistrate's Court that has only one magistrate and a Magistrate's Court that has more than one magistrate make a great deal of sense. The Legislature could not have intended anything so absurd, ludicrous and incapable of being given effect to as the contention canvassed by the applicant. The interpretation I have put forth will not

result in a manifest absurdity; indeed, *a fortiori*, it is not contrary to the legislative intent.

[15] I think the 1st respondent issuing a s 10 (1)-authority to a magistrate “by name or by virtue of being the holder of the office mentioned in the authorization,” as was put forth by this Court in *Koch* (HC) at p 8, which Mr. Hodes, lead counsel of the applicant, was so much enamoured with, has attendant insoluble difficulties. As I say, the Minister issuing such authority to a specific magistrate “by name” will indubitably result in manifest absurdity and intractable impracticalities for any Magistrate’s Court, whether it has one magistrate or more than one magistrate, as I have shown above. The Minister issuing a s 10 (1)-authority to a magistrate “by virtue of being the holder of the office” may work well in single-magistrate Magistrate’s Courts; but it will be utterly unworkable in more-than-one-magistrate Magistrate’s Courts. The reason is simple: suppose, for example, the 1st respondent’s authorization document says, “I hereby authorize the Chief Magistrate of Windhoek to proceed with this matter.” By any true interpretation of the sentence, only the Chief Magistrate of Windhoek can lawfully hold the extradition enquiry proceedings in terms of s 12 of the Extradition Act. In fact this is not what this Court envisaged in the passage I have quoted from *Koch* (HC) supra at p.8. The correct approach is what was followed by the 1st respondent in the s 10 (1)-authority set out above: the authority authorized “a magistrate”; then a covering note enclosing the authorization document was sent to the Chief Magistrate of the Windhoek Magistrate’s Court for him or her to take the necessary action. It is he or she *qua* head of the Windhoek Magistrate’s Court who will “then allocate the matter to one of the magistrates on his or her staff.” I have not an iota of doubt in my mind that this is the only correct approach according to the true

interpretation and the proper application of s 10 (1), read with s 12, of the Extradition Act as far as more-than-one-magistrate Magistrate's Courts are concerned.

[16] I must add as an adjunct that I have not accepted Ms Katjipuka-Sibolile's (the 1st, 2nd and 3rd respondents' counsel's) reliance on *S v Koch* 2006 (2) NR 513 (SC) as regards the point under consideration because that case concerned bail under s 12 (2) and not bail under s 11 (8), as Mr. Hodes correctly argued.

[17] For all the above reasons, I have come to the reasonable conclusion that the true interpretation and the proper application of ss (10) (1) and 11 (7) (b), read with ss 11 (8) and 12, of the Extradition Act cannot in any imaginable way support the contention that if it was Magistrate X who remanded the claimed person in custody or admitted him or her to bail, it is Magistrate X who the Minister must authorize by name in the authorization document to hold the enquiry proceedings in terms of s 12 of the Extradition Act, and it is only Magistrate X who can lawfully hold the enquiry proceedings – whether Magistrate X has died or has resigned or has been dismissed from the magistracy by the time the authorization document arrives at the Magistrate's Court in question. As I have said *ad nauseam*, the applicant's contention as to the interpretation of the relevant provisions of the Extradition Act can and will surely lead to real and glaring absurd results, which offends the well known rule of construction that when interpreting a statute there is a presumption against absurdity (*Du Toit v Office of the Prime Minister* 1996 NR 52). In the present case, the absurdity I have demonstrated above would *a fortiori* be so intractable that effect can not be given to the Extradition Act.

[18] Moreover, rules of construction of Acts of Parliament clearly state that Acts must be constructed according to the intention of the Legislature expressed in the Acts (*Engels v Allied Chemical Manufacturers (Pty) Ltd and another* 1992 NR 372); and, in my opinion, the “absurdity (in the applicant’s contention is) so glaring that it could never have been contemplated by the legislature.” (*Engels supra* at 380H) In other words, “such an unjust and absurd result could not have been countenanced by the Legislature.” (*S v Zemburuka* (2) 2003 NR 200 at 212J)

[19] It follows that I find that the applicant has not made out a case for the grant of the relief sought in prayer 1; and so in the exercise of my discretion, I refuse to grant the relief. Consequently, I pass to consider prayer 2.1, together with prayer 2B, as far as it is necessary in relation to it.

Relief sought in prayers 2.1 and 2B: Argument that the Chief: Lower Courts may not lawfully hold extradition enquiry proceedings (2.1) and the constitutionality or otherwise of s 11 (7) of the Magistrates Act (2B)

[20] In terms of s 12 of the Extradition Act, if the Minister is satisfied that the return of a claimed person can lawfully be made in accordance with the Extradition Act he or she forwards the request and the relevant documents to *a magistrate* and a s 10 (1)-authority for holding enquiry proceedings.

[21] The Extradition Act defines “magistrate” to include “an additional magistrate, divisional magistrate, or regional magistrate.” It is to the Magistrate Act that I must therefore now direct my attention. Section 1 of that Act defines “magistrate” as “a

magistrate appointed under this Act (i.e. the Magistrates Act).” Section 13 (1) of the Magistrates Act provides:

The Minister may, on the recommendation of the Commission but subject to subsection (2), appoint as many magistrates as there are posts on the permanent establishment of the magistracy.

[22] As the title of s 13 shows, that section deals only with the appointment of magistrates on the *permanent establishment*. The upshot of this statutory provision is that some persons may be lawfully appointed *in addition to the permanent establishment* as magistrates; and these are temporary magistrates, and their appointment is provided for in s 11 (7) of the Magistrates Act. Section 11 (7) provides:

- (a) Notwithstanding section 13 (1), the Commission may appoint temporarily any person who is qualified to be appointed as a magistrate under this Act to act, either generally or in a particular matter, as magistrate of a regional division, district division, district or subdistrict in addition to any magistrate of that regional division, district division, district or subdistrict.
- (b) A person appointed under paragraph (a) must be appointed for such period as the Commission may determine at the time of the appointment or for the duration of a particular matter.
- (c) Notwithstanding section 18 (1) and (2), the Minister, in consultation with the Commission and with the concurrence of the Minister responsible for finance, may determine the remuneration and allowances and the method of calculation of such remuneration and allowances, payable to a person appointed under paragraph (a) who is not subject to the laws governing the Public Service.

[23] As I understand it, the essence of the applicant’s argument in support of the relief sought in prayer 2.1 may be reduced to the following syllogism: only a magistrate can lawfully be issued with the Minister’s authority to hold enquiry proceedings in terms of s 12 of the Extradition Act; the Chief: Lower Courts in the Ministry of Justice is not a magistrate; ergo, the Chief: Lower Courts cannot lawfully be issued with the Minister’s authority to hold such enquiry proceedings.

[24] The crisp question I must therefore answer is this: is the Chief: Lower Courts a magistrate within the meaning of the applicable laws, particularly the Magistrates' Courts Act, 1944 (Act 32 of 1944), and the Magistrates Act?

[25] Prior to the coming into force of the Magistrates Act in June 2003, magistrates were appointed in terms of Act 32 of 1944, and the definition of "magistrate" in s 1 of Act 32 of 1944, which is a stipulative definition, is as follows: " 'Magistrate' does not include assistant magistrate." This definition has been repealed by deletion by the Magistrates Act in terms of s 31 thereof. Another reference to "magistrate" in s 1 of Act 32 of 1944 is this: "'judicial officer' means a magistrate, an additional magistrate or an assistant magistrate." This definition has been amended by s 31 of the Magistrates Act to read: "'judicial' officer means a magistrate appointed under the Magistrates Act, 2003." Thus, in terms of Act 32 of 1944 a judicial officer is now a magistrate appointed under the Magistrates Act; and as I have shown above, as the law now stands, a magistrate's position may be either within the permanent establishment (s 13 (1)), or additional to the permanent establishment (s 11 (7)), of the Magistrates Act. This latter situation is the subject of the challenge in 2B. I will proceed to deal with the relief sought in prayer 2B now before returning to deal with the relief sought in prayer 2.1.

[26] The practice of appointing persons as temporary magistrates additional to the permanent establishment is not, in my opinion, per se offensive of the Namibian Constitution; but a particular appointment under s 11 (7) may be inconsistent with the Namibian Constitution, and that would depend rather on the individual appointed.

[27] I find that what s 11 (7) of the Magistrates Act permits is not different from what the Namibian Constitution permits in respect of the appointment of acting Judges of the High Court under Article 82 (3) of the Constitution, which is:

At the request of the Judge-President, the President (the appointing authority of Judges) may appoint Acting Judges of the High Court from time to time to fill casual vacancies in the Court, to enable the Court to deal expeditiously with its work.

[28] I accept applicant's counsel's submission that the object of s 11 (7) appointment is to address a temporary exigency; but in my opinion that object ought to take into account the meaning of the phrase "permanent establishment" in s 13 (1) of the Magistrates Act and the requirements for appointment to the permanent establishment. As I understand it, a s 11 (7)-appointment is made where, there is the need for a magistrate to be appointed but there is no post on the "permanent establishment of the magistracy" within the meaning of s 13 (1) of the Magistrates Act, i.e. the pensionable staff complement determined by the Minister, in terms of s 12 of the Magistrates Act, in consultation with the Magistrates Commission and with the concurrence of the Minister responsible for Finance, and funded. In such a situation and as the exigency of the situation demands, a person may be appointed as a temporary magistrate additional to the permanent establishment in terms of s 11 (7) to "act either generally or in a particular matter."

[29] Thus, there may be so many reasons why a person qualified to be a magistrate in terms of the Magistrate's Act cannot be appointed to the permanent establishment; e.g. there may be no suitable vacant post on the permanent establishment; the person's age may be higher than the retirement age stipulated in s 20 of the Magistrates Act; or the person may not be a Namibian citizen or a permanent resident of Namibia.

[30] As I said previously, a s 11 (7)-appointment of a person temporarily to act as a magistrate under the Magistrates Act is by all intents and purposes not different from an Article 82 (3)-appointment of acting Judges of the High Court or, indeed, Article 82 (2)-appointment of acting Judges of the Supreme Court. In this regard, I take judicial notice of the fact that at least one person has acted *continually* as acting Judge of the Supreme Court on one-year terms since 1993; and some other persons have acted *continually* as acting Judges of the High Court on one-year terms for between five to eight years. In terms of s 11 (7) of the Magistrates Act, too, a person appointed temporarily as a temporary magistrate acts as a magistrate generally or in a particular matter.

[31] I understand a temporary appointment to mean the appointment must be for a period certain, because it is not permanent; that is to say it is not a pensionable (or ‘retireable’) appointment within the meaning of s 13 (1), read with s 20, of the Magistrates Act. In my opinion, the object of such temporary appointments is to enable the magistracy “to deal expeditiously with its work.” In this regard, I take judicial notice of the fact that the magistracy is plagued unendingly by a very long list of pending cases and the magistrates on the permanent establishment are humanly unable to cope with the problem – try as they may – hence the need to employ qualified persons as temporary magistrates additional to the permanent establishment.

[32] I have perused the authorities referred to me by applicant’s counsel dealing with the independence of the judiciary, and I accept the principles enunciated by the courts. But we must not lose sight of the fact that, as I have demonstrated above, the Namibian Constitution permits the appointment of acting, non-pensionable Judges both in the High Court and in the Supreme Court additional to the permanent

establishment of the (upper) judiciary. If that is the constitutional reality and practice in Namibia, I fail to see how and why the appointment of temporary, non-pensionable magistrates additional to the permanent establishment of the (lower) judiciary, i.e. the magistracy, can be inconsistent with the Namibian Constitution.

[33] The fact that permanent appointments are made by the Minister on the recommendation of the Magistrates Commission in terms of s 13 of the Magistrates Act but temporary appointments are made by the Magistrates Commission in terms of s 11 (7) cannot, in my opinion, make a s 11 (7)-appointment inconsistent with judicial independence. The making of a temporary appointment, as I have said, is determined by the exigency of the situation, requiring “urgent decision-making.” (*Van Rooyen and others v The State and others* 2002 (5) SA 246 (CC) at 328E) Regard should also be had to the fact that there are by far more magistrates than there are High Court Judges in Namibia, and also to the fact that while all High Court Judges are at the seat of the High Court, magistrates are scattered throughout the country in all 32 magisterial districts, not to count subdistricts, and regional divisions. Moreover, a temporary appointment is for determinate period, which means that the temporary magistrate has security of tenure during that period, for which the appointment is made, and he or she does not hold office at the discretion of the Commission or, indeed, the Minister (*Van Rooyen supra*).

[34] For all the above reasons, I hold that s 11 (7) of the Magistrates Act is consistent with the Namibian Constitution, and valid.

[35] However, that is not all. As I said previously, the person appointed to act as a temporary magistrate may, in the particular circumstances, render the particular

appointment inconsistent with the independence of the judiciary which is one of the touchstones of Namibia's constitutionalism, even if the appointment is made under s 11 (7) of the Magistrates Act, which as I have held, is consistent with the Namibian Constitution. In this regard, the applicant takes issue with the appointment of Chief: Lower Courts as a temporary magistrate. One of the primary arguments on 2.1 and 2B is that while magistrates, in terms of the Magistrates Act, occupy posts on an establishment that is independent from, and that exists, outside the establishment of the Ministry of Justice, the Chief: Lower Courts remains the Chief of Lower Courts *in the Ministry of Justice*. For this reason, so the argument goes, the Chief: Lower Courts is a public servant and therefore his appointment to act as a temporary magistrate from 1 August 2007 to 31 August 2008 violates the principle of separation of powers and independence of the judiciary. I accept that separation of powers and independence of the judiciary are some of the key constitutional principles confirmed by the Namibian Constitution and upon which our constitutional milieu is anchored.

[36] The 1st respondent responded contrariwise. In an earlier opinion given to the Magistrates Commission – upon the Commission's request – the 1st respondent had stated that the Chief: Lower Courts did not fall under the Magistrates Act but under the Public Service Act, 1995 (Act No. 13 of 1995) (the Public Service Act); thus, making the holder of the post a public servant. However, in the 1st respondent's answering affidavit in these proceedings, the 1st respondent did an about-turn over the position of Chief: Lower Courts. The 1st respondent now states that the Chief: Lower Courts is not a public servant but a magistrate on the permanent establishment of the magistracy.

[37] According to s 1 of the Magistrates Act,

Chief: Lower Courts means the Chief of Lower Courts in the Ministry of Justice; ...

[38] As I said in *Japhta Jacobs v The State* Case No.: 198/2007 (Unreported), it is trite that in interpreting statute, recourse should first be had to the golden rule of construction. In *Paxton v Namibia Rand Desert Trails (Pty) Ltd* 1996 NR 109 at 111A-C, and *Sheehama v Inspector-General of Namibia Police* 2006 (1) NR 106 at 114G-I, this Court relied on the restatement of the golden rule by Joubert, JA in *Adampol (Pty) Ltd v Administrator, Transvaal* 1989 (3) SA 800 (A) at 804B-C in the following passage:

The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent. See *Venter v Rex* 1907 TS 910 at 913-14, *Johannesburg Municipality v Cohen's Trustees* 1909 TS 811 at 813-14, *Senker v The Master and Another* 1936 AD 136 at 142; *Ebrahim v Minister of The Interior* 1977 (1) SA 665 (A) at 678A-G.

In *Tinkham v Perry* [1951] 1 All ER 249 at 250E, which Hannah, J cited with approval in *Engels v Allied Chemical Manufacturers (Pty) Ltd and another* 1992 NR 372 at 380F-G, Evershed, MR said:

Plainly, words should not be added by implication into the language of a statute unless it is necessary to do so to give the paragraph sense and meaning in its context.

[39] There is no need for this Court to add any words by implication to the provisions of s 1 of the Magistrates Act, which have defined “Chief: Lower Courts”. The words are clear and unambiguous. Accordingly, in my respectful view, this Court must give effect to the ordinary, literal and grammatical meaning of the clear

and unambiguous words “in the Ministry of Justice” in that section. In *Borcherds v CW Peace & J Sheward t/a Lubrite Distributors* (1993) 13 ILJ 1262 (LAC) at 1269C-D, which this Court also relied on in *Paxon* supra at 111H, McCall, J said:

It must not be lost sight of, however, that the purpose of interpretation is to give effect to the intention of the legislature, and in ascertaining that intention, regard is to be had both to the language of the enactment and to the context.

[40] Having relied on these trite rules of construction of statutes as developed and restated by the Courts, I have come to the only reasonable and inescapable conclusion that “Chief of Lower Courts in the Ministry of Justice” means the holder of the post is “a member of” the Ministry of Justice (see *Concise Oxford Dictionary*, 10th ed.) The “Organization and Establishment of the Ministry of Justice” attached to the 1st respondent’s answering affidavit, showing that the Chief: Lower Courts is not a part of the organization and establishment of the Ministry of Justice, and which Ms Katjipuka-Sibolile relied on cannot take her submission any further. The document, in my opinion, is merely an attempt to add by implication words into the plain, grammatical and literal meaning of the words “Chief of Lower Courts *in* the Ministry of Justice”, which attempt offends the golden rule of construction.

[41] Ms Katjipuka-Sibolile sought to rely also on “Regulations regarding Magistrates” made in terms of s 27 of the Magistrates Act (GN No. 130 of 27 June 2003) to support her argument that the Chief: Lower Courts is in the magistracy. Regulation 5 provides:

“The remuneration payable to a magistrate in terms of s 18 of the Act (Magistrates Act) is as set out in Schedule 1 opposite his or her grade.”

And “Chief: Lower Courts” appears in Schedule 1 to the Regulations. The conclusion I have made above in respect of the “Organization and Establishment of the Ministry of Justice” applies with equal force to reg. 5, apart from the added point that since reg. 5 is a delegated legislation, it cannot add by implication words into the Act, which would have the effect of the delegated legislation amending the principal legislation; an approach, which is unallowable in statute law.

[42] I am fortified in my view by the following. First, in his answering affidavit, the 2nd respondent concedes that the holder of the post of Chief of Lower Courts was appointed to act as a temporary magistrate for the period 1st August 2007–31 August 2008 in terms of s 11 (7) of the Magistrates Act. If the post is, indeed, within the permanent establishment of the magistracy, it is inexplicable that the holder of the post was appointed as a temporary magistrate, additional to the permanent establishment, if regard is had to the transitional provisions in s 29 of the Magistrates Act. That was also the rhetorical question that Mr Hodes asked in his submission. Section 29 provides:

- (1) All posts created for magistrates on the permanent establishment of the Ministry of Justice and which existed immediately before the date of commencement of section 12 are, as from the said date, deemed to be posts created in terms of that section for magistrates on the permanent establishment of the magistracy.
- (2) Any person who immediately before the date of commencement of section 13 held the office of magistrate is, as from the said date, deemed to have been duly appointed as a magistrate under that section, and the provisions of this Act apply to such person.

[43] This unexplained situation on its own, in my opinion, buries any argument by Ms Katjipuka-Sibolile that the Chief: Lower Courts is not a public servant within the meaning of the Public Service Act but a magistrate in terms of the Magistrates Act. Be that as it may, counsel's response to this is that "as a matter of law these temporary appointments were not necessary." But the appointments were made by the Magistrates Commission, which must know.

[44] As to the phrase "in the Ministry of Justice" contained in the definition of Chief: Lower Courts; I have found above that it can only mean that in terms of the Act, the Chief: Lower Courts is a member of the Public Service, i.e. a public servant. However, Ms Katjipuka-Sibolile submits that these "words were inserted by mistake by the draftsmen (i.e. the legislative drafters)," and that the intention of the Legislature was that the Chief: Lower Courts is not a public servant, subject to the Public Service Act. The stupendous difficulty, which faces any argument that claims better knowledge of what the Legislature intended than what the Legislature actually had in mind when it expressed itself clearly as it did in the Magistrates Act, is to put forward, without any justification, the unexpressed intention of the Legislature. (See *Poswa v Member of the Executive Council for Economic Affairs, Environment and Tourism, Eastern Cape* 2001 (3) SA 582 (SCA).) By her submission, counsel shot herself in the foot and has, probably unwittingly, vindicated my conclusion that the proper construction of the words "in the Ministry of Justice" means the Chief: Lower Courts is a public servant and a staff member of the Ministry of Justice within the meaning of the Public Service Act. In any case, it need hardly be said that legislative drafters who are a part of the bureaucratic Executive do not make law in Namibia.

[45] I have discussed *in extenso* the golden rule of construction above. In my view, the words “in the Ministry of Justice” are clear and unambiguous; and going by the golden rule of construction, they must, therefore, be given their ordinary, literal and grammatical meaning, as I have done above. I have not one iota of doubt in my mind that the literal construction of the phrase does not fall within one of those exceptional cases permitting this Court to depart from such literal construction; for it does not lead to a glaring or manifest absurdity, inconsistency, or a result contrary to the intention of the Legislature. “It is a well-known principle,” Cockburn, J said in *The Queen v Bishop of Oxford* (1879) 4 QBD 245 at 261, “that a statute ought to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void or insignificant.” (*Bishop of Oxford* is cited with approval in *Attorney-General, Transvaal v Additional Magistrate for Johannesburg* 1924 AD 421 at 436; *S v Weinberg* 1979 (3) SA 89 (A) at 98E; and *Watchenuka and another v Minister of Home Affairs* 2003 (1) SA 619 (C) at 625B.)

[46] Thus, in construing the phrase “in the Ministry of Justice” in the way I have done, I have taken it into account that no word in the phrase is superfluous, void or insignificant.

[47] It follows that, in my judgment, the Chief: Lower Courts is a member of the public service within the meaning of the Public Service Act, and so the Chief: Lower Courts cannot at the same time be a part of the magistracy without offending the Namibian Constitution. I have come to this irrefragable conclusion based on Namibia’s constitutional ambience. In this regard, it must be remembered that the concept of independence of the judiciary stands on two inseparable pillars, namely, individual independence and institutional independence. Individual independence

means the complete liberty of individual judges and magistrates to hear and decide the cases that come before them. (*Provincial Court Judges Assn. (Manitoba) v Manitoba (Minister of Justice)*) (1977) 46 (CRR 2nd) 1 (SCC), approving *The Queen in Right of Canada v Beauregard* (1986) 26 CRR 59, [1986] 2 SCR); *Van Rooyen supra*)). This facet of judicial independence has found expression in Article 78 (3) of the Namibian Constitution. Institutional independence of the judiciary, on the other hand, reflects a deeper commitment to the separation of powers between and among the legislative, executive and judicial organs of State (*Provincial Court Judges Assn. supra* at 47; *Mostert and another v The Magistrates Commission and another* 2005 NR 491 (HC)). The doctrine of separation of powers is also a part of Namibia's constitutional make-up, as I have said above; and in *Mostert* (HC) *supra* at 501H, this Court observed tersely that "institutional independence of the judiciary is not subject to any limitation."

[48] In sum, I find that the Chief: Lower Courts is a staff member of the Ministry of Justice, and the situation violates institutional judicial independence which inheres in the principle of separation of powers, and therefore it is unconstitutional.

[49] Any lingering doubt as to the fact that the Chief: Lower Courts is not a magistrate within the meaning of the Magistrates Act, as was held by this Court in *Mostert* (HC) *supra*, must now be put to rest, if regard is also had to the above analyses and conclusions and the reasons therefor.

[50] For all the above reasons, I have come to the only reasonable conclusion that the applicant has made a case for the grant of the declaration sought in 2.1, and so I exercise my discretion in favour of granting the relief sought. Consequently, I need

not bother myself with the relief sought in 2.2. I therefore, pass on to deal with the relief sought in prayer 2A.

The relief sought in prayer 2A: Argument that the Magistrates Commission's decision to appoint Mr Petrus Unengu, Chief: Lower Courts to hold extradition enquiry proceedings in respect of the applicant is *ultra vires*

[51] If the determination I have made in respect of the relief sought in prayer 2.1 is extrapolated to the relief sought in prayer 2A, the following result emerges as a matter of course and inexorably: any individual *qua* Chief: Lower Courts cannot lawfully hold enquiry proceedings in terms of the Extradition Act. It follows that Mr. Petrus Unengu *qua* Chief: Lower Courts cannot lawfully hold extradition enquiry proceedings under the Extradition Act in relation to the applicant. The reason is that the Chief: Lower Courts is a public servant and not a magistrate who may be authorized to hold extradition enquiry proceedings under the Extradition Act since the proceedings, as I have said, are judicial proceedings. (See *United States of America v Ferras* 268 D.L.R. (4th), 1.) For this reason, I respectfully accept Mr Hodes's submission on the point.

[52] Besides, Mr Hodes submitted that the Magistrates Commission has no power to determine which specific person may be authorized to conduct enquiry proceedings in terms of s 12 of the Extradition Act. Ms Katjipuka-Sibolile argued in the opposite direction thus: the Magistrates Commission has the power to appoint any magistrate to deal with a particular matter; the Extradition Act provides that enquiry proceedings must be held by a magistrate; ergo, the Commission has the power to assign a

magistrate to hold such enquiry proceedings because such proceedings are “a particular matter” within the meaning of s 11 (7) of the Magistrates Act.

[53] This is seemingly an attractive proposition, but with the greatest deference, counsel’s interpretation of s 11 (7) is parochial as far as it relates to the instant case. In my view, in the present case, the interpretation and application of s 11 (7) should unavoidably take into account contextually ss 10 (1) and (12) of the Extradition Act. While under s 11 (7) of the Magistrates Act, the Magistrates Commission may appoint temporarily any qualified person to act as a magistrate, “either generally or in a particular matter,” it is only the Minister (1st respondent) who has the power, as I have demonstrated previously, to issue a s 10 (1)-authority required to hold enquiry proceedings under the Extradition Act.

[54] In my view, s 11 (6), which Ms Katjipuka-Sibolile relied on, too, comes into play when, for instance, Magistrate M is seized with holding extradition enquiry proceedings but he or she is unable to continue because of his or her absence or incapacity, and therefore it becomes necessary to take quick action to enable the proceedings to continue without undue delay. I also fail to see how s 3 (b) and (d) of the Magistrates Act are relevant to the point under consideration. I respectfully accept Mr. Hodes’s submission that s 11 (6) and s 3 (b) and (d) cannot assist the respondents.

[55] As I have held above, if the authorization document issued by the Minister is to go to a magistrate’s court which usually has one magistrate, the authorization will be directed to “the Magistrate” of that court, as was done in the *Koch* case (HC) supra. In *Koch* the authorization document was directed to the magistrate of Tsumeb. There is no evidence that the Minister directed the authorization document to the

Magistrates Commission for the Commission to decide which magistrate should deal with the matter in Tsumeb; neither, in my opinion, would it have been lawful if that had been done. And, as I have said previously, if the magistrate's court in question has more than one magistrate, the Minister must issue the s 10 (1)-authority to "a magistrate", and send the authorization document, under cover of a covering note, to the head of that Magistrate's Court, who would then "allocate the matter to one of the magistrates on his or her staff."

[56] For all the foregoing reasons, I hold that the decision of the Magistrates Commission dated 25 April 2007 appointing Mr. Petrus Unengu, Chief: Lower Courts, to hold enquiry proceedings in respect of the applicant cannot be allowed to stand: the Commission acted *ultra vires* in terms of the Magistrates Act. The result is that that decision falls to be reviewed and set aside; accordingly, the relief in prayer 2A is granted.

[57] I have already determined the constitutionality, and therefore validity, of s 11 (7) of the Magistrates Act (prayer 2B); there is therefore no point in rehashing the discussion and the conclusions thereanent in relation to 2A, too.

Relief sought in prayer 3: Constitutionality or otherwise of s 21 of the Extradition Act

[58] I now proceed to consider the relief sought in 3. The essence of the applicant's constitutional challenge is as follows. According to s 21 of the Extradition Act, a person who has been committed to prison in terms of either s 12 (5) or s 15 (2) of the Extradition Act to await the Minister's decision under s 16 of that Act to return such claimed person to the requesting State is not entitled to bail. It is the applicant's

contention that s 21 is unconstitutional because it infringes Articles 7, 11 (1), and 10 (1) of the Namibian Constitution. In support of this submission, the applicant's counsel, Mr Chaskalson, referred to me a bevy of authorities from Namibia and other jurisdictions, as well as the International Covenant on Civil and Political Rights (ICCPR), which, like the domestic instrument, prohibits arbitrary arrest or detention.

[59] I have considered the authorities, and, in my opinion, some of them are persuasive, if not binding, while some of them are binding. The primary counter argument by Ms Katjipuka-Sibolile is that the constitutional challenge is premature and not so it is not ripe for determination. Of course, counsel goes on to argue on the merits that, in any case, s 21 is not unconstitutional, and refers authorities to me in support of both responses.

[60] Mr Chaskalson does not agree that the constitutional challenge to s 21 of the Extradition Act is premature and that it is not ripe for determination. Counsel relies for support also on Article 25 (2) of the Constitution, which deals with the enforcement of fundamental rights and freedoms, and in his written submission, he underlines the word “threatened”; for emphasis, I suppose. I think the word “aggrieved” must also be underlined because it is also fundamental to the interpretation and application of Article 25 (2) of the Namibian Constitution since the word “aggrieved” connotes the question of *locus standi*. Accordingly, it must necessarily be read intertextually with the word “threatened” (and, indeed, “infringed”). Article 25 (2), in a material part, provides:

Aggrieved persons who claim that a fundamental right or freedom guaranteed by this Constitution has been *infringed* or *threatened* shall be entitled to approach a competent Court to enforce or protect such right or freedom. (My emphasis)

[61] In my view, in every application where an applicant relies on Article 25 (2) of the Constitution, the threshold he or she must cross in order to persuade a competent Court that he or she is entitled to approach the Court for redress is that he or she must show that he or she is an “aggrieved” person and that a human right guaranteed to him or her by the Constitution has *already* been violated (“infringed”) or *is likely* to be violated or it is *immediately in danger* of being violated (“threatened”). (See *Cabinet of the Transitional Government of SWA v Eins* 1988 (3) SA 369 (A).) According to the *Oxford Advanced Learners Dictionary*, 9th ed., the meaning of “threatened” is “to seem likely to happen”. Thus, the likelihood that the right may be violated must be real, not open to doubt, in the sense that the violation may or may not occur; i.e. the danger must also be immediate not anticipated in advance, not knowing whether it may or may not occur. (*Eins supra*)

[62] Thus, the question that immediately arises is whether when the applicant launched the present application, the applicant’s right to personal liberty guaranteed to him by Article 7 was threatened; that is, likely to be violated or in immediate danger of being violated. It must be remembered that Article 7 of the Namibian Constitution does not say that a person cannot be deprived of his liberty: on the contrary, under this Article a person can be deprived lawfully of his or her personal liberty in terms of the Constitution, so long as the deprivation is done “according to procedures established by law.” In short, the right under Article 7 is derogable: it is not absolute. In this regard, I find that there is not a phantom of evidence before me on which to decide that when the time comes, if it comes, for the applicant to be deprived of his personal liberty there is the real likelihood that it would not be done in accordance with “procedures established by law.” For this reason, in my opinion the applicant’s reliance on Article 7 of the Constitution to challenge s 21 of the Extradition Act at this

stage is, accordingly, premature: the applicant was admitted to bail in October 2006 and remains free on bail, enjoying his right to liberty, as we speak.

[63] The fact that the right to liberty “is one of the most important fundamental rights of an individual” (*Amakali v Minister of Prisons and Correctional Services* 2000 NR 221 at 223J) cannot detract from my view that this human right is not absolute; it is derogable. Whether the applicant may be deprived of his right to liberty lies in the future; what is more, whether the deprivation will be in accordance with procedures established by law also lies in the future. What the applicant is asking me to do is that I must look into the future and decide that so long as s 21 of the Extradition Act remains on Namibia’s statute books, it is likely that the applicant’s right to liberty *under the Constitution* will indubitably be violated. With respect, I cannot humanly and judicially do that. I must add that in *Amakali* supra the applicant had been detained by executive action, and so he had applied for *interdictum de libero homine exhibendo*.

[64] By a parity of reasoning, the applicant’s right to freedom from arbitrary arrest or detention is also derogable: it is not absolute. Article 11 (1) of the Constitution, too, does not say no person shall be subjected to arrest or detention. What Article 11 (1) of the Namibian Constitution, Article 9 (1) of the ICCPR and Article 6 of the African Charter on Human and Peoples’ Rights (the African Charter) outlaw is “*arbitrary*” arrest or detention and not arrest or detention per se and simpliciter. To arrest or detain an individual arbitrarily means the arrest or detention has been carried out without lawful excuse. An arrest or detention can be lawful within the meaning of the derogation under the Namibian Constitution and the aforementioned international instruments, if the arrest or detention is carried out with “due process of law”, that is

to say, in accordance with the law (Prof. Wade, *Administrative Law*, 5th ed: p 22). As Muller, AJ (as he then was) correctly stated in *Djama v Government of the Republic of Namibia and others* 1993 (1) SA 387 (NmH) at 394H, “It will be arbitrary to detain a person if such detention is not authorized by law.” This is also the case under Article 5 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which has been interpreted and applied by some of the authorities referred to me by Mr. Chaskalson, e.g. the *Case of Nasrulioyev v Russia* (Application No. 665/06), that the right to freedom from arbitrary arrest or detention is not absolute. In any case, *Nasrulioyev v Russia* is not relevant here inasmuch as what the petitioner complained about was that he had not been able to obtain effective domestic judicial review of his continuing detention.

[65] Like the argument based on Article 7, the argument based on Article 11 (1), too, is without merit, because under this head, too, what the applicant is inviting this Court to do is to speculate that if the time comes for him to be committed to prison, it is likely that the detention would be done arbitrarily; but not a scintilla of evidence is before this Court to support such contention.

[66] With respect, I do not find *Attorney-General’s Reference: In re The State v Marapo* [2000] 2 BLR 26 of real assistance on the point under consideration. In that case the Court of Appeal of Botswana was interpreting s 5 (3) (b) of the Botswana Constitution, which in a way constitutionalizes an accused’s right to bail, contextually with s 142 (1) (i) of the Penal Code, which provides that a person who is *charged* with the offence of rape shall not be entitled to be granted bail. In that case the respondent, Marapo, had been arrested and charged with rape on 27 September 2000, and when he

brought the application on 9 February 2001 he was in custody awaiting trial. *In casu*, as I have said *ad nauseam*, the applicant remains free on bail.

[67] *Ex parte Graham: In re United States of America v Graham* 1987 (1) 368, too, is not relevant here inasmuch as that case concerns mainly the Court holding that under South African Extradition Act 67 of 1962 it had inherent power to grant bail to a person committed to prison pending his or her surrender to the requesting State. By the same token, *R v Spilsbury* [1898] 2 QB 615, too, is of no assistance on the point under consideration. *Attorney-General v Gilliland* [1985] IR 643 must be counted together with *Graham* and *Spilsbury*. I also do not see how *Giancarlo Parretti v United States of America* 112 F. 3rd 1363 (9th Circuit 1997) can take the applicant's case any further. In that case the Court of Appeals held that detention of the petitioner-appellant without bail violated due process in terms of the United States Constitution. As I have said more than once above, in terms of the Namibian Constitution an individual can be arrested or detained so long as such arrest or detention is not arbitrary, and I have explained above what I understand the qualifying word "arbitrary" to mean. As we speak, the applicant is not under detention, let alone arbitrary detention.

[68] I have said above, and I accept Mr. Chaskalson's submission, that the notion of separation of powers is firmly embedded in Namibia's constitutionalism. I also accept that the Courts are the ultimate protectors of individual rights. But I do not find that at this stage the doctrine of separation of powers *in respect of the applicant* will indubitably be breached just because s 21 exists on Namibia's statute books. The applicant was arrested by the Executive, he was admitted to bail by the lower court in terms of the law – that is, in accordance with the rule of law – and he remains free on

bail; and the Legislature or the Executive has not interfered with the lower court's decision – taken in terms of the applicable law – to admit the applicant to bail. It would be highly presumptuous of me to decide that the applicant will be committed to prison in breach of the procedures established by law or that such detention will be arbitrary. If I took any such decision, I will not be acting judicially, if regard is had to the constitutional provisions discussed above.

[69] In terms of Namibia's constitutional jurisprudence as regards Article 7 of the Constitution, an individual may be deprived of his or her right to liberty, including his or her freedom of movement, which is relevant in the present matter, but it must be done according to procedures established by law, e.g. the Criminal Procedure Act, 1977 (Act No. 51 of 1977), the Extradition Act, 1996 (Act No. 11 of 1996), and the Immigration Control Act, 1993 (Act No. 7 of 1993). Such a law, for example, the Criminal Procedure Act or the Extradition Act or the Immigration Control A, decides on what grounds and in what manner the deprivation under the particular Act may take place. On that score, I accept Mr Chaskalson's submission that Articles 7 and 11 (1) rights have both substantive and procedural elements in their contents. (See *Zealand v Minister for Justice and Constitutional Development* 2008 (6) BCLR 601 (CC) at 612 E-G, where Langa, CJ cited with approval the principles in a passage by O'Regan, J in *S v Coetzee* 1997 (3) SA 527 (CC) at 591 G-H, and *De Lange v Smuts NO and others* 1998 (3) SA 785 (CC) at 795 C-D, where Ackermann, J also approved the passage in *Coetzee*.)

[70] In any case, in my opinion, it is even pleonastic to talk about substantive and procedural elements of these rights, e.g. the right to freedom of movement. Even under Article 11 (1) in which the word "procedures" does not appear under the right

to freedom from arbitrary arrest or detention, an aggrieved person is entitled to know on what ground – and the ground must be acceptable – he or she is being arrested or detained, and the arrest or detention must be carried out in a manner that is procedurally fair.

[71] But all these considerations about Article 7 and Article 11 (1) rights having substantive and procedural elements do not detract from my conclusion that there is no evidence before me tending to show that at the time the applicant launched the present application, there was the real likelihood that those rights were going to be infringed or that he stood immediately in danger of having those rights infringed just because s 21 of the Extradition Act exists on the statute books. How, if I may ask, am I able to decide at this stage that if a s 10 (1)-enquiring-magistrate holds extradition enquiry proceedings in respect of the applicant, he or she will commit the applicant to prison awaiting his surrender and there will be no acceptable reasons for the deprivation of the applicant's liberty or there will be no grounds for violating the applicant's right to freedom from arbitrary arrest and detention, and/or that the deprivation or violation will be done in a manner that is procedurally unfair? (*Zealand; Coetzee; and De Lange supra*)

[72] One must not lose sight of the fact that extradition enquiry proceedings under the Extradition Act are held by a competent court as judicial proceedings, as I have noted above, and decisions taken by such a court must be taken judicially; they are not an administrative inquiry. (*United States of America v Ferras* 2006 268 D.L.R. (4th), 1 at paras. 24-26) This is the stage, which Mr Chaskalson correctly referred to the as the judicial phase in the extradition process. As I have said, the magistrate who will be authorized to hold the proceedings may find that he or she is not satisfied after

hearing evidence tendered at such enquiry and may, therefore, not commit the applicant to prison to await the Minister's decision under s 16 of that Act to return the applicant to the requesting State.

[73] While accepting this apparent reality, Mr. Chaskalson still argued that there was a threat that the applicant would be committed without recourse to bail. With respect I cannot accept that argument. As matters stand, in my opinion, there is 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. As I have explained *ad nauseam*, under the Namibian Constitution, the rights under Article 7 and 11 (1) are derogable; and therefore a person can lawfully be deprived of his or her personal liberty so long as the deprivation is done "according to procedures established by law" and is based on acceptable grounds; and a person can lawfully be arrested or detained so long as the arrest or detention is not arbitrary.

[74] As I say, the applicant's prayer in this regard amounts to asking this Court to hold that when the time comes – if it comes – for him to be committed to prison it will be done arbitrarily. More important, there is not one grain of evidence before me that in terms of s 15 (1) of the Extradition Act, the applicant had at the time he brought the present application he had waived or would waive his right to any impending inquiry proceedings, which may result in the evocation of s 15 (1) of that Act.

[75] In this connection, I do not for a moment, with the greatest deference, find *Geuking v President of the Republic of South Africa and others* 2003 (3) SA 34 (CC) of any real assistance on the point under consideration. The action that the appellant in

Geuking sought to impugn was not only *threatened*; it was *certain* that the Director of Public Prosecutions was going to carry it out in terms of s 10 (2) of South Africa's Extradition Act, 1962 (Act 67 of 1962). In terms of s 10 (2) of South Africa's Act, the magistrate who holds an extradition enquiry is obliged to accept as conclusive proof that there is sufficient evidence to warrant a prosecution in the requesting State, a certificate to that effect issued by an appropriate authority in the requesting State. Thus, in *Geuking* it was *certain*, not just *likely*, as I say, that the certificate from the requesting State was going to be used in the extradition proceedings involving the appellant because, as Ms Katjipuka-Sibolile correctly submitted, the Director of Public Prosecutions in that case had indicated that he or she intended to use the certificate at the appellant's extradition hearing.

[76] For all the above reasons, I hold that the applicant has not shown that at the time that he brought the present application his rights guaranteed to him by the Constitution under Articles 7, 10 and 11 (1) and Article 9 (1) of the ICCPR and Article 6 of the African Charter were *likely* to be contravened *in respect of him* or that he stood *immediately in danger* of having those rights violated just because s 21 of the Extradition Act exists on the statute books. In this regard it has been said, and I respectfully subscribe to it, that "in accordance with the general rules governing the necessity of determination of constitutional questions, they will not be determined abstractly, or in a hypothetical case, or *anticipated in advance* of the necessity for determination thereof ..." (*Corpus Juris Secundum* vol. 16 (1984 ed.; cited with approval by Rabie, ACJ in *Eins* supra at 395G)

[77] In the light of the factual averments in the applicant's affidavits, read with the other parties' papers filled of record, considered against the backdrop of the

applicable constitutional provisions, provisions of the Extradition Act, and the relevant case law thereanent, I am not at all persuaded that the applicant's constitutional attack on s 21 of the Extradition Act was justiciable at his instance at the time he brought the present application. I find nothing in the plethora of cases referred to me by Mr. Chaskalson, some of which I have discussed above, which would persuade me to hold that the applicant is an aggrieved person whose right to liberty and right to freedom from arbitrary arrest or detention were at the time he brought the present application threatened or immediately in danger of being violated, just because of the existence of s 21 of the Extradition Act. By a parity of reasoning, I do not find anything in the authorities to convince me to hold that at the time the applicant brought the present application his right under Article 10 was infringed or threatened for the same reason.

[78] For the foregoing reasons, I respectfully accept Ms Katjipuka-Sibolile's submission that any decision I take now on the merits as respects the constitutional challenge to s 21 of the Extradition Act will be hypothetical and academic. I have taken into consideration the conclusions I have reached above in respect of the applicant's constitutional challenge together with the principle that a court may decline to exercise its discretion to grant a declaration if the court regards the question raised before it as hypothetical, abstract, or academic (*Shoba v Officer Commanding, Temporary Police Camp, Wagendrift Dam, and another* 1995 (4) SA 1 (A)). Having done so, I have come to the only reasonable conclusion that I must refuse to grant the declaration prayed for in prayer 3. I now proceed to deal with the relief sought in 4, which concerns costs.

Costs

[79] Mr Hodes asked for costs on the attorney and client scale and for one instructing counsel and three instructed counsel. The main ground on which Mr Hodes based his argument is that the 2nd and 3rd respondents made unacceptable assertions that the applicant has brought the present application merely to delay the proceedings, when, according to him, the applicant is merely asserting his rights under the Constitution. Ms Katjipuka-Sibolile, on the other hand, submitted that the Court should refuse to award costs because of the nature of the case.

[80] The basic rule with regard to costs is that all costs – unless expressly otherwise enacted – are in the discretion of the Judge, and the discretion must be exercised judicially (*Levben Products (Pvt) Ltd v Alexander Films (SA) (Pty) Ltd* 1957 (4) SA 225 (SR); *Kruger Bros & Wasserman v Ruskin* 1918 AD 63); that is, not arbitrarily. (*Merber v Merber* 1948 (1) SA 446 (A)) In short, an award of costs ought to be fair and just between the parties. (*Fripp v Gibbon & Co* 1913 AD 354) It has also been held that the *successful party* should be awarded his or her costs, and the rule ought not to be departed from without good grounds (*Letsitele Stores (Pty) Ltd v Roets* 1959 (4) SA 579). But the rule is subject to the above-mentioned overriding principle that the award of costs is in the discretion of the Judge (*Unimark Distributors (Pty) Ltd* 2003 (1) SA 204); it depends upon the circumstances of the particular case.

[81] The logical question that arises is therefore this: is a party “successful” if he or she recovers only a small portion of what he or she claimed? It has been stated that there must be substantial success before the party achieving such success will be regarded as “successful” for the purposes of an award of costs. (Cilliers, *ibid.*, p. 2-10; *Fleming v Johnson & Richardson* 1903 TS 319)

[82] I will now apply the principles set out above to the facts of this case. The applicant sought substantive relief in prayers 1, and/or 2.1, and/or prayer 2.2, and 2A, 2B, 3, and 4; bar prayer 5, which is for further and/or alternative relief. I have considered five prayers, viz. prayers 1, 2.1, 2A, 2B, and 3. The applicant was successful in only two, namely, 2.1 and 2A; if anything, it is rather the 1st, 2nd, and 3rd respondents who chalked greater success as their opposition to three of the five prayers was successful, namely, prayers 1, 2B, and 3. Therefore, the applicant's success is not substantial success on any pan of scale; the parties shared the honours almost equally. Besides, according to the Supreme Court an extradition enquiry is neither a criminal trial nor a civil matter; it is something *sui generis* (*Koch supra* (SC)), and according to the House of Lords, "extradition proceedings are criminal proceedings; of course criminal proceedings of a very special kind, *but criminal proceedings nonetheless*" (*R v Governor of Brixton Prison, ex p. Levin* [1997] 3 All ER 289 (HC) at 293j) (Emphasis added) One must not lose sight of the fact that in criminal proceedings orders for costs are not ordinarily made (*Van Rooyen supra*). In this regard, it must be signalized that the present application arose out of an ongoing extradition matter.

[83] I have taken into consideration my conclusion that the applicant's success is not substantial by any measure. I have also taken into account the observations of the Supreme Court in *Koch* and of the House of Lords in *Ex parte Levin* about the nature of extradition proceedings, and of the South African Constitutional Court on costs in criminal proceedings. Having taken these considerations into account, in the circumstances of this case, I think this is a fitting case in which it would be just and fair, and therefore appropriate, to make no order as to costs.

[84] In the result, I make the following orders:

- (1) It is declared that the 5th respondent is not the only magistrate that may be authorized in terms of s 12 of the Extradition Act by the 1st respondent to hold enquiry proceedings in terms of that Act in respect of the applicant.
- (2) It is declared that the Chief of Lower Courts in the Ministry of Justice must not be authorized in terms of s 10, read with s 12, of the Extradition Act to hold enquiry proceedings under that Act.
- (3) The decision of the Magistrates Commission dated 25 April 2007 to appoint Mr. Petrus Unengu, *in his capacity as* Chief: Lower Courts, to hold enquiry proceedings in terms of the Extradition Act in respect of the applicant is reviewed and set aside.
- (4) It is declared that s 11 (7) of the Magistrates Act is consistent with the Namibian Constitution, and therefore valid.
- (5) It is ordered that a determination of the constitutionality or otherwise of s 21 of the Extradition Act *in respect of the applicant* is premature and therefore the question is not ripe for determination.
- (6) There is no order as to costs.

Parker, J

ON BEHALF OF THE APPLICANT:

Adv. P Hodes, SC

Adv. M Chaskalson

Adv A Katz

Instructed by:

Metcalf Legal

Practitioners

ON BEHALF OF THE 1ST, 2ND, 3RD RESPONDENTS:

Ms U Katjipuka-Sibolile

Instructed by:

The Government Attorney

ON BEHALF OF THE, 4TH RESPONDENT:

No appearance

ON BEHALF OF THE, 5TH RESPONDENT:

No appearance