CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 235/19 and 243/19

In the matter between:

JASON SMIT	Applicant
and	
MINISTER OF JUSTICE AND CORRECTIONAL SERVICES	First Respondent
MINISTER OF HEALTH	Second Respondent
DIRECTOR OF PUBLIC PROSECUTIONS, WESTERN CAPE	Third Respondent
ADDITIONAL MAGISTRATE, SOMERSET WEST	Fourth Respondent
MAGISTRATE, PRETORIA	Fifth Respondent

Neutral citation:	*Smit v Minister of Justice and Correctional Services and Others* [2020] ZACC 29
Coram:	Mogoeng CJ, Jafta J, Khampepe J, Madlanga J, Majiedt J, Mathopo AJ, Mhlantla J, Theron J, Tshiqi J and Victor AJ
Judgments:	Tshiqi J (minority): [1] to [96] Madlanga J (majority): [97] to [155]
Heard on:	20 February 2020
Decided on:	18 December 2020

Summary: Drugs and Drugs Trafficking Act 140 of 1992 — constitutionality of section 63 and Schedules — section is unconstitutional and only the amendments are unconstitutional.

Section 63 assigns plenary legislative power to the minister — Breach of doctrine of separation of powers.

Extradition Act 67 of 1962 — Constitutionality of section 5(1)(a) — section is unconstitutional.

Breach of separation of powers — lack of Magistrate discretion — Section 12 of the Constitution — insufficient safeguards to protect the right not to be deprived of freedom arbitrarily.

ORDER

On appeal and for confirmation of the order of the High Court of South Africa, Western Cape Division, Cape Town:

1. The declaration of invalidity made by the High Court of South Africa, Western Cape Division, Cape Town is confirmed in the terms set out in paragraph 2.
2. Section 63 of the Drugs and Drug Trafficking Act 140 of 1992 is declared to be inconsistent with the Constitution and invalid to the extent that it purports to delegate plenary legislative power to amend Schedules 1 and 2 to the Drugs and Drug Trafficking Act to the Minister of Justice and Correctional Services.
3. The following purported amendments to Schedules 1 and 2 to the Drugs and Drug Trafficking Act are declared invalid:
    (i) GN R1765 of 1 November 1996, which amended Part III of Schedule 2;
    (ii) GN R344 of 13 March 1998, which amended Part I and II of Schedule 1;

(iii) GN R760 of 11 June 1999, which amended Part I, II and III of Schedule 2;

(iv) GN R521 of 15 June 2001, which amended Part I of Schedule 1 and Part I, II, and III of Schedule 2;

(v) GN R880 of 8 October 2010, which amended Part II of Schedule 1; and

(vi) GN R222 of 28 March 2014, which amended Part I, II, and III of Schedule 2.

4. The declarations of invalidity in paragraphs 1, 2 and 3 of the order take effect from the date of this order.

5. The order of invalidity is suspended for a period of 24 months to allow Parliament to cure the defect.

6. The application for leave to appeal directly to this Court is granted.

7. The appeal against the order of the High Court in terms of which it refused to declare all the Schedules to the Drugs and Drug Trafficking Act invalid, but only the amendments to Schedules 1 and 2 of the Drugs and Drug Trafficking Act, effected in terms of section 63, as invalid is dismissed.

8. The appeal against the order of the High Court dismissing the application to declare section 5(1)(a) of the Extradition Act 67 of 1962 to be inconsistent with the Constitution is upheld, and that order is set aside.

9. Section 5(1)(a) of the Extradition Act 67 of 1962 is declared to be inconsistent with the Constitution and invalid.

10. The declaration of invalidity in paragraph 9 takes effect from the date of this order.

11. Each party must pay its own costs.

JUDGMENT

TSHIQI J (Jafta J, Mhlantla J and Victor AJ concurring):

Introduction

[1] There are two applications in this matter, and they arise from the order of the High Court of South Africa, Western Cape Division, Cape Town, per Francis AJ. The first one is an application to confirm a declaration that section 63 of the Drugs and Drug Trafficking Act[1] (Drugs Act) and amendments made to Schedules 1 and 2 to the Drugs Act, are inconsistent with the Constitution. The second one is an application for leave to appeal directly to this Court against the order of the High Court, which consists of the following components. The first attack is against the finding that not all the Schedules to the Act but only the amendments to Schedules 1 and 2 to the Drugs Act effected in terms of section 63 are invalid. The second attack is aimed at the refusal by the High Court to declare the provisions of section 5(1)(a) of the Extradition Act[2] to be inconsistent with the Constitution. The applicant has also attacked the order of the High Court on a ground linked to both the Drugs Act and the Extradition Act. He argues that following this Court's judgment in *Prince*,[3] the offence for which he is charged in the United Kingdom (UK) is no longer an offence in South Africa in terms of the Drugs Act, and that the double criminality requirement envisaged in the Extradition Act has not been satisfied.

[1] 140 of 1992.

[2] 67 of 1962.

[3] *Minister of Justice and Constitutional Development v Prince (Clarke and Others Intervening); National Director of Public Prosecutions v Rubin; National Director of Public Prosecutions v Acton* [2018] ZACC 30; 2018 (6) SA 393 (CC); 2018 (10) BCLR 1220 (CC) *(Prince).*

Parties

[2] The applicant is Mr Jason Smit, an adult South African citizen and businessman currently residing in Somerset West, Western Cape. The first respondent is the Minister of Justice and Correctional Services (Minister). The second respondent is the Minister of Health. The third respondent is the Director of Public Prosecutions for the Western Cape. The fourth respondent, the Additional Magistrate, Somerset West, was the presiding officer in the extradition proceedings against the applicant. The fifth respondent, the Magistrate, Pretoria, received a notification from the Minister for the applicant's surrender to the UK and issued the warrant for the arrest of the applicant.

Background

[3] The application in the High Court flowed from a request, made in terms of section 4 of the Extradition Act, from the UK to the Minister. The request was for the arrest and subsequent extradition of the applicant. It alleged that the applicant had committed various criminal offences relating to the production, intent to supply, and possession of cannabis under the UK's Misuse of Drugs Act, 1971 and that the charges against him were still pending.

[4] The circumstances surrounding the request for the applicant's extradition are outlined in an affidavit in support of his extradition, which was attested to by Police Constable Steven John Wilde of the Cumbria Police Constabulary in the UK. Police Constable Wilde stated that a quantity of cannabis was found in the flat in which the applicant was residing, as well as two other residences that were leased out in his name in the UK. The applicant was arrested and taken to the police station for questioning. Subsequent to the arrest, the applicant was granted police bail and directed to return to Durranhill Custody Unit, Carlisle Police Station, on 15 May 2008. The applicant failed to comply with his bail conditions and a warrant for his arrest was issued by the Eden Magistrate's Court, Carlisle, Cumbria, England on 30 January 2009. The request for the applicant's extradition was also supported by an affidavit

from Ms Alison Claire Riley, a barrister and crown advocate with the Crown Prosecution Service of England and Wales.

[5] In or about May 2011, the Minister issued a notification in terms of section 5(1)(a) of the Extradition Act to the effect that a request for the surrender of the applicant had been received. A warrant for his arrest was duly issued, and he was arrested in Somerset West, near Cape Town. On the same day, the applicant appeared before the Additional Magistrate, Somerset West, where proceedings relating to the extradition inquiry were adjourned *sine die* (without setting a time to reconvene). He was released on bail, which has since been extended from time to time.

Litigation history

High Court

[6] On 5 August 2015, the applicant launched an application in the High Court, Western Cape Division, Cape Town, where he sought an order to the effect that section 63 of the Drugs Act and all the Schedules made in terms of section 63, and section 5(1)(a) of the Extradition Act, are inconsistent with the Constitution and invalid. The attack on section 63 of the Drugs Act was based on the premise that it delegates plenary legislative power which ought to be exercised by the Legislature to the Minister, who is part of the Executive arm of government, in breach of the doctrine of separation of powers.

[7] Regarding section 5(1)(a) of the Extradition Act, the applicant submitted that its jurisdictional factors were satisfied by the mere receipt of the notification by the Magistrate, consequently the latter was stripped of his discretion as a judicial officer to decide whether to issue a warrant or not. This, according to the applicant, means that the Magistrate is not required to exercise any discretion before issuing the warrant, but simply to rubber-stamp the notification from the Executive, thereby undermining judicial independence in breach of section 165(2) of the Constitution.

[8] Regarding the merits of the pending criminal trial in the UK, and apart from the constitutional attacks on the two pieces of legislation, the applicant denied that the substance found in his flat was cannabis and denied that the two other addresses where the cannabis was found were rented in his name with his knowledge. He further denied that he was warned to return to Durranhill Custody Unit, Carlisle Police Station on 15 May 2008.

[9] The Minister opposed the application. The third respondent, Director of Public Prosecutions for the Western Cape, filed a short affidavit in support of the submissions advanced by the Minister. The remaining respondents did not formally participate in the proceedings before the High Court, with the second and fourth respondents filing notices to abide.

[10] The first issue raised by the Minister, which was considered as a preliminary issue by the High Court, was whether the applicant had the legal standing to challenge the provisions of section 63 of the Drugs Act. The Minister contended that the applicant was not entitled to challenge the constitutional validity of all Schedules made in terms of section 63 of the Drugs Act. According to the Minister, the applicant's standing was confined to challenging the listing of cannabis in Part III of Schedule 2, as the applicant is not adversely affected by the listing of the other substances in the Schedules to the Drugs Act.

[11] The Minister also submitted that it was unnecessary to deal with the constitutional validity of section 5(1)(a), because even if the Court were to find that the section was unconstitutional and invalid, this would be of no assistance to the applicant, as the warrant was issued in terms of section 5(1)(b) and was, therefore, valid.

[12] Regarding legal standing, the High Court held that as the extradition proceedings and the possible threat to the applicant's freedom hinge on the content of a Schedule to the Drugs Act, read together with the prohibition contained in the

impugned statute, it was the Drugs Act and the Schedule that the applicant sought to impugn. This constituted the applicant's cause of action. The High Court also held that, because the applicant is not only challenging the cannabis prohibition, but also the Drugs Act and its Schedules, he had standing on the basis of the rule of law and the principle of legality.

[13] The High Court further held that the possible usurpation by the Executive of plenary legislative powers is a matter of public interest. It impacts on the broader concerns of accountability and responsiveness which are hallmarks of the doctrine of the separation of powers. In the High Court's view, the applicant had sufficient interest, also on this basis, in the subject matter of the dispute.

[14] Having found that the applicant had legal standing, the Court considered the merits of the application. Regarding the attack on the constitutionality of section 63 and the Schedules, the High Court held that section 63 constitutes an impermissible delegation of plenary legislative power to a member of the Executive. According to the High Court, when the Minister takes a decision to include or delete a substance in a Schedule to the Drugs Act, he is in fact amending plenary legislation.

[15] The High Court held further that in conferring this power to amend the Schedules, the Legislature has also given the Minister the power to create new criminal offences without the requisite public consultation process that is required when Parliament does so. The High Court concluded that section 63 is inconsistent with the Constitution and that only those amendments to the Schedules effected in terms of section 63 fall to be declared invalid. It held that, since cannabis was not included in the Schedules of the Drugs Act as a result of the exercise of the powers conferred on the Minister by section 63, the original Schedule proscribing cannabis cannot be impugned. The High Court accordingly declared section 63 and the Schedules amended in terms thereof inconsistent with the Constitution and invalid.

[16] With regard to the contention that it was not necessary to deal with the constitutional challenge to section 5(1)(a) of the Extradition Act, the Court held that it was not persuaded in this regard because the applicant had alleged that the warrant had been issued in terms of section 5(1)(a) of the Extradition Act. The Court also referred to *S v Jordan*,[4] where this Court held that it is incumbent on a High Court, when considering a constitutional challenge, to express its opinion on all constitutional challenges raised, even though the Court may decide to resolve the matter only on one ground.

[17] The High Court accepted the submission that the Magistrate is not required to exercise a discretion after receipt of the notification from the Minister. It held that the issuance of a warrant pursuant to section 5(1)(a) does not necessarily entail a substantive exercise of any discretion by the Magistrate. Rather, it simply depends on the establishment of an objective fact, namely the issue of a notification by the Minister. It held that there is no merit in the argument that the Magistrate must be satisfied, independently, that the person concerned is indeed liable to be surrendered to the requested state before issuing a warrant in terms of section 5(1)(a) of the Extradition Act.

[18] However, the Court held that section 5(1)(a) of the Extradition Act does not infringe on the constitutionally protected right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause. It reasoned that there are built in safeguards to ensure procedural fairness in the extradition enquiry, and that there was thus no limitation of rights as envisaged in section 36 of the Constitution. It also concluded that the warrant of arrest was validly issued under section 5(1)(a) and 5(1)(b) of the Extradition Act.

[4] *S v Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* [2002] ZACC 22; 2002 (6) SA 642 (CC); 2002 (11) BCLR 1117 (CC) at para 21.

[19] The High Court accordingly dismissed the application to declare section 5(1)(a) inconsistent with the Constitution. It granted an order declaring Section 63 of the Drugs Act and the following amendments made to the Schedules by the Minister in terms of section 63 to be inconsistent with the Constitution:

(a) GN R1765 of 1 November 1996, which amended Part III of Schedule 2;
(b) GN R344 of 13 March 1998, which amended Part I and II of Schedule 1;
(c) GN R760 of 11 June 1999, which amended Parts I, II and III of Schedule 2;
(d) GN R521 of 15 June 2001, which amended Part I of Schedule 1 and Parts I to III of Schedule 2;
(e) GN R880 of 8 October 2010, which amended Part II of Schedule 1; and
(f) GN R222 of 28 March 2014, which amended Part I, II and III of Schedule 2.

[20] Regarding costs, the High Court reasoned that, as both parties had enjoyed a measure of success, and because the applicant had raised important issues of law, especially in relation to the Drugs Act, the *Biowatch*[5] principle applied, even though the limited finding in favour of the applicant did not provide any succour to him. The Court therefore ordered that each party pays its own costs.

In this Court

Jurisdiction

[21] We have jurisdiction to entertain the application for confirmation of the order of invalidity by the High Court. In terms of section 172(2) of the Constitution, an order of constitutional invalidity has no force unless it has been confirmed by this Court. The High Court has declared section 63 of the Drugs Act inconsistent with the

[5] *Biowatch Trust v Registrar Genetic Resources* [2009] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC).

Constitution and this Court is required to determine whether or not to confirm the order of the High Court in this regard.

[22] Regarding the interpretation of section 5(1)(a) of the Extradition Act, this Court has jurisdiction to entertain the application for leave to appeal directly to it. The interpretation of the provision raises a constitutional issue,[6] as it has the potential to impact the rights enshrined in sections 12(1)(a) and 35 of the Constitution. This Court also has jurisdiction to deal with the application for leave to appeal directly to it on the refusal by the High Court to declare all the Schedules to the Drugs Act inconsistent with the Constitution. The impugned Schedules to the Drugs Act, have the effect of criminalising certain substances and plants listed therein. The fair trial rights of accused persons who have been charged with offences arising from the use of or dealing with substances listed in the Schedules would be impacted by an order concerning constitutional invalidity.

Application for leave for direct appeal

[23] It is in the interests of justice to entertain the application to appeal directly to this Court, as contemplated in section 167(6)(b) of the Constitution. The constitutional challenge to section 5(1)(a) of the Extradition Act, which is the subject of the appeal, and the content of the warrant issued by the Magistrate, are inextricably linked to the constitutional challenge to the Drugs Act, which is the subject of the confirmation application. They are so connected because section 5(1)(a) and (b) of the Extradition Act authorise the issue of a warrant if the person required to be

[6] See section 167(3)(b) of the Constitution which states:

> "(3) The Constitutional Court—
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> . . .
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> (b) may decide—
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> (i) constitutional matters; and
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> (ii) any other matter, if the Constitutional Court grants leave to appeal on the grounds that the matter raises an arguable point of law of general public importance which ought to be considered by that Court."

extradited is accused or convicted of an offence committed in the foreign state, and the issue of the warrant would be justified if the offence had been committed in South Africa (the double criminality requirement). In the event that this Court finds that cannabis related offences no longer exist in South Africa and that the double criminality requirement has not been satisfied, then the warrant would have to be set aside. A refusal to deal with the application for leave to appeal directly to this Court in matters that are so interlinked would lead to unnecessary duplication of legal resources.

[24] Furthermore, it is in the interests of justice that we entertain the application for direct leave to appeal to this Court against the refusal by the High Court to declare all the Schedules to the Drugs Act inconsistent with the Constitution, because this raises an arguable point of law of general public importance. The challenge, which is an arguable point of law of general public importance, centres around whether all the Schedules to the Drugs Act were tainted as a result of the amendments made to the Schedules in terms of section 63 and should thus be struck down, or whether only those amended by the Minister are invalid. Even if this Court concludes that not all the Schedules are tainted, but that only those amended in terms of section 63 are to be declared invalid, the application raises a matter of general public importance, because the Minister has already purportedly amended the Schedules six times under a potentially invalid provision in the statute. These amendments, if not set aside, will have the effect of retaining invalid Schedules to the Drugs Act. This may affect other people against whom warrants have been issued, and also other accused persons who have been charged with the offences arising from the inclusion of certain substances listed in the Schedules. This in turn would have the effect of infringing fair trial rights enshrined in section 35(3) of the Constitution.

Legal standing

[25] In this Court, the Minister persists with the argument raised in the High Court that the applicant did not have legal standing to challenge the provisions of section 63

of the Drugs Act. Legal standing in constitutional matters is determined in accordance with section 38 of the Constitution which provides:

> "Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. The persons who may approach a court are—
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> (a) anyone acting in their own interest;
>
> (b) anyone acting on behalf of another person who cannot act in their own name;
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> (c) anyone acting as a member of, or in the interest of, a group or class of persons;
>
> (d) anyone acting in the public interest; and
>
> (e) an association acting in the interest of its members."[7]

[26] In *Giant Concerts*,[8] although this Court cautioned that courts should not be required to deal with abstract or hypothetical issues, and should devote their scarce resources to issues that are properly before them, it held that own-interest standing does not require that a litigant be the person whose constitutional right has been infringed or threatened. It stated: "[w]hat the section requires is that the person concerned should make the challenge in his or her own interest."[9]

[27] This Court then said—

> "one must add that the interests of justice under the Constitution may require courts to be hesitant to dispose of cases on standing alone where broader concerns of accountability and responsiveness may require investigation and determination of the merits. By corollary, there may be cases where the interests of justice or the public interest might compel a court to scrutinise action even if the applicant's standing is

[7] See *Ferreira v Levin N.O.; Vryenhoek v Powell N.O.* [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) at para 36-9.

[8] *Giant Concerts CC v Rinaldo Investments (Pty) Ltd* [2012] ZACC 28; 2012 JDR 2298 (CC); 2013 (3) BCLR 251 (CC).

[9] Id at para 37.

> questionable. When the public interest cries out for relief, an applicant should not fail merely for acting in his or her own interest."[10]

[28] The applicant has satisfied the threshold set in *Giant Concerts* relating to own-interest standing. In contesting the constitutional validity of section 63, the applicant argued that all the Schedules to the Drugs Act are tainted because each time the Minister effected amendments to the Schedules, this entailed a decision regarding which substances or plants to delete or leave in the Schedules. This, according to the applicant, illustrates that the retention of cannabis in the Schedules was as a result of the exercise of the section 63 power by the Minister. Although the order by the High Court amounted to an empty victory for the applicant, it is clear that in bringing the application, he believed that an order declaring that section 63, together with all the Schedules, is inconsistent with the Constitution, would lead to a finding that cannabis is no longer an offence in South Africa. This would mean that the double criminality requirement had not been satisfied and that the warrant for his extradition would be successfully impugned. A successful attack on the constitutional validity of the section and all of the Schedules would thus have removed the threat of his pending extradition and would protect his rights enshrined in section 12(1)(a) of the Constitution.

[29] The application also raises public interest issues in that a confirmation of the declaration of the constitutional invalidity of section 63 will result in the removal of a provision that undermines the doctrine of separation of powers from the statute.

Is section 63 of the Drugs Act inconsistent with the Constitution?

[30] Section 63 of the Drugs Act provides:

> "Amendment of Schedules 1 and 2. — The Minister may by notice in the Gazette and after consultation with the Minister of National Health—

[10] Id at para 34.

(a) include any substance or plant in Schedule 1 or 2;
(b) delete any substance or plant included in that Schedule; or
(c) otherwise amend that Schedule."

[31] The applicant, in challenging the constitutional validity of section 63 of the Drugs Act, argued that to the extent that section 63 delegates plenary legislative power to the Minister, it is inconsistent with the Constitution. The Minister has not argued that section 63 authorises a permissible delegation of plenary legislative power to the Minister, who is a member of the Executive arm of government. This is hardly surprising. Plenary power is the authority to pass, amend or repeal an Act of Parliament.[11] Rabie and Erasmus define plenary legislative power as follows:

> "Plenary means of full scope or extent; complete or absolute in force or effect. Plenary legislative power, in the full sense of the phrase would be the power enjoyed by Parliament."[12]

[32] In order to understand the different tiers of legislative authority, it is helpful to refer to sections 43 and 44 of the Constitution. Section 43 provides:

> "In the Republic, the legislative authority—
> (a) of the national sphere of government is vested in Parliament, as set out in section 44;
> (b) of the provincial sphere of government is vested in the provincial legislatures, a set out in section 104; and
> (c) of the local sphere of government is vested in the Municipal Councils, as set out in section 156."

[33] Section 44 provides:

> "(1) The national legislative authority as vested in Parliament—

[11] Mojapelo "The doctrine of Separation of Powers (a South African perspective)" (conference paper presented at the Middle South Africa Conference, 2012) at 41.

[12] Rabie and Erasmus "When Delegated Power Becomes Plenary Powers" (1989) 5 *SAJHR* 440 at 444.

> (a) confers on the National Assembly the power—
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> . . .
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> (ii) to pass legislation with regard to any matter, including a matter within the functional area listed in Schedule 4, but excluding, subject to subsection (2), a matter within a functional area listed in Schedule 5."

[34] Schedule 5 of the Constitution contains a list of functional areas of exclusive provincial legislative competence and local governance. Executive bodies derive their power almost exclusively from statutes. Rautenbach and Malherbe observe that the law by which the power is conferred (the enabling statute) provides, to a large extent, the particulars for lawful executive action.[13]

[35] The Legislature may not assign plenary legislative power to another body, including the power to amend the statute. Subordinate legislation is one not enacted by Parliament. In *Executive Council*,[14] this Court said:

> "There is nothing in the Constitution which prohibits Parliament from delegating subordinate regulatory authority to other bodies. The power to do so is necessary for effective law making. It is implicit in the power to make laws for the country, and I have no doubt that under our Constitution Parliament can pass legislation delegating such legislative functions to other bodies. There is, however, a difference between delegating authority to make subordinate legislation within the framework of a statute under which the delegation is made, and assigning plenary power to another body."[15]

[36] Section 63 confers on the Minister plenary legislative power to amend the Schedules. As the Schedules are essentially part and parcel of the Act,[16] it in effect

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[13] Rautenbach and Malherbe *Constitutional Law* revised 2 ed (Butterworth Publishers (Pty) Ltd, Durban 1997) at 192.

[14] *Executive Council of the Western Cape Legislature v President of the Republic of South Africa* [1995] ZACC 8; 1995 (4) SA 877 (CC); 1995 (10) BCLR 1289 (CC).

[15] Id at para 51.

[16] *De Reuck v Director of Public Prosecutions (Witwatersrand Local Division)* [2003] ZACC 19; 2004 (1) SA 406 (CC); 2003 (12) BCLR 1333 (CC) at para 37.

delegates original power to amend the Act itself. This is a complete delegation of original legislative power to the Executive and there is no clear and binding framework for the exercise of the powers. This is constitutionally impermissible.

[37] Section 63 also undermines the doctrine of separation of powers, which this Court has repeatedly affirmed as an important constitutional principle. In *Treatment Action Campaign (No 2)*,[17] this Court stated:

> "This Court has made it clear on more than one occasion that, although there are no bright lines that separate the roles of the Legislature, the Executive and the courts from one another, there are certain matters that are pre-eminently within the domain of one or other of the arms of government and not the others. All arms of government should be sensitive to and respect this separation."[18]

[38] In *Doctors for Life*,[19] this Court said:

> "Parliament has a very special role to play in our constitutional democracy – it is the principal legislative organ of the state. With due regard to that role, it must be free to carry out its functions without interference.
>
> . . .
>
> The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle "has important consequences for the way in which and the institutions by which power can be exercised."[20]

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[17] *Minister of Health v Treatment Action Campaign (No 2)* [2002] ZACC 15; 2002 (5) SA 721 (CC); 2002 (10) BCLR 1033 (CC).

[18] Id at para 98.

[19] *Doctors for Life International v Speaker of the National Assembly* [2006] ZACC 11; 2006 (6) SA 416 (CC); 2006 (12) BCLR 1399 (CC) at paras 36-7.

[20] See also *Certification of the Constitution of the Republic of South Africa*, 1996 [1996] ZACC 26; 1996 (4) SA 744 (CC); 1996 (10) BCLR 1253 (CC) (First Certification case).

[39] For all these reasons, the application for confirmation of the order of the High Court that section 63 is inconsistent with the Constitution should succeed.

The direct appeal

[40] As already stated, the applicant seeks to appeal directly to this Court, on the following grounds: first, the applicant seeks to appeal against the finding that not all the Schedules to the Act, but only the amendments to Schedules 1 and 2 of the Drugs Act effected in terms of section 63 are invalid. The applicant's argument in this regard is that each time the Minister purported to amend the Schedules in terms of section 63, he created his own Schedules and that all the Schedules, including those originally enacted by Parliament are therefore invalid. The second ground of appeal is against the refusal by the High Court, to declare the provisions of section 5(1)(a) of the Extradition Act inconsistent with the Constitution. According to the applicant, section 5(1)(a) of the Extradition Act is inconsistent with the Constitution because the Magistrate is not required to exercise any discretion before issuing the warrant, but simply to rubber-stamp the notification from the Executive, thereby undermining judicial independence. The applicant also challenges the order of the High Court on a ground related to the Drugs Act and the Extradition Act. He submits that, following this Court's judgment in *Prince,* the offence for which he is charged in the UK is not an offence in South Africa in terms of the Drugs Act, and that, therefore, the double criminality requirement envisaged in the Extradition Act has not been satisfied.

Are all the Schedules to the Drugs Act tainted by the declaration of invalidity?

[41] The answer to this question is in the negative. The scheme of the Drugs Act in relevant part is as follows: The Drugs Act was enacted by Parliament and came into force on 30 April 1993. Section 3 of the Drugs Act prohibits the manufacturing or supply of any Scheduled substance. Section 4 prohibits use and possession of any dependence producing substance, dangerous dependence producing substance, and undesirable dangerous dependence producing substance unless certain conditions are

met. Section 4 will be amended to align with this Court's recent judgment in *Prince*, which will have the effect of allowing the private use or possession of cannabis by an adult person for his or her own consumption. The Drugs Act defines "Scheduled substance" as any substance included in Part I and II of Schedule 1. "Dangerous dependence-producing substance" is defined as any substance or any plant from which a substance can be manufactured included in Part II of Schedule 2. "Undesirable dependence-producing substance" is defined as any substance or any plant from which a substance can be manufactured included in Part III of Schedule 2. Cannabis is listed in Part III of Schedule 2.

[42] Section 5 provides:

> "No person shall deal in—
>
> (a) any dependence-producing substance or
>
> (b) any dangerous dependence-producing substance or any undesirable dependence-producing substance"

[43] The Minister purported to amend Schedules 1 and 2 six times in terms of Section 63. However, cannabis was listed in Part III of Schedule 2 in terms of the enactment of the Drugs Act and thus through the original statute by Parliament. The listing of cannabis as an undesirable dangerous dependence producing substance thus stems from the exercise of the original plenary legislative powers by Parliament, and not from the purported amendments by the Minister. A declaration that section 63 is inconsistent with the Constitution means that only the purported amendments made under section 63 should be set aside.

[44] Another factor is that, as the Minister was not competent to exercise plenary legislative powers to amend the Schedules, any purported amendments were of no effect on the Schedules and therefore invalid. The consequence, therefore, is that there were no Schedules created by the Minister. As the Minister has not validly effected any amendments to the Drugs Act, there is no basis on which to strike down the original portions of the Drugs Act and the original Schedules. It follows that only

the purported amendments to the Schedules are invalid. The appeal against the order of the High Court that only those purported amendments to Schedules 1 and 2 are invalid should thus be dismissed.

Is section 5(1)(a) of the Extradition Act inconsistent with the Constitution?

[45] Section 5(1) of the Extradition Act provides:

> "(1) Any Magistrate *may*, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person—
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> (a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister; or
>
> (b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the Magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic." (Emphasis added)

[46] The warrant of arrest in the present matter reads:

> "Whereas a request under Section 4(1) of the Extradition Act 67 of 1962, has been received and a notification under Section 5(1)(a) of the Act for the surrendering of one Jason Smit has been issued by the Minister.
>
> Whereas I am in receipt of information under oath that a warrant of arrest has been issued in the United Kingdom against Jason Smit and he is wanted to answer a complaint, charging him with crimes relating to producing and cultivating a controlled drug and possession of controlled drug under the Misuse of Drugs Act 1971.
>
> And whereas I am also of the opinion, based upon information placed before me, that the issuing of a warrant of arrest under Section 5(1)(a) of the Extradition Act 67 of 1962, in respect of Jason Smit would have been justified on the similar charge of cultivation of dagga and possession of and or dealing in dagga had it been alleged that

> he committed the said offence in the Republic, and that he is a person liable to be surrendered to the United Kingdom.
>
> You are hereby directed to arrest him and to bring him before a lower court in accordance with the provisions of Section 50 of the Criminal Procedure Act, 1977 (Act 51 of 1977)."

[47] The initial basis for the constitutional attack was that the warrant was issued in terms of section 5(1)(a) of the Extradition Act and that the section is inconsistent with the Constitution, because it deprives the Magistrate of the power to exercise a discretion whether to issue a warrant, thus confining the Magistrate's role to that of rubber-stamping the notification by the Minister. During argument, counsel for the applicant conceded that the warrant withstands scrutiny.

[48] Even though this concession was made, it is nonetheless necessary for this Court to consider whether section 5(1)(a) of the Extradition Act is inconsistent with the Constitution because the applicant in the High Court had launched a frontal attack on the provisions of section 5(1)(a). As this is a direct appeal against the refusal by the High Court to declare the section inconsistent with the Constitution, this Court has to determine whether the High Court adopted a correct interpretation of section 5(1)(a) and whether the order of the High Court should be upheld. The other important factor is that, as already stated, the attacks on the Drugs Act and the Extradition Act are interlinked. A related factor is that as legal and judicial resources have already been expended on these issues; it is prudent to consider both of them in order finally determine the proper interpretation of section 5(1)(a).

[49] General principles of extradition in South Africa were laid down in *Harksen,*[21] where this Court said:

[21] *Harksen v President of the Republic of South Africa* [2000] ZACC 29; 2000 (2) SA 825 (CC); 2000 (5) BCLR 478 (CC) (*Harksen*).

> "Where South Africa is bound by an extradition treaty, its terms will govern the international obligations of this country to the foreign State. Nonetheless, as far as domestic law is concerned the implementation of those international obligations is expressly made subject to the provisions of the Act. Similarly, in a non-treaty extradition, the surrender of the person sought is subject to the requirements of the Act. In other words, before the person whose extradition is sought may be surrendered to the foreign State, the procedures prescribed in the Act must be completed. This includes the arrest of the person under section 5(1), the holding of an enquiry under section 9(1), and a finding by a magistrate under section 10 that the evidence is sufficient to make the person liable to surrender. If the magistrate makes that finding, the Minister of Justice is given a discretion under section 11 to order the surrender of the requested person to any person authorised by the foreign State to receive him or her."[22] (footnotes omitted).

[50] The South African domestic extradition process, therefore, has different phases as stated in *Harksen*. The judicial phase encompasses Magistrates' Court proceedings. These entail the issue of a warrant by the Magistrate to procure the presence of the person in respect of whom extradition is sought, to appear before an extradition enquiry to determine the legal and factual basis for extradition.[23] The political phase requires the Minister to exercise a discretion in terms of section 11 of the Extradition Act on whether to surrender the person concerned to the requesting state. The Minister exercises his discretion on whether to surrender the person to the requesting state only after a Magistrate has made a finding, under section 10, that the evidence is sufficient to make the person liable to be surrendered.

[51] The applicant challenges the validity of section 5(1)(a) on the ground that the section deprives the Magistrate of a discretion on whether to issue a warrant. The applicant argued that under this section, a Magistrate merely rubberstamps the Minister's notification, as opposed to exercising discretionary power that enables him or her to make a value judgment on the issue. For this attack to succeed, two issues

[22] Id at para 14.

[23] See further *Geuking v President of the Republic of South Africa* [2002] ZACC 29; 2003 (3) SA 34 (CC); 2004 (9) BCLR 895 (CC).

must be established. First, it must be shown that section 5(1)(a) not only empowers a Magistrate to issue a warrant of arrest, but also deprives a Magistrate of the power to elect not to issue a warrant where a warrant is, in his view, not justified. Secondly, there must be a section in the Constitution with which section 5(1)(a) is inconsistent.

[52] Therefore, the answer to the question whether section 5(1)(a) is inconsistent with the Constitution lies primarily in the interpretation of this section and the provision of the Constitution against which section 5(1)(a) is to be tested. Once the interpretation process is completed, section 5(1)(a) must be tested against the provision of the Constitution, to determine whether there is an inconsistency between them.

Meaning of section 5(1) of the Extradition Act

[53] As has been repeatedly affirmed by this Court in its jurisprudence, specifically defined words used in a statutory provision must be given their ordinary meaning.[24] These words must be read in their proper context and in a manner that enables the provision to achieve its purpose. In *Cool Ideas*,[25] this Court said:

> "[A] fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:
>
> (a) that statutory provisions should always be interpreted purposively;
> (b) the relevant statutory provision must be properly contextualised; and
> (c) all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to

[24] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 89.

[25] *Cool Ideas 1186 CC v Hubbard [*2014] ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) *(Cool Ideas)*.

> the general principle is closely related to the purposive approach referred to in (a)."[26]

[54] *Endumeni Municipality* reminds us that the process of attributing a meaning to words used in a statute also involves consideration of the ordinary rules of grammar and syntax.[27] Syntactically, section 5(1) of the Extradition Act consists of one sentence only. That sentence covers both paragraph (a) and paragraph (b) of the same Act. The sub-section commences with the empowering part of the provision. This empowering part makes a wide reference to "any Magistrate" and "any person". Taken literally, the reference to any person would be a reference to every individual, irrespective of whether the person concerned is the subject of an extradition request.

[55] But when the words are read in their proper context, they do not carry such wide meaning. A warrant of arrest may not be issued arbitrarily against any person; this would constitute a violation of the fundamental rights guaranteed by the Bill of Rights, including the right not to be deprived of freedom arbitrarily. Therefore, section 5(1) may not be construed as empowering a Magistrate to issue a warrant of arrest randomly against any person. In the context of the section "any person" carries a particular meaning.

[56] The true meaning of the words may be gathered from paragraphs (a) and (b) of the section. To begin with, paragraph (a) illuminates that "any person" in the opening phrase of the section refers to a person whose surrender is requested by a foreign State. This is apparent from the content of the notification from the Minister to a Magistrate. Paragraph (a) expressly states that the notification must be "to the effect that a request for the surrender of such person to a foreign State has been received by the Minister". Read in isolation, these words are opaque. Apart from "such person" which refers back to "any person", the meaning of paragraph (a) is not readily

[26] Id at para 28.

[27] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) *(Endumeni Municipality)* at para 18.

apparent. But a clear and sensible reading of the phrase "any person" in the opening part of the section is that it refers to the person whose surrender is requested. Implicit in the language of the paragraph is that the person concerned was identified by the foreign State which requested his or her surrender. Therefore, in the context of paragraph (a) "any person" means any person whose surrender is requested by a foreign State. A Magistrate who receives the notification must thus be satisfied that the person concerned was so identified by the foreign State.

[57] But what does the phrase "request for surrender of such person to a foreign State" mean? The meaning of these words, barring "such person", is not discernible from the language of paragraph (a) itself. In order to understand what the notification to the Magistrate is about, one must read section 5(1) together with sections 2, 3 and 4 of the Extradition Act. Section 2 empowers the President of the Republic to conclude extradition agreements with foreign States, for the surrender on a reciprocal basis of persons accused or convicted of the commission, either in the Republic or within such State, of an extraditable offence.[28] Section 3 stipulates that a person accused or convicted of an extraditable offence under such agreement is liable to be surrendered in terms of the agreement to the requesting State.[29] Section 4 sets out the process that

[28] Section 2(1)(a) of the Act above n 2 provides:

> "The President may, on such conditions as he or she may deem fit, but subject to the provisions of this Act
>
> (a) enter into an agreement with any foreign State, other than a designated State, providing for the surrender on a reciprocal basis of persons accused or convicted of the commission within the jurisdiction of the Republic or such State or any territory under the sovereignty or protection of such State, of an extraditable offence or offences specified in such agreement and may likewise agree to any amendment or revocation of such agreement; and
>
> (b) designate any foreign State for purposes of section 3 (3), and may at any time amend the conditions to which such designation was subjected to or revoke such designation."

[29] Id section 3(1) reads:

> "Any person accused or convicted of an offence included in an extradition agreement and committed within the jurisdiction of a foreign State a party to such agreement, shall, subject to the provisions of this Act, be liable to be surrendered to such State in accordance with the terms of such agreement, whether or not the offence was committed before or after the commencement of this Act or before or after the date upon which the agreement comes into operation and whether or not a court in the Republic has jurisdiction to try such person for such offence."

must be followed in making a request for a surrender of a person liable to be extradited.[30]

[58] These provisions undoubtedly clarify what a request for surrender means and why the request is directed to the Minister. In addition, sections 5 to 10 of the Extradition Act address the role played by the Magistrate in the extradition process.

[59] Paragraph (b) too qualifies the wide meaning of "any person" in the opening part of section 5(1). It describes that person as one who is accused or convicted of an extraditable offence that was committed in a foreign State. In addition to this description, paragraph (b) requires the Magistrate to hold an opinion that, had the offence been committed in the Republic, the issue of a warrant of arrest would have been justified.

[60] It is evident from the text of both paragraphs that the purpose they serve is twofold. First, they identify the person against whom the Magistrate may issue a warrant. Second, they set the conditions that must exist before a warrant is authorised. With regard to paragraph (a), there must be a notification from the Minister. Implicitly, this notification must specify the identity of the person to be surrendered and information on the liability of such person to be surrendered.

[61] In relation to paragraph (b), information on the person to be surrendered must be accompanied by the Magistrate's opinion on the justification for the issue of a

[30] Id section 4 provides:

> "(1) Subject to the terms of any extradition agreement any request for the surrender of any person to a foreign State shall be made to the Minister by a person recognized by the Minister as a diplomatic or consular representative of that State or by any Minister of that State communicating with the Minister through diplomatic channels existing between the Republic and such State.
>
> (2) Any such request received in terms of an extradition agreement by any person other than the Minister shall be handed to the Minister.
>
> (3) The provisions of subsections (1) and (2) do not apply in respect of a request for the endorsement for execution of a warrant of arrest under section *six*."

warrant. These may be appropriately described as jurisdictional factors that must be in place before the power to issue a warrant is exercised.

[62] Importantly, that power does not flow from the wording of the two paragraphs. These paragraphs do not constitute empowering provisions. The source of the power to issue a warrant is the phrase "any Magistrate may . . . issue a warrant for the arrest of any person", regardless of whether the warrant is issued under paragraph (a) or (b). This phrase carries the same meaning irrespective of the paragraph under which the power is exercised because the words used in the phrase bear their ordinary meaning, which does not vary based on the applicable paragraph.

[63] It is an established principle of our law that "the same words in the same statute bear the same meaning".[31] This principle applies with greater force where the words appear in the same sentence.[32] Where the same word is repeated in different parts of a statute, the presumption is that it bears the same meaning throughout the statute, unless there is a clear indication that it is used in a different sense.[33] But the latter principle finds no application here because the words employed in the empowering provision are not repeated in the paragraphs. They are used only once. This fortifies the proposition that they carry the same meaning whether they apply to paragraph (a) or (b).

[64] The principles mentioned here were affirmed by this Court in more than one decision.[34] In *Hoërskool Ermelo*,[35] Moseneke DCJ affirmed the principles in these terms:

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[31] See *Minister of Interior v Machadodorp Investments* 1957 (2) SA 395 (A) at 404D-E (*Minister of Interior*) and *Head of Department, Mpumalanga Department of Education v Hoërskool Ermelo* [2009] ZACC 32*;* 2010 (2) SA 415 (CC); 2010 (3) BCLR 177 (CC) *(Hoërskool Ermelo)* at para 70.

[32] *Minister of Interior* id at para 404D-E.

[33] *Chagi v Singisi Forset Products* [2007] ZASCA 63; 2007 (5) SCA 513 at para 13.

[34] *City of Johannesburg Metropolitan Municipality v Gauteng Development Tribunal* [2010] ZACC 11; 2010 (6) SA 182 (CC); 2010 (9) BCLR 859 (CC) at para 52.

[35] *Hoërskool Ermelo* above n 31.

> "[P]recepts of statutory interpretation suggest that the word 'function' should have the same meaning wherever it occurs in the statute since there is a 'reasonable supposition, if not a presumption' that 'the same words in the same statute bear the same meaning' throughout the statute."[36]

[65] Here, there can be no legal justification for reading the words "any Magistrate may . . . issue a warrant" as conferring a discretion in relation to paragraph (b) and not in respect of paragraph (a). These words are clearly permissive. They mandate a Magistrate to issue a warrant under specified circumstances. The paragraphs deal with different circumstances under which a warrant may be issued. But the power to issue the warrant remains the same.

[66] Although the language used in a statutory provision may reasonably bear more than one meaning, once a court of law has declared what the provision means, it carries only that meaning, regardless of the circumstances and the facts of a particular case. This is because facts play no role in an interpretation process, which entails giving meaning to the words used in a statute.[37] There is nothing in the relevant paragraphs which suggests that the phrase "any Magistrate may. . . issue a warrant" should be construed differently, depending on the paragraph to which it applies at a given time.

[67] What is apparent from a perusal of the entire section 5(1) is that it confers the same power on the Magistrate, to be exercised either under paragraph (a) or (b). These paragraphs depict different processes leading up to the issuing of a warrant. Under paragraph (a), the process before the Magistrate is initiated by the Minister who delivers a notification. In terms of paragraph (b), it is not clear from section 5(1) who initiates the process and whether the Magistrate acts of his or her own accord. The

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[36] Id at para 70.

[37] *Kubyana v Standard Bank of South Africa Ltd* [2014] ZACC 1; 2014 (3) SA 56 (CC); 2014 (4) BCLR 400 (CC) at para 78.

section does not explain how the information on the person who is accused or convicted of an extraditable offence is placed before a Magistrate.

[68] What distinguishes paragraph (a) from (b) is the process to be followed under each paragraph and the conditions which must be present before a warrant is issued. In the case of paragraph (b), the additional distinguishing factor is that a Magistrate who has issued a warrant is obliged to forthwith furnish the Minister with particulars relating to the issue of the warrant. And the Minister may overrule the Magistrate and direct him or her to cancel the warrant and release the arrested person forthwith. The Minister is empowered to do this for any reason that the Minister deems fit.[38]

[69] Apart from these distinguishing features, what is also clear from the language of section 5(1) is the nature of the power bestowed upon Magistrates. Its nature may be determined only with reference to the words "any Magistrate may . . . issue a warrant". Having settled the question whether the same power applies to both paragraphs, it is necessary to ascertain its nature. Evidently, the empowering provision uses permissive language to the effect that a Magistrate may issue a warrant. It is a settled principle of our law that the use of permissive language signifies conferral of a discretion to do or not to do what is stipulated in the provision.[39]

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[38] Section 8 of the Act provides:

> "(1) Any magistrate who, under paragraph *(b)* of subsection (1) of section five or under section seven, issues a warrant for the arrest or further detention of any person other than a person alleged to have committed an offence in an associated State, shall forthwith furnish the Minister with particulars relating to the issue of such warrant.
>
> (2) The Minister may at any time after having been notified that a warrant has been issued as contemplated in subsection (1)—
>
> (a) in the case where the warrant has not yet been executed, direct the magistrate concerned to cancel the warrant; or
>
> (b) in the case where the warrant has been executed, direct that the person who has been arrested be discharged forthwith, if the Minister is of the opinion that a request for the extradition of the person concerned is being delayed unreasonably, or for any other reason that the Minister may deem fit."

[39] See *Schwartz v Schwartz* 1984 (4) SA 467 (A); and *South African Railways and Harbours v Transvaal Consolidated Land and Exploration Co Ltd* 1961 (2) SA 467 (A).

[70] This principle was affirmed by this Court in *South African Police Service*.[40] In that case, this Court formulated the principle thus:

> "It follows, then, that subject to the qualification mentioned below, 'may' in the context of this case does not mean 'must'. The commissioner has a discretion and is accordingly entitled to make a declaration that although he is authorised without advertising to promote an incumbent whose job is upgraded, he is not obliged to do so."[41]

[71] This principle finds application in the present matter. Although the Magistrate is authorised to issue a warrant upon receipt of a notification from the Minister to the effect that a request for the surrender of a person has been received from a foreign State, the Magistrate is not obliged to do so. This is reinforced by the Bill of Rights, which obliges the State in all its manifestations to "respect, protect, promote and fulfil the rights in the Bill of Rights".[42] Moreover, the Bill of Rights binds all arms of the State, including the Judiciary.[43] This means that when a Magistrate exercises the power conferred by section 5(1), the Magistrate is obliged to do so in a manner that promotes the rights in the Bill of Rights, including the right not to be deprived of freedom arbitrarily. Consequently, section 5(1) of the Extradition Act cannot be assigned a meaning that authorises arbitrary deprivation of freedom.

[72] Moreover, reading legislation in a manner that promotes rights guaranteed in the Bill of Rights is also prescribed by section 39(2) of the Constitution.[44] This provision obliges courts to promote the spirit, purport and objects of the Bill of Rights

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[40] *South African Police Service v Public Servants Association* [2006] ZACC 18*;* 2007 (3) SA 521 (CC); [2007] 5 BLLR 383 (CC).

[41] Id at para 35.

[42] Section 7(2) of the Constitution.

[43] Section 8(1) of the Constitution provides:

> "The Bill of Rights applies to all law, and binds the legislature, the executive, the judiciary and all organs of state."

[44] Section 39(2) of the Constitution provides:

> "When interpreting any legislation, and when developing common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

when interpreting legislation. But this interpretative aid is not without limits. The language of the provision under construction must reasonably be capable of a meaning that promotes the objects of the Bill of Rights.[45]

[73] The question that arises on this aspect of the matter is whether section 5(1)(a) is reasonably capable of being read in a manner that is constitutionally compliant. At the outset, I must point out though that the words "any Magistrate *may* . . . issue a warrant" do not oblige a Magistrate to issue the warrant. On the basis of these words alone, the Magistrate has a discretion to issue or not to issue a warrant. The real issue is whether when these words are read together with paragraph (a), they authorise the Magistrate to issue a warrant purely upon receipt of a notification from the Minister and without first satisfying himself or herself that the person concerned is indeed liable to be surrendered to the requesting foreign State. A literal reading of section 5(1) suggests that under paragraph (a), as soon as the Magistrate receives the Minister's notification, he or she may issue a warrant. In other words, the only condition to be satisfied is receipt of the notification. Such a literal reading suggests that the Magistrate would close his or her eyes regarding whether the person concerned was identified by the foreign State as being liable to be surrendered.

[74] This is not how section 5(1)(a) should be read in view of its impact on the right not to be arbitrarily deprived of freedom. Although the section does not expressly say so, it must, under section 39(2) of the Constitution, be read as if it requires the Magistrate to be satisfied, before authorising a warrant, that the person to be arrested is indeed liable to be surrendered. This interpretation of the section does not only avoid arbitrary deprivation of freedom, but also promotes the attainment of the purpose of the Extradition Act. As I will illustrate shortly, this interpretative approach is entrenched in our jurisprudence.

[45] *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd*: *In Re Hyundai Motor Distributors (Pty) Ltd v Smit N.O.* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at paras 21 and 26.

[75] To demonstrate the point, a reference to cases interpreting section 50(1) of the Prevention of Organised Crime Act[46] (POCA) would suffice. Section 50(1)(a) and (b) of POCA provides:

> "*The High Court shall*, subject to section 52, *make an order applied for under section 48(1)* if the Court finds on a balance of probabilities that the property concerned—
>
> (a) is an instrumentality of an offence referred to in Schedule 1;
>
> (b) is the proceeds of unlawful activities."

[76] With regard to the correct approach to interpreting section 50(1) of POCA, this Court in *Prophet*[47] said:

> "Asset forfeiture orders as envisaged under Chapter 6 of the POCA are inherently intrusive in that they may carry dire consequences for the owners or possessors of properties, particularly residential properties. Courts are therefore enjoined by section 39(2) of the Constitution . . . to interpret legislation such as the POCA in a manner that 'promote(s) the spirit, purport and objects of the Bill of Rights', to ensure that its provisions are constitutionally justifiable, particularly in the light of the property clause enshrined in terms of section 25 [of] the Constitution."[48]

[77] This approach was later affirmed in *Mohunram.*[49] In that matter, Moseneke DCJ stated:

> "It is indeed so that section 50(1) is couched in peremptory terms. It provides that a court "shall" make a forfeiture order if it finds on the civil standard of balance of probabilities that the property sought to be forfeited is an instrumentality of an offence. Textually, once the instrumentality threshold has been met, courts must authorise forfeiture. However, courts have consistently interpreted "shall" to mean

[46] 121 of 1998.

[47] *Prophet v National Director of Public Prosecutions* [2006] ZACC 17; 2007 (6) SA 169 (CC); 2007 (2) BCLR 140 (CC).

[48] Id at para 46.

[49] *Mohunram v National Director of Public Prosecutions (Law Review Project as Amicus Curiae)* [2007] ZACC 4; 2007 (4) SA 222 (CC); 2007 (6) BCLR 575 (CC).

> "may". They have correctly held all requests by state prosecutors for civil forfeiture to the standard of proportionality which amounts to no more than that the forfeiture should not constitute arbitrary deprivation of property or the kind of punishment not permitted by section 12(1)(e) of the Constitution."[50]

[78] This statement makes it clear that provisions which may be read as authorising arbitrary deprivation of property should not be construed literally. But the reference to section 12 of the Constitution is of more importance. This section guarantees, among other rights, the right not to be arbitrarily deprived of freedom. It is plain from *Mohunram* that provisions like section 5(1)(a) are not to be construed literally and that they should be read in a manner that avoids arbitrary deprivation. Therefore, a Magistrate may not approach the matter on the footing that notification from the Minister has been received and proceed to issue the warrant. He or she must also determine whether the warrant to be issued would arbitrarily deprive the arrested person of his or her freedom. If it would, the Magistrate would not be authorised to issue the warrant, just as the High Court may not make a forfeiture order in terms of section 50(1) of the POCA, if such forfeiture would amount to arbitrary deprivation of property or a cruel, inhumane or degrading punishment, even if the State adduced evidence that the property concerned was used as an instrumentality of an offence or if it is proceeds of unlawful activities.

[79] In other words, proof of jurisdictional factors mentioned in the provision is not enough for purposes of exercising power that may lead to arbitrary deprivation. In these circumstances, I conclude that section 5(1)(a) is reasonably capable of a meaning that is constitutionally compliant. It follows that the section is not inconsistent with section 12 of the Constitution. It does not authorise arbitrary issue of warrants by Magistrates. The fact that the repository of the power to issue a warrant is a member of the Judiciary supports the proposition that the power is

[50] Id at para 121.

discretionary and that a warrant would not be justified if the arrest would be arbitrary. That is why Parliament has designated Magistrates as repositories of the power.

[80] But the applicant's attack against section 5(1)(a) was not based only on section 12 of the Constitution. The applicant contended that the section was inconsistent with the Constitution because the Magistrate enjoys no discretion but simply rubber-stamps the Minister's notification. It was submitted that this undermines judicial independence. The premise from which this argument departs is flawed; section 5(1)(a) does not deprive the Magistrate of discretion. It merely sets out a condition which must exist before the power to issue a warrant may be exercised. The laying down of that condition does not, of itself, mean that once the condition is established the Magistrate is obliged to issue a warrant. He or she is not. A warrant may be issued only if, in the opinion of the Magistrate, to do so is justified. The need for the Magistrate to be satisfied whether or not a warrant is justified is what is required by the Bill of Rights that binds all organs of state, including the Judiciary.

[81] This interpretation of section 5(1)(a) is further supported by the fact that section 5(2) of the Extradition Act requires that any warrants issued under section 5(1) be in the form and executed in a manner as near as possible to that which may be prescribed in respect of warrants of arrest in general by, or under, the laws of the Republic relating to criminal procedure. The reference to "[a]ny warrant issued in terms of this section" is a reference to warrants issued in terms of both section 5(1)(a) and (b). The issuing of warrants relating to criminal procedure in the Republic is governed by section 43 of the Criminal Procedure Act[51] (CPA). Before a warrant is executed, it needs to be issued by a Magistrate. Before it is issued, section 43(1)(a) of the CPA[52] requires that the Magistrate receives a written application from a Director

[51] 51 of 1977.

[52] Section 43 of the Criminal Procedure Act states:

"Warrant of arrest may be issued by magistrate or justice—

of Public Prosecutions, a public prosecutor or a commissioned police officer "setting out the offence alleged to have been committed".[53] Section 43(1)(c) of the CPA states that the written application should state under oath that "there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence". Section 43(2) of the CPA requires that the alleged offence be stated in the warrant of arrest. It can be safely inferred from the need for submission of a written application and the fact that the information envisaged in section 43(1)(a)-(c) and (2) is placed before the Magistrate, that a Magistrate is required to consider the application together with the information and decide whether or not to issue a warrant. This is the information that is incorporated into the warrant in order to complete it before it is issued. The reference to "any warrant" in section 5(2) must be a reference to a duly completed warrant and not a blank pro-forma. If it were a reference to the latter, it would mean that the Magistrate is required to append his or her signature and stamp to a blank pro-forma in the hope that someone else will complete the full details correctly later. This cannot be. A consideration of an application before the issuing

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> Any magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police—
>
> (a) which sets out the offence alleged to have been committed;
>
> (b) which alleges that such offence was committed within the area of jurisdiction of such magistrate or, in the case of a justice, within the area of jurisdiction of the magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and
>
> (c) which states that from information taken upon oath that there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence."

[53] See *Minister of Safety and Security v Sekhoto* [2010] ZASCA 141; 2011 (5) SA 367 (SCA) at para 23 where the following was mentioned:

> "It may be convenient to interpose a further mention of section 43. As said, it deals with the issue of a warrant for arrest upon the written application of a Director of Public Prosecution, a public prosecutor or a commissioned officer of police. The further jurisdictional facts for the warrant are that the application must set out (i) the offence alleged to have been committed (which need not be a Schedule 1 offence); (ii) that the offence was committed within the area of jurisdiction of the magistrate, or that the suspect is known or is on reasonable grounds suspected to be within such area of jurisdiction; and (iii) that from information taken upon oath there is a reasonable suspicion that the suspect has committed the alleged offence."

of a warrant in the form prescribed in terms of the criminal procedure is not a mere mechanical process. It requires the Magistrate to apply his or her mind to it.

[82] In extradition matters, there are two possible sources of the information that must be incorporated into the warrant: the notification and the request for extradition. The Act does not prescribe what the notification from the Minister should contain. In *Kouwenhoven*,[54] the section 5(1)(a) notification signed by the Minister stated:

> "I . . . give notice under section 5(1)(a) of the Extradition Act . . . that I have received a request for the surrender of [the applicant] from the Republic of South Africa to The Netherlands to serve a term of nineteen years imprisonment imposed upon conviction of three charges of contravening article 8 of the War Crimes Act and two charges of contravening article 2, paragraph 2 of the Sanctions Act, 1977."[55]

In the present matter, although the warrant was issued in terms of section 5(1)(b), it was issued pursuant to a notification from the Minister after a request was sent to him by the UK in terms of section 4 of the Extradition Act. We know that the information contained in the warrant was sourced from the request from the UK which was accompanied by the affidavits of Police Constable Wilde and Ms Allison Claire Riley, a barrister and crown advocate with the Crown Prosecution Services of England and Wales. These kind of documents, to my mind will inevitably be the source of the information which will find itself in any warrant to be issued in terms of section 5(1)(a) of the Extradition Act.

[83] The requirement that the notification be sent to the Magistrate can only mean that it is submitted to him or her to consider it by applying his or her mind to the information contained in the request for extradition before issuing the warrant. This includes satisfying himself or herself that the offence alleged to have been committed

[54] *Kouwenhoven v Minister of Police* 2019 JDR 1782 (WCC).

[55] Id at para 100.

has been set out as required in terms of section 43(1)(a) of the CPA; that the warrant contains certain allegations regarding the area of jurisdiction in terms of section 43(1)(b); in extradition proceedings this means that the allegation must be that the person is within the borders of South Africa; and that "there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence" as required in terms of section 43(1)(c) of the CPA.

[84] The deprivation of freedom contemplated in the Extradition Act is both substantively and procedurally fair. South Africa is a signatory to the Multilateral European Convention on Extradition and has, pursuant to section 231(2) of the Constitution, an international obligation to co-operate with state signatories, including the UK. The scheme of the Extradition Act is such that there are appropriate safeguards for the person who is the subject of an extradition request.

[85] One of the criticisms this Court made against section 34 of the Immigration Act[56] in *Lawyers for Human Rights*[57] was that the section did not require that a detainee be informed of the rights enumerated in section 35(2) of the Constitution, apart from being told of the reason for detention. The Court said—

> "[s]ignificantly, section 34(1)(b) does not require an automatic judicial review of a detention before 30 calendar days expire. It merely grants a detainee the right to request an immigration officer to cause the detention to be confirmed by a warrant of a court. Such warrant may be obtained only during the currency of the detention and at the instance of the immigration officer. The nature and scope of the information to be placed before the court is to be determined by the immigration officer. The provision does not allow the detainee to make any representations to the court, either orally or in writing. Nor does it permit him or her to appear in person."[58]

[56] 13 of 2002.

[57] *Lawyers for Human Rights v Minister of Home Affairs* [2017] ZACC 22; 2017 (5) SA 480 (CC); 2017 (10) BCLR 1242 (CC) at para 51.

[58] Id at para 52.

[86] In this matter, it is accepted that the issuing of the warrant deprived the applicant of his freedom. The next consideration is whether there is just cause for this deprivation and whether there are constitutionally acceptable reasons that reveal a rational connection between the detention and an objectively determinable and legitimate purpose for it. It is not disputed that the warrant was issued pursuant to a request from the UK and concerned pending criminal proceedings against the applicant relating to the Misuse of Drugs Act in that country. The contents of the affidavits by Police Constable Steven John Wilde and Ms Allison Claire Riley, regarding the applicant's arrest and pending criminal charges are not placed in dispute. What the applicant has denied is the contravention of the Misuse of Drugs Act. Regarding the manner in which the warrant was issued, it is uncontroverted that the Magistrate issued it after forming an opinion, based upon information placed before him, that it could be issued. This shows that the Magistrate considered the information placed before him before forming the opinion to issue the warrant. There was thus no infringement of the right not to be deprived of freedom arbitrarily or without just cause as envisaged in section 12(1)(a) of the Constitution.

[87] The Extradition Act has safeguards that apply after the arrest of the person, which are in line with those highlighted in *Lawyers for Human Rights*.[59] They include a right to be released on bail, as was the case in this matter and for the person to be brought before the Magistrate as soon as possible for the holding of an enquiry in terms of sections 9 and 10. Significantly in terms of section 10(1), the Magistrate must satisfy himself or herself whether there is sufficient evidence to warrant an order committing the person to prison awaiting the Minister's decision with regard to his or her surrender. Additionally, the Magistrate is required to inform the person of the right to appeal. Section 10(3) provides that if the Magistrate finds that the evidence does not warrant the issue of the order of committal, or that the evidence is not forthcoming within a reasonable time, he or she shall discharge the person. Section 11 deals with the powers of the Minister to either order or refuse the surrender of a

[59] *Lawyers for Human Rights* above n 57.

person to a foreign State after he or she has been committed to prison following an enquiry held by a Magistrate in terms of section 10. Whilst section 10 deals with the conduct of an enquiry where the offence is alleged to have been committed in a foreign State, section 12 deals with the factors to be considered by a Magistrate when conducting an enquiry, where the offence was alleged to have been committed in an associated State.[60] Section 12(3) is worded similarly to section 10(3).

[88] In *Harksen*,[61] this Court stated that before the person whose extradition is sought may be surrendered to the foreign State, the procedures prescribed in the Extradition Act must be completed.[62] This, as already alluded to, includes the arrest of the person under section 5(1), the holding of an enquiry under section 9(1), and a finding by a Magistrate under section 10 that the evidence is sufficient to render the person liable to surrender. If the Magistrate makes that finding, the Minister has a discretion under section 11 to order the surrender of the requested person to any person authorised by the foreign State to receive him or her. The purpose of section 5(1) of the Extradition Act is thus to trigger the necessary procedural safeguards, which are initially undertaken by the Magistrate, before the Minister can proceed to the final step and exercise his political discretion under section 11 on whether to surrender the requested person to the foreign State.

Can the applicant rely on the Prince judgment?

[89] The applicant's reliance on *Prince* is misplaced for two reasons:

(a) In *Prince*, this Court declared the provisions of the Drugs Act read with Part III of Schedule 2 to that Act invalid to the extent that they make the use or possession of cannabis by an adult person for his or her own consumption in private a criminal offence. In this matter, the allegation

[60] Associated State refers to certain foreign States in Africa.

[61] *Harksen* above n 21.

[62] Id at para 4.

is that the applicant is facing charges of possession of cannabis with intent to supply. This is still an illegal act in South Africa. The double criminality rule has thus been satisfied.

(b) The order in *Prince* is effective from 18 September 2018. It is not retrospective. According to *Patel*, "the double criminality rule must be satisfied as at the date of request for the extradition".[63] In this case, the extradition request was made in or around May 2011 and the warrant of arrest was issued on 11 August 2011, on which date the double criminality rule was evidently satisfied. During argument in this Court, counsel for the applicant was constrained to concede that there is no challenge to *Patel*.

[90] It follows that the contention by the applicant that the double criminality requirement has not been met, must be rejected.

Conclusion

[91] The direct appeal against the order of the High Court where it refused to declare section 5(1)(a) of the Extradition Act inconsistent with the Constitution must fail. As stated above, the declaration by the High Court that section 63 of the Drugs Act is inconsistent with the Constitution and invalid should be confirmed.[64] Only those amendments effected to the Schedules to the Drugs Act in terms of section 63 are invalid. The warrant issued by the Magistrate stands, as conceded by the applicant.

[63] *Patel v National Director of Public Prosecutions* [2016] ZASCA 191; 2017 (1) SACR 456 (SCA) at para 40.

[64] See [39] above.

Prospective operation and suspension

[92] The Minister has submitted that in the event that this Court confirms the constitutional invalidity of section 63 of the Drugs Act and all the amendments to the Schedules made in terms thereof, this Court should grant an order in terms of section 172(1)(b)(i) of the Constitution to the effect that the declaration of unconstitutionality will operate prospectively.

[93] Since the enactment of the Drugs Act, the Minister has exercised the powers conferred by section 63 of the Drugs Act in good faith so as to ensure the control of Scheduled substances. More specifically, one of the objects of the Drugs Act is to protect the welfare of the public and to prevent the use, possession and dealing in undesirable dependence producing substances in uncontrolled circumstances. If section 63 of the Drugs Act is declared unconstitutional and invalid with retrospective effect, the result will be the setting aside of all the amendments to the Schedules thereunder. Any such retrospective invalidation would be inimical to the public interest, to the interests of proper administration, and in relation to concluded prosecutions for contraventions of sections 4(b) and 5(b) of the Drugs Act. It will also result in a disruption in the prosecution of suspected offenders.

[94] Regarding suspension, the Minister has urged this Court to suspend the declaration of invalidity for a period of 24 months to avoid a *lacuna* (gap) and to allow Parliament to correct the defect. It is not disputed that a period of 24 months will be adequate for this process. Good cause has been shown for the granting of a prospective order and for the suspension of the order to afford Parliament an opportunity to cure the defect.

Costs

[95] Regarding costs, as the High Court reasoned, both parties had a measure of success in the matter and as the applicant had raised important issues of law, especially in relation to the Drugs Act, the *Biowatch* principle should apply, even

though the limited finding in favour of the applicant did not provide any form of relief for him. An appropriate costs order in this Court is that each party should pay its own costs and the costs order in the High Court should remain.

Order

[96] I would have made the following order:

1. The declaration of invalidity made by the High Court of South Africa, Western Cape Division, Cape Town is confirmed in the terms set out in paragraph 2.
2. Section 63 of the Drugs and Drug Trafficking Act 140 of 1992 is declared to be inconsistent with the Constitution and invalid to the extent that it purports to delegate plenary legislative power to amend Schedules 1 and 2 to the Drugs and Drug Trafficking Act to the Minister of Justice and Correctional Services.
3. The following purported amendments to Schedules 1 and 2 to the Drugs and Drug Trafficking Act are declared invalid:
   (i) GN R1765 of 1 November 1996, which amended Part III of Schedule 2;
   (ii) GN R344 of 13 March 1998, which amended Part I and II of Schedule 1;
   (iii) GN R760 of 11 June 1999, which amended Part I, II and III of Schedule 2;
   (iv) GN R521 of 15 June 2001, which amended Part I of Schedule 1 and Part I, II, and III of Schedule 2;
   (v) GN R880 of 8 October 2010, which amended Part II of Schedule 1; and
   (vi) GN R222 of 28 March 2014, which amended Part I, II, and III of Schedule 2.
4. The declarations of invalidity in paragraphs 1, 2 and 3 of the order take effect from the date of this order.

5. The order of invalidity is suspended for a period of 24 months to allow Parliament to cure the defect.
6. The application for leave to appeal directly to this Court is granted.
7. The appeal against the order of the High Court in terms of which it refused to declare all the Schedules to the Drugs and Drug Trafficking Act invalid, but only the amendments to Schedules 1 and 2 of the Drugs and Drug Trafficking Act, effected in terms of section 63, as invalid is dismissed.
8. The appeal against the order of the High Court dismissing the application to declare the provisions of section 5(1)(a) of the Extradition Act 67 of 1962 to be inconsistent with the Constitution is dismissed.
9. Each party must pay its own costs.

MADLANGA J (Mogoeng CJ, Khampepe J, Majiedt J, Mathopo AJ and Theron J concurring):

[97] I have had the benefit of reading the judgment penned by my colleague, Tshiqi J (first judgment). I agree with my colleague's conclusions that: section 63 of the Drugs Act is inconsistent with the Constitution to the extent that it purports to delegate to the Minister the plenary legislative power to amend Schedules 1 and 2 to the Drugs Act; only the amendments to the Schedules listed in paragraph 3 of the order in the first judgment are invalid; the applicant cannot rely on the *Prince* judgment to escape extradition; the declaration of constitutional invalidity must be prospective; this declaration must be suspended for 24 months; and the warrant issued for the arrest of the applicant is, in fact, valid. What I do not agree with is the dismissal of the applicant's appeal against the High Court's dismissal of the application to declare section 5(1)(a) of the Extradition Act inconsistent with the Constitution.

[98] There are two central questions in this appeal. The first is whether section 5(1)(a) impermissibly limits the right to freedom and security of the person, more specifically the right not to be deprived of freedom arbitrarily or without just cause. The second is whether – based on the *Heath* test on functions performed by Judicial Officers outside of court – the function a Magistrate is required to perform under section 5(1)(a) is compatible with the judicial office.[65] This is a separation of powers issue.

[99] I will first look at the right not to be deprived of freedom arbitrarily or without just cause protected by section 12(1)(a) of the Constitution. This right falls under the umbrella category of the right to freedom and security of the person guaranteed in section 12(1).[66] Although all the rights contained in paragraphs (a) to (e) of section 12(1) fall under one category, they each constitute distinct rights which are capable of individual, self-contained violation. Although some may be inter-related, that does not detract from their separateness. For example, there is a close link between arrest and detention; the first generally leads to the second and each constitutes a deprivation of freedom. But that does not make them the same, nor does it alter the fact that each may stand on its own. One individual may allege only that the law in terms of which an arrest is effected is unconstitutional. Another may assert only that the law authorising the detention, post arrest, is inconsistent with the Constitution. The complaint – whether about arrest or detention – may also be directed at conduct, not necessarily law.

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[65] *South African Association of Personal Injury Lawyers v Heath* [2000] ZACC 22; 2001 (1) SA 883 (CC); 2001 (1) BCLR 77 (CC) at para 34.

[66] Section 12(1) provides:

> "Everyone has the right to freedom and security of the person, which includes the right—
>
> (a) not to be deprived of freedom arbitrarily or without just cause;
>
> (b) not to be detained without trial;
>
> (c) to be free from all forms of violence from either public or private sources;
>
> (d) not to be tortured in any way; and
>
> (e) not to be treated or punished in a cruel, inhuman or degrading way."

[100] Here our focus is a challenge to the constitutionality of the power conferred on a Magistrate by section 5(1)(a) of the Extradition Act to authorise an arrest. That is not concerned with the detention that follows the arrest.

[101] The right not to be deprived of freedom arbitrarily or without just cause protected by section 12(1)(a) of the Constitution has two facets[67] – i.e. substantive and procedural facets. In *Boesak* Langa DP said that "[t]his Court has held that section 12(1)(a) entrenches two different aspects of the right to freedom, the substantive and the procedural".[68]

[102] Both facets have to be satisfied for a deprivation of freedom not to be inconsistent with section 12(1)(a). Let me start with the substantive facet. In *Bernstein* O'Regan J said that the substantive facet relates to the grounds for the deprivation of freedom; "the deprivation of freedom will not be constitutional [if] the grounds upon which freedom has been curtailed are unacceptable".[69] In similar vein, in *De Lange* Ackermann J said that "[t]he substantive aspect ensures that a deprivation of liberty cannot take place without satisfactory or adequate reasons for doing so".[70]

[103] Without doubt, an arrest under section 5(1)(a) constitutes a deprivation of freedom and thus implicates the right not to be deprived of freedom arbitrarily or without just cause. The question is: does this section satisfy the test for the substantive facet of the section 12(1)(a) right? Section 5(1) of the Extradition Act provides:

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[67] See *Zealand v Minister of Justice and Constitutional Development* [2008] ZACC 3; 2008 (4) SA 458 (CC); 2008 (6) BCLR 601 (CC) at para 33; *S v Boesak* [2000] ZACC 25; 2001 (1) SA 912 (CC); 2001 (1) BCLR 36 (CC) at para 37; *De Lange v Smuts N,O, [*1998] ZACC 6; 1998 (3) SA 785; 1998 (7) BCLR 779 (CC) at paras 22-5; *Sibiya v Director of Public Prosecutions, Johannesburg* [2005] ZACC 6; 2005 (5) SA 315 (CC); 2005 (8) BCLR 812 (CC) at para 32; and *Lawyers for Human Rights* above n 57 at para 32.

[68] *Boesak* id at para 37. See also *Zealand* id at para 33.

[69] *Bernstein v Bester N.O.* [1996] ZACC 2; 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC) at para 145. Ackermann J endorsed this in *De Lange* above n 67 at para 17.

[70] *De Lange* id at para 23.

> "(1) Any Magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person—
>
> (a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister; or
>
> (b) upon such information of his or her being a person accused or convicted of an extraditable offence committed within the jurisdiction of a foreign State, as would in the opinion of the Magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic."

[104] I think the substantive facet is satisfied. That is so because the need to arrest for purposes of extraditing in fulfilment of the Republic's international obligation to extradite (where appropriate) does provide "acceptable", "satisfactory" or "adequate reasons" for depriving the person concerned of freedom. The need to extradite stems from considerations of reciprocity and comity amongst nations. This is explained thus by Goldstone J in *Geuking*:

> "The need for extradition has increased because of the ever-growing frequency with which criminals take advantage of modern technology, both to perpetrate serious crime and to evade arrest by fleeing to other lands. The government of the country where the criminal conduct is perpetrated will wish the perpetrator to stand trial before its courts and will usually offer to reciprocate in respect of persons similarly wanted by the foreign State. Apart from reciprocity, governments accede to requests for extradition from other friendly States on the basis of comity. Furthermore, governments do not wish their own countries to be, or be perceived as safe havens for the criminals of the world."[71]

[71] *Geuking* above n 23 at para 2.

[105] The procedural facet "requires that no-one be deprived of physical freedom unless fair and lawful procedures have been followed".[72] And that is so even in instances where there is no fair procedure expressly prescribed by the Constitution on the manner of deprivation of freedom.[73] The procedure will be fair if there is the "interposition of an impartial entity, independent of the Executive and the Legislature to act as an arbiter between the individual and the State".[74] And in *Lawyers for Human Rights* Jafta J said "[i]mplicit in the procedural aspect of the right is the role played by courts. Judicial control or oversight ensures that appropriate procedural safeguards are followed."[75] This, of course, excludes instances which – although there is no involvement of the Judiciary – are reasonable and justifiable under section 36(1) of the Constitution.[76]

[106] Axiomatically, this requirement can be satisfied only if, in terms of the legislation in issue, a Judicial Officer does indeed play the role of a Judicial Officer. That is, in the sense of being able to act as an independent arbiter and to exercise the kind of oversight that guarantees procedural safeguards. Requiring a Judicial Officer to rubberstamp what a member of the Executive branch of State presents to her or him is inconsonant with this requirement.

[107] The "jurisdictional facts" for a Magistrate to issue a warrant are to be gleaned from section 5(1)(a) and (b). Section 5(1)(b) affords a Magistrate the leeway to act as a Magistrate. I say so because in *Heath* this Court said the function of issuing search warrants is suited to the judicial office because it entails the weighing-up of facts and reaching a decision on them.[77] Section 5(1)(b) does afford a Magistrate an

[72] *Bernstein* above n 69 at para 145. This too was endorsed at para 17 of *De Lange* above n 67.

[73] Compare *Sibiya* above n 67 at para 31. An example of such procedure is the one stipulated by section 35 of the Constitution.

[74] *Nel v Le Roux N.O.* [1996] ZACC 6; 1996 (3) SA 562 (CC); 1996 (4) BCLR 592 (CC) at para 14.

[75] *Lawyers for Human Rights* above n 57 at para 35.

[76] An example is the need – under certain circumstances – for immediate arrest without the participation of a Judicial Officer.

[77] *Heath* above n 65 at para 34.

opportunity to exercise a judicial function in this fashion. That is so because this section makes provision for the Magistrate to issue a warrant only if she or he would have issued one in respect of an offence committed in South Africa. The effect of that is to import the requirements under section 43(1) of the CPA.[78] The functionaries empowered to issue warrants of arrest under that section are Magistrates and "justices of the peace".[79] I will focus only on Magistrates.

[108] Section 43(1)(a) requires that an application for a warrant of arrest must set out the offence alleged to have been committed. Whether an application does do this is established through a mere perusal of the application. No special skill is required. In that sense this is a mechanical exercise. I must accept though that in the context of extradition the complexion changes in that the Magistrate has to satisfy her- or himself that the offence is extraditable.

[109] Section 43(1)(b) requires that the application must allege: that the offence was committed within the area of jurisdiction of the Magistrate; or, where the offence was not committed within that area, that the person sought to be arrested is known or is –

[78] Above n 51. Section 43(1) provides:

> "Any Magistrate or justice may issue a warrant for the arrest of any person upon the written application of an attorney-general, a public prosecutor or a commissioned officer of police—
>
> (a) which sets out the offence alleged to have been committed;
>
> (b) which alleges that such offence was committed within the area of jurisdiction of such Magistrate or, in the case of a justice, within the area of jurisdiction of the Magistrate within whose district or area application is made to the justice for such warrant, or where such offence was not committed within such area of jurisdiction, which alleges that the person in respect of whom the application is made, is known or is on reasonable grounds suspected to be within such area of jurisdiction; and
>
> (c) which states that from information taken upon oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence."

[79] Section 43 refers to a "justice". This is not reference to Justices who hear court cases. Section 1 of the CPA defines a justice as "a person who is a justice of the peace under the provisions of the Justices of the Peace and Commissioners of Oaths Act [16 of] 1963". In terms of the latter Act a justice of the peace is appointed by the Minister of Justice or any officer of the Department of Justice with the rank of director, or an equivalent or higher rank, delegated thereto in writing by the Minister, and is empowered to carry out such instructions for the preservation of the peace and good order in such magisterial district as he may receive from the Magistrate of that magisterial district, and render all assistance possible in suppressing disorder or disturbance in such magisterial district.

on reasonable grounds – suspected to be within that area. Although this does entail a weighing-up exercise and a need to decide whether these requirements are met, this section is not applicable to extraditions. That is so for two reasons. First, with extraditions the offences will always be ones committed in other countries. Second, that part of section 5(1) which is applicable to both paragraphs (a) and (b) of the section says any Magistrate may issue a warrant "irrespective of the whereabouts or suspected whereabouts of the person to be arrested". That means a Magistrate in Johannesburg may issue a warrant for the arrest of a person in Cape Town.

[110] Section 43(1)(c) stipulates that, on information taken upon oath, the Magistrate must be satisfied that "there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence". This too involves an exercise of weighing-up evidentiary material and taking a decision on it.

[111] Section 5(1)(b) of the Extradition Act imports the section 43(1)(c) of the CPA requirement. The result is that under section 5(1)(b) the Magistrate must bring her or his own independent mind to bear on whether, in the case where the person concerned is accused of an extraditable offence,[80] there are reasonable grounds to suspect that the person has committed the offence. In the case where the information before the Magistrate is that the person concerned is convicted of an offence,[81] all that the Magistrate is required to do is to satisfy her- or himself that the person has indeed been convicted. For it to be a conviction, it must be by a competent court. The Magistrate must be satisfied that this is so. She or he is not expected to play the role of a review or appellate arbiter on the legal correctness of the conviction; not even at the level whether there are reasonable grounds to believe that the conviction is legally correct. To use an Americanism, the Magistrate must not second-guess the conviction by the foreign court. To do so, would be to undermine the judicial system of the

[80] Paragraph (b) of section 5(1).

[81] Id.

requesting State. That, in turn, would be inconsonant with the idea of comity between South Africa and those nations it owes extradition obligations.

[112] The procedural requirement of the right not to be deprived of freedom arbitrarily or without just cause protected by section 12(1)(a) of the Constitution appears to be satisfied by the Magistrate's consideration of the questions whether: the person concerned has been convicted of an extraditable offence by a competent court of the requesting State; or, there are reasonable grounds to suspect that the person has committed the offence charged. I say "appears to be satisfied" because I do not want to be categorical as section 5(1)(b) is not under challenge. A categorical pronouncement will have to be made when there is a challenge to the section.

[113] Coming to section 5(1)(a), the question is: how, if at all, does it satisfy this procedural facet? The jurisdictional facts that a Magistrate issuing a warrant of arrest under this section must be satisfied exist are: a notification; by the Minister; that the Minister has received a request from a foreign State; that the request is for the surrender of the person concerned to that foreign State; and – as the first judgment says with reference to sections 2 to 4 of the Extradition Act – that the request is in respect of an extraditable offence. Although this last requirement is not readily apparent from the wording of section 5(1)(a), it is not a thumbsuck. It comes from the reference to "request" in section 5(1)(a). Section 4 makes plain that the request relates to an extraditable offence.

[114] I have traversed every bit of the entire section 5(1)(a). On its plain wording, that for me is the sum total of its requirements. On that wording, not much is required of the Magistrate to exercise her or his mind. Mainly, she or he is required to act on the mere say-so of the Minister.[82] That does not in the least afford the procedural safeguards that are necessary under section 12(1)(a) of the Constitution. A lawyer's

[82] Unsurprisingly, the Minister admits as much in his written submissions: "[a] decision by the Magistrate to issue a warrant in terms of section 5(1)(a) does not depend upon the exercise of a discretion, at least in the ordinary administrative law sense of the word".

mind balks at the idea that section 5(1)(a) can possibly be requiring a Magistrate to issue a warrant purely on the basis that she or he has received a notification from the Minister that the Minister has received a request from a foreign State for the surrender of the person sought to be arrested. That is understandable. But the question is whether the section can be read in a constitutionally compliant manner.

[115] Section 39(2) of the Constitution provides that "[w]hen interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights". That means "[i]f the provision under construction implicates or affects rights in the Bill of Rights, then the obligation in section 39(2) is activated".[83] Jafta J said in *Makate*:

> "The objects of the Bill of Rights are promoted by, where the provision is capable of more than one meaning, adopting a meaning that does not limit a right in the Bill of Rights. If the provision is not only capable of a construction that avoids limiting rights in the Bill of Rights but also bears a meaning that promotes those rights, the court is obliged to prefer the latter meaning. For, as this Court observed in *Fraser*:
>
> > 'Section 39(2) requires more from a court than to avoid an interpretation that conflicts with the Bill of Rights. It demands the promotion of the spirit, purport and objects of the Bill of Rights.'"[84]

[116] And in *Hyundai* Langa DP tells us that an expansive reading of legislation must not focus only on the Bill of Rights, but must – as far as possible – ensure conformity with the Constitution as a whole. He says:

> "[W]hen the constitutionality of legislation is in issue, [Judicial Officers] are under a duty to examine the objects and purport of an Act and to read the provisions of the legislation, so far as is possible, in conformity with the Constitution.
>
> . . .

[83] *Makate v Vodacom (Pty) Ltd* [2016] ZACC 13; 2016 (4) SA 121 (CC); 2016 (6) BCLR 709 (CC) at para 88.

[84] Id at para 89.

> Accordingly, Judicial Officers must prefer interpretations of legislation that fall within constitutional bounds over those that do not, provided that such an interpretation can be reasonably ascribed to the section."[85]

[117] Section 5(1)(a) of the Extradition Act implicates the right not to be deprived of freedom arbitrarily or without just cause.[86] This calls for a constitutionally compliant reading. But – as *Hyundai* held – that is only if that reading "can be reasonably ascribed to the section".[87] If a reading that is in conformity with the Constitution would unduly strain the language of the legislation, then that reading is not viable.[88]

[118] Willing as I am to find a constitutionally compliant interpretation of section 5(1)(a), the problem I have is how one wiggles out of its provisions and somehow finds other requirements that satisfy the procedural facet of the section 12(1)(a) right. This, without unduly straining the language of the provision. My difficulty is exacerbated by the fact that the procedural safeguards appear to be specifically provided for in paragraph (b) of section 5(1). How can it be that in respect of paragraph (a) we must somehow try to find them, from I do not know where? These two paragraphs come one after the other in the exact same subsection. It seems hardly likely that – whilst the Extradition Act was meant to have these safeguards in both paragraphs – the Legislature would have made provision for them in the one paragraph but not in the other. To insist that these safeguards are satisfied in section 5(1)(a) is straining the language of the section. There are simply no other requirements outside of what is specified in paragraph (a).

[119] The first judgment sees a constitutionally compliant reading of section 5(1)(a) in its use of the word "may" in section 5(1). That is insofar as the section provides

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[85] *Hyundai* above n 45 at paras 22-3.

[86] Section 12(1)(a) provides that "[e]veryone has the right to freedom and security of the person, which includes the right not to be deprived of freedom arbitrarily or without just cause".

[87] *Hyundai* above n 45 at para 23.

[88] Id at para 24.

that "[a]ny Magistrate may . . . issue a warrant". The first judgment reasons that these words – which precede both paragraphs (a) and (b) of section 5(1) – must mean the same thing in both paragraphs. Yes, they do. But they mean no more than that a Magistrate is being afforded a power to issue a warrant under whichever paragraph is applicable. Each paragraph stipulates specific requirements that must be met for a warrant to be issued. And those requirements have nothing to do with the words "[a]ny Magistrate may . . . issue a warrant", which introduce *both* paragraphs. Thus I do not see how, in the case of paragraph (a), these words can have the magical effect suggested by the first judgment. So, the fact that the words mean the same thing in both paragraphs adds nothing to the debate. The real debate is about the requirements of each paragraph.

[120] Where the two judgments diverge is on the first judgment's reasoning that – because of the use of the word "may" in section 5(1) – in paragraph (a) a Magistrate has a discretion to go outside of the requirements that appear *ex facie* (on the face of) this paragraph. According to this reasoning, "may" is permissive and it is because of this that a Magistrate is empowered to find requirements that satisfy the procedural facet of section 12(1)(a) of the Constitution. For this, the reasoning relies on the judgment of Sachs J in *South African Police Service*.[89] From the very passage quoted in the first judgment, it is plain that there Sachs J did not purport to hold that "may" is always permissive in the manner suggested by the first judgment. He prefaced what he held with "*in the context of this case*" the word "'may' . . . does not mean 'must'".[90] So, there the conclusion was reached through an interpretative exercise dictated by the context, and not because "may" is always permissive.

[121] In the present context, an interpretation that some requirements that render section 5(1)(a) constitutionally compliant can somehow be sourced from elsewhere gives rise to absurdities and incongruities; and – with a measure of reluctance and

[89] *South African Police Service* above n 40.

[90] Id at para 35. Sachs J's judgment was the majority judgment.

deference – I dare say glaring absurdities and incongruities.[91] An age-old principle says courts must avoid an interpretation that results in glaring absurdities. In *Venter v Rex* Innes CJ held:

> "[W]hen to give the plain words of the statute their ordinary meaning would lead to absurdity so glaring that it could never have been contemplated by the Legislature, or where it would lead to a result contrary to the intention of the Legislature, as shown by the context or by such other considerations as the Court is justified in taking into account, the Court may depart from the ordinary effect of the words to the extent necessary to remove the absurdity and to give effect to the true intention of the Legislature."[92]

[122] In the more than 100 years that have elapsed this principle has been followed consistently.[93] Shorn of the reference to the "intention of the Legislature",[94] I endorse this statement of the law. And this Court already endorsed it in *Bertie Van Zyl*.[95]

[123] The absurdities and incongruities that result from the first judgment's interpretation tell us that this interpretation unduly strains the language of section 5(1). *Hyundai* says such an interpretation is not viable.[96]

[124] Unsurprisingly, in different contexts this Court has held that "may" grants a power coupled with an obligation to exercise it once the applicable jurisdictional facts have been met.[97] What was held in *Van Rooyen* is captured as follows in *Saidi*:

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[91] I deal fully with this shortly.

[92] *Venter v Rex* 1907 TS 910 at 914-5.

[93] See *Hanekom v Builders Market Klerksdorp (Pty) Ltd* [2006] ZASCA 2; 2007 (3) SA 95 (SCA) at para 7.

[94] In *Marshall v Commission for the South African Revenue Service* [2018] ZACC 11; 2019 (6) SA 246 (CC); 2018 (7) BCLR 830 (CC) at para 4 Froneman J held that it is "a relic of an outdated approach to interpretation . . . to seek to ascertain the subjective intention of the Legislature rather than to adopt the proper purposive interpretation, which is concerned with the objective purpose of the legislation".

[95] *Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at fn 36.

[96] *Hyundai* above n 45 at para 23.

> "At issue in *Van Rooyen* was the meaning of 'may' in section 13(3)(*a*A) of the Magistrates Act. The question was whether – since the section provided that the Minister of Justice 'may' confirm a recommendation by the Magistrates Commission that a Magistrate be suspended – the Minister could exercise a discretion not to suspend the Magistrate. Answering the question in the negative, Chaskalson CJ held:
>
> > 'As far as the Act is concerned, if "may" in section 13(3)(*a*A) is read as conferring a power on the Minister coupled with a duty to use it, this would require the Minister to refer the Commission's recommendation to Parliament, and deny him any discretion not to do so.
> >
> > . . .
> >
> > In my view this is the constitutional construction to be given to section 13(3)(*a*A). On this construction, the procedure prescribed by section 13(3) of the Act for the removal of a Magistrate from office is not inconsistent with judicial independence.'"[98]

[125] On the first judgment's interpretation, section 5(1)(a) would read something like (with the insertion underlined):

> "Any Magistrate may, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, issue a warrant for the arrest of any person—
>
> (a) upon receipt of a notification from the Minister to the effect that a request for the surrender of such person to a foreign State has been received by the Minister <u>and upon such information as would in the opinion of the Magistrate justify the issue of a warrant for the arrest of such person, had it been alleged that he or she committed an offence in the Republic</u>."

[126] On this reading, there would be little separating paragraphs (a) and (b) of section 5(1). They could easily have been collapsed into one instead of – as the first judgment suggests – repeating the underlined requirement. When one renders this

[97] *S v Van Rooyen (General Council of the Bar of South Africa Intervening)* [2002] ZACC 8; 2002 (5) SA 246; 2002 (8) BCLR 810 (CC) at para 181 and *Saidi v Minister of Home Affairs* [2018] ZACC 9; 2018 (4) SA 333 (CC); 2018 (7) BCLR 856 (CC) at para 17.

[98] *Saidi* id.

reading, it becomes plain that the Extradition Act has not made this choice. It has, in terms, made provision for the procedural safeguards in paragraph (b), and it has not done so in paragraph (a). The major concern of the first judgment is unconstitutional consequences that would be visited upon a person to be arrested in terms of a warrant issued under paragraph (a). On my approach, those do not have to come about; I invalidate paragraph (a).

[127] Lastly on this, the first judgment's reliance on *Mohunram* is inapt. That is so because in the instant matter, there are the two paragraphs of section 5(1) that stand in stark contrast to one another. Crucially, there are the incongruities and absurdities, which I deal with presently, that simply do not admit of a constitutionally compliant interpretation.

[128] I next interrogate the first judgment's reliance on section 5(2) of the Extradition Act.

[129] Section 5(2) provides that a warrant "issued" under section 5(1) must be "in the form and shall be executed in the manner as near as may be as prescribed in respect of warrants of arrest in general by or under the laws of the Republic relating to criminal procedure". The first judgment's reading of section 5(2) is that it incorporates the factors that must be taken into account when a warrant is issued under section 43(1) of the CPA. In this regard, it errs. It accepts – and it has no option not to – that section 5(2) applies to both types of warrants, i.e. warrants issued under both paragraphs (a) and (b) of section 5(1). It has no option because section 5(2) in terms refers to warrants issued "under this section". And those are the paragraph (a) and paragraph (b) warrants. Thus it must follow on the first judgment's reasoning that the factors imported from section 43(1) of the CPA into section 5(1) of the Extradition Act apply to both types of warrants.

[130] One need only say this to see that it simply cannot be correct. By requiring a Magistrate to issue a warrant only upon information that would justify the issuing of a

warrant if the offence had been committed in South Africa, section 5(1)(b) already has a self-contained importation of those requirements stipulated by section 43(1) of the CPA that can appropriately find application to section 5(1)(b) warrants. The first judgment's reading of section 5(2) means this section doubly imports those CPA requirements in the case of section 5(1)(b). For what purpose? There cannot possibly be any. And one would have to engage in impractical mental gymnastics to suggest that – although section 5(2) applies to both paragraphs (a) and (b) – this section somehow does not make the CPA requirements to find application in paragraph (b) warrants. That simply cannot be done; the first judgment's interpretation must, therefore, mean that, in the case of section 5(1)(b), the CPA requirements are imported twice. One must then be left with the absurd surplusage of the double imposition of the CPA requirements in the case of paragraph (b).

[131] This alone is an indication that section 5(2) does not mean what the first judgment says it means. What does the section mean? The section says a warrant issued under section 5(1) must – as near as may be – be "in the form" and executed "in the manner" as may be prescribed for warrants of arrest under South Africa's laws on criminal procedure. The manner of execution is irrelevant for present purposes. "Execution" relates to how the warrant will be "used" for its intended purpose. In this regard, I refer to some of the meanings of "execute", which are "implement", "effect" and "perform".[99]

[132] In context, I would say "form" as envisaged in section 5(2) concerns what the warrant must look like; what form must it take? It has nothing to do with the requirements for issue. This reading is buttressed by the incongruity of the double importation of the CPA factors to section 5(1)(b). Indeed, dictionary meanings of "form" that make sense in our context are: "organisation, shape and structure"[100] of a

[99] Collins Dictionary and English Thesaurus, available at https://www.collinsdictionary.com/dictionary/english-thesaurus/execute.

[100] Cambridge Dictionary, available at https://dictionary.cambridge.org/dictionary/english/form.

document; the "particular way in which a thing exists or appears";[101] or "a document printed with spaces in which to write answers or information".[102]

[133] It makes sense that after setting out the requirements for issuing a warrant in section 5(1), the Extradition Act must make provision for what the warrant should look like and how it should be executed. And, because under our criminal procedure warrants already take a particular form and are executed in a certain manner, the Act does not reinvent the wheel; it merely cross-refers to what pertains in the case of warrants issued under our law on criminal procedure. The very fact that section 5(2) pairs "form" with "execution" is an indication that both are not part of the Magistrate's decision on whether to issue a warrant. That is why the section refers to "a warrant *issued* under this section". The choice of tense is not an accident. Of course, in practice as the Magistrate decides to issue a warrant, she or he almost simultaneously signs it in the form envisaged in section 5(2). But the reality is that – before signature – there is a decision to issue, even if the decision and signature may be separated by a split second. And that decision has nothing to do with the form the warrant takes.

[134] Even at the level of language, if what was meant by section 5(2) was that in issuing a warrant under section 5(1) of the Extradition Act the Magistrate was required to take into account, inter alia, section 43(1) of the CPA, section 5(2) would most likely have been worded differently. That is, to convey the exact idea that, inter alia, the section 43(1) requirements are to be taken into account. But then again, section 5(2) does not do that. In the case of paragraph (b) of section 5(1) it is understandable why not; that paragraph has – as I have said – an inbuilt importation of those requirements. In the case of paragraph (a) it must simply be that there is a conscious choice for the CPA requirements not to apply to section 5(1)(a).

[101] Lexico Dictionary, powered by Oxford, available at https://www.lexico.com/definition/form.

[102] Cambridge Dictionary above n 100.

[135] I would be surprised if it were ever to be suggested that the requirements for the issuing of a warrant of arrest under the CPA on suspicion of the commission of an offence are not fully set out in section 43(1) of the CPA.[103] What then must we make of the similarity in the wording used in that section and in section 5(1) of the Extradition Act? Section 43(1) states that "*any Magistrate* or justice *may issue a warrant for the arrest of any person*. . .". Similarly, section 5(1) states that "*any Magistrate may*, irrespective of the whereabouts or suspected whereabouts of the person to be arrested, *issue a warrant for the arrest of any person*. . .". Like section 43(1), section 5(1) must also be dealing with the requirements and, unless there is a clear basis for suggesting otherwise, it too must be doing so fully. This too must mean that section 5(2) has nothing to do with requirements for the issuing of warrants.

[136] Thus section 5(2) does not provide a bridge for the first judgment to reach the CPA requirements for the issuing of warrants of arrest. Although – on its own – this conclusion is dispositive of this issue, there are additional reasons. Through section 5(2), the first judgment takes from the CPA all the requirements contained in paragraphs (a) to (c) of section 43(1). On the paragraph (a) requirement, i.e. the requirement that the application for a warrant must set out the offence alleged to have

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[103] I am mindful of the Appellate Division and Supreme Court of Appeal judgments that have held that a Magistrate may, under certain circumstances, refuse to issue a warrant of arrest for reasons outside of the set requirements. In *Prinsloo v Newman* 1975 (1) SA 481 (A) at 500C-D the Appellate Division held:

> "[T]he Magistrate is not called upon to consider the correctness of the prosecutor's conclusion with regard to reasonable grounds of suspicion. But that does not mean that the Magistrate does not exercise a discretion in considering whether to issue a warrant. He must satisfy himself that the alleged offence is an offence in law, and that it is of such a nature and gravity as to justify the issue of a warrant."

And in *Sekhoto* above n 53 at para 28 the Supreme Court of Appeal held:

> "Once the jurisdictional facts for an arrest . . . in terms of section 43 are present, a discretion arises. The question whether there are any constraints on the exercise of discretionary powers is essentially a matter of construction of the empowering statute in a manner that is consistent with the Constitution. In other words, once the required jurisdictional facts are present, the discretion whether or not to arrest arises. The [Magistrate], it should be emphasised, is not obliged to effect an arrest."

Both *dicta* are a far cry from a suggestion that a Magistrate may refuse to issue a warrant at will. In fact, these *dicta* do not suggest that there are statutorily imposed additional requirements. Rather they say that, as a matter of law, if there is some impropriety in seeking a warrant, it will not be issued even if the set and *only* requirements have been met.

been committed, even in the case of section 5(1)(a) of the Extradition Act this would constitute a duplication. In [113] above where I deal with the jurisdictional facts for issuing a warrant under that section, I mention that it is a requirement that the extraditable offence must be set out. On my understanding (and this is crucial), my colleague and I agree on this. The question that then arises is: why must this be provided for a second time through section 43(1)(a) of the CPA? This can only be another case of absurd surplusage.

[137] I do not quite understand how the first judgment relies on section 43(1)(b). That section requires that an application for a warrant must allege that the offence was committed within the Magistrate's area of jurisdiction or that the person who is the subject of the warrant is known, or on reasonable grounds suspected, to be within that area of jurisdiction. By its very nature, extradition concerns offences committed in foreign territory. So, the first envisaged allegation is an impossibility. Regarding the second envisaged allegation, it is excluded in so many words by section 5(1), which does away with a Magistrate's territorial jurisdiction: "[a]ny Magistrate may, *irrespective of the whereabouts or suspected whereabouts of the person to be arrested*, issue a warrant".

[138] With regard to paragraph (c) of section 43(1) of the CPA, I need say nothing more.

[139] That puts paid to all the section 43(1) requirements. In sum, I do not see the point of the first judgment's importation of section 43(1). That means a Magistrate acting under section 5(1)(a) of the Extradition Act is left with having to issue a warrant once the requirements set by that section have been satisfied. That is bereft of the procedural safeguards necessary under section 12(1)(a) of the Constitution. The fact that we balk at what section 5(1)(a) requires of a Magistrate does not lead to the section's constitutionality.

[140] What led to unconstitutionality in *Lawyers for Human Rights* was, amongst others, the lack of judicial oversight in the deprivation of freedom.[104] Here as well – because section 5(1)(a) makes it impossible for a Magistrate to act as a Magistrate – there is no distinction.

[141] In conclusion, section 5(1)(a) limits the right not to be deprived of freedom arbitrarily or without just cause. It cannot be saved by a *Hyundai*-type interpretation, which requires that courts render a constitutionally compliant interpretation where that is possible.[105] Constitutionally compliant does not automatically equal viable. To be viable, an interpretation must meet the *Hyundai* principle: whilst constitutionally compliant, it must not do violence to or strain the language.[106] *Hyundai*, as amplified in *Makate*, never meant a constitutionally compliant interpretation must be rendered at all costs. What it seeks to achieve is a construction that averts invalidation, if averting be possible, or where there is no risk of invalidation but there are two or more possible interpretations, one that better accords with the Constitution in general,[107] or one that, in terms of section 39(2) of the Constitution, better promotes the spirit, purport and objects of the Bill of Rights.[108] Where there is a constitutional challenge and the legislation cannot be saved by the *Hyundai* principle, invalidation must follow or – where the challenge is founded on the Bill of Rights – a justification analysis must be undertaken. Here there is a challenge and section 5(1)(a) cannot be read in a constitutionally compliant manner.

[142] No serious attempt was made by the Minister to justify the limitation.[109] I am well aware that – even where the party who had to proffer evidence of justification has

[104] *Lawyers for Human Rights* above n 57 at para 39.

[105] *Hyundai* above n 45 at para 23.

[106] Id at para 24.

[107] Id at paras 22-3.

[108] *Makate* above n 83 at para 88.

[109] Section 36(1) of the Constitution provides:

failed to do so – it is incumbent upon this Court to be satisfied that the limitation is not justified.[110] With that duty in mind, I have considered the question of justification and am not satisfied that the limitation is reasonable and justifiable in terms of section 36(1).

[143] Thus section 5(1)(a) is unconstitutional for unjustifiably limiting the right not to be deprived of freedom arbitrarily or without just cause.

[144] The section is also unconstitutional for breaching the separation of powers principle. I next deal with this.

[145] Let me preface this discussion by clarifying that the separation of powers principle is not a bar to the performance by Judicial Officers of non-judicial functions.[111] In *SARFU* this Court held that "Judicial Officers may, from time to time, carry out administrative tasks".[112] But it cautioned that "[t]here may be circumstances in which the performance of administrative functions by Judicial Officers infringes the doctrine of separation of powers".[113] *Heath* explains that those circumstances are where the performance of non-judicial functions would be incompatible with judicial office.[114] In the words of Chaskalson CJ—

> "The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—
>
> (a) the nature of the right;
>
> (b) the importance of the purpose of the limitation;
>
> (c) the nature and extent of the limitation;
>
> (d) the relation between the limitation and its purpose; and
>
> (e) less restrictive means to achieve the purpose."

[110] *Phillips v Director of Public Prosecutions, Witwatersrand Local Division* [2003] ZACC 1; 2003 (3) SA 345 (CC); 2003 (4) BCLR 357 (CC) at para 20.

[111] See *Sibiya* above n 67 at para 39.

[112] *President of the Republic of South Africa v South African Rugby Football Union* [1999] ZACC 11; 2000 (1) SA 1 (CC); 1999 (10) BCLR 1059 (CC) (*SARFU*) at para 141.

[113] Id at fn 107.

[114] *Heath* above n 65 at para 31.

> "the question is one calling for a judgment to be made as to whether or not the functions that the Judge is expected to perform are incompatible with the judicial office and, if they are, whether there are countervailing factors that suggest that the performance of such functions by a Judge will not be harmful to the institution of the Judiciary, or materially breach the line that has to be kept between the Judiciary and the other branches of government in order to maintain the independence of the Judiciary."[115]

[146] Reverting to section 5(1), I will start with section 5(1)(b) in order to bring to the fore the contrast with section 5(1)(a).

[147] Under section 5(1)(b) a Magistrate must bring her or his own mind to bear on whether the information placed before her or him would justify the issuing of a warrant of arrest in respect of an offence alleged to have been committed in South Africa. That is exactly what *Heath* places within the purview of functions of the judicial office.[116] The effect of the reference to information that would justify the issuing of a warrant of arrest in South Africa is to import the prerequisite of the existence of "a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence".[117] That is so because for an offence alleged to have been committed in South Africa a warrant of arrest may be issued if, amongst others, this prerequisite is satisfied.[118] And the Magistrate is expected to do more than merely rubberstamp the assertion in the application for the issuing of a warrant of arrest that a reasonable suspicion exists. She or he must satisfy her- or himself that this is indeed so. I explained above that, even in the case of a request for the extradition of a person who has been convicted of an extraditable offence, a

[115] Id.

[116] Id at para 34.

[117] That is the language of section 43(1)(c) of the CPA. This is one of the prerequisites for the issuing of a warrant of arrest.

[118] This is provided for in section 43(1) of the CPA. See above n 78.

Magistrate permissibly performs a judicial function in deciding whether there is enough to satisfy her or him of this fact.

[148] A question that arises is whether the issuing of a warrant of arrest by a Magistrate under section 5(1)(a) is compatible with the judicial office: does it meet the *Heath* test? Section 5(1)(a) requires no more than that a Magistrate may issue a warrant of arrest upon being presented with a notification from the Minister to the effect that the Minister is in receipt of a request for the extradition of the person concerned to a foreign State. That is all. A Magistrate *must* issue the warrant if what the section stipulates is satisfied.

[149] This Court held in *Heath*:

> "The performance of [the functions of presiding over commissions of inquiry] ordinarily calls for the qualities and skills required for the performance of judicial functions – independence, the weighing up of information, the forming of an opinion based on information, and the giving of a decision on the basis of a consideration of relevant information. The same can be said about the sanctioning of search warrants, where the Judge is required to determine whether grounds exist for the invasion of privacy resulting from searches."[119]

[150] The issuing of a warrant of arrest under section 43(1) of the CPA is comparable to the issuing of a search warrant. It too requires a determination by the Judicial Officer whether grounds exist for the deprivation of freedom resulting from the arrest. That determination entails an independent assessment of information presented to her or him and a decision whether – based on that information – the issuing of the warrant of arrest is warranted. On the authority of *Heath* that places the issuing of a warrant of arrest under section 43(1) within the purview of functions of the judicial office.

[119] *Heath* above n 65 at para 34.

[151] On the other hand, the issuing of a warrant of arrest under section 5(1)(a) makes it impossible for a Magistrate to act as an independent arbiter and to exercise the kind of oversight that guarantees procedural safeguards. Section 5(1)(a) strait-jackets a Magistrate to act within its restrictive confines, which do not admit of the exercise of an independent mind. Put bluntly, in a situation where a Magistrate ought to do something that pre-eminently falls within the domain of judicial function, section 5(1)(a) co-opts the Magistrate effectively to act on the mere say-so of a member of the Executive arm of State, the Minister. The unintended consequence of the section's involvement of a Magistrate under those circumstances is that a Judicial Officer is required to lend judicial legitimacy to what, in essence, is an executive act. Not only is the performance of the section 5(1)(a) function outside of the purview of functions of the judicial office, it is "harmful to the institution of the Judiciary" and thus breaches the principle laid down in *Heath.*[120] That constitutes a breach of the separation of powers principle, thus rendering section 5(1)(a) unconstitutional on this basis as well.

[152] The invalidation of section 5(1)(a) will not do violence to comity. From what this Court held in *Harksen*, it seems that this is not something that should surprise the international community. Goldstone J held:

> "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*."[121]

[120] Id at para 31.

[121] *Harksen* above n 21 at para 4.

[153] In our case, we have our extradition law, the Extradition Act. This law is subject to our supreme law, the Constitution.

[154] The appeal is upheld, and section 5(1)(a) is declared unconstitutional.

[155] The following order, which is largely taken from the order proposed in the first judgment, is made:

1. The declaration of invalidity made by the High Court of South Africa, Western Cape Division, Cape Town is confirmed in the terms set out in paragraph 2.
2. Section 63 of the Drugs and Drug Trafficking Act 140 of 1992 is declared to be inconsistent with the Constitution and invalid to the extent that it purports to delegate plenary legislative power to amend Schedules 1 and 2 to the Drugs and Drug Trafficking Act to the Minister of Justice and Correctional Services.
3. The following purported amendments to Schedules 1 and 2 to the Drugs and Drug Trafficking Act are declared invalid:
    (i) GN R1765 of 1 November 1996, which amended Part III of Schedule 2;
    (ii) GN R344 of 13 March 1998, which amended Part I and II of Schedule 1;
    (iii) GN R760 of 11 June 1999, which amended Part I, II and III of Schedule 2;
    (iv) GN R521 of 15 June 2001, which amended Part I of Schedule 1 and Part I, II, and III of Schedule 2;
    (v) GN R880 of 8 October 2010, which amended Part II of Schedule 1; and
    (vi) GN R222 of 28 March 2014, which amended Part I, II, and III of Schedule 2.

4. The declarations of invalidity in paragraphs 1, 2 and 3 of the order take effect from the date of this order.
5. The order of invalidity is suspended for a period of 24 months to allow Parliament to cure the defect.
6. The application for leave to appeal directly to this Court is granted.
7. The appeal against the order of the High Court in terms of which it refused to declare all the Schedules to the Drugs and Drug Trafficking Act invalid, but only the amendments to Schedules 1 and 2 of the Drugs and Drug Trafficking Act, effected in terms of section 63, as invalid is dismissed.
8. The appeal against the order of the High Court dismissing the application to declare section 5(1)(a) of the Extradition Act 67 of 1962 to be inconsistent with the Constitution is upheld, and that order is set aside.
9. Section 5(1)(a) of the Extradition Act 67 of 1962 is declared to be inconsistent with the Constitution and invalid.
10. The declaration of invalidity in paragraph 9 takes effect from the date of this order.
11. Each party must pay its own costs.

For the Applicant:	A Katz SC, D Simonsz and K Perumalsamy instructed by Riley Incorporated
For the First Respondent:	A Breitenbach SC and A Christians instructed by State Attorney