



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 13 March 2023

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Spagni v The Acting Director of Public Prosecutions, Western Cape and Others (455/2022) [2023] ZASCA 24 (13 March 2023)

Today, the Supreme Court of Appeal (SCA) dismissed an appeal against the judgment of the Western Cape Division of the High Court, Cape Town (the high court), dismissing the appellant's review application for an order setting aside for Constitutional invalidity, the Acting Director of Public Prosecutions', Western Cape, formal extradition request to the United States of America (USA) dated 21 September 2021. The application for declarator that the ADPP had no authority to submit an extradition request to a foreign state on behalf of South was also unsuccessful. The appeal was dismissed on mootness alone. The SCA held that it is not necessary to make any pronouncement on the validity of the extradition process. The appellant was ordered to pay costs, including those occasioned by the employment of two counsel.

The facts of the matter were as follows. Mr Spagni is a (dual) South African-Italian citizen. From 2011 he has been facing criminal charges of fraud, forgery and uttering in the Cape Town courts – first, in the Cape Town District Court and later in the Regional Magistrates Court, Western Cape Division, Cape Town (the regional court). The amount involved is R1.5 million. His trial commenced on 22 August 2019.

Following the onset of the Covid-19 pandemic and the country being placed on national lockdown on 26 March 2020, Mr Spagni's trial was postponed on several occasions in his absence. He then failed to appear in court on 24 and 25 March 2021, these being the dates on which the trial was set down to proceed. It was later established that on 21 March 2021 he and his family had travelled to Bermuda and thereafter to the USA on a non-immigrant visa, which he had obtained on 7 October 2020.

The Republic of South Africa submitted an extradition request dated 21 September 2021 (the request) to the USA. Spagni was arrested by the US authorities on 21 July 2021 following an application for his provisional arrest that was transmitted by the South African office of Interpol to its counterparts in the US in terms of Article 13 of the Extradition Treaty between the US and South Africa (the treaty). During the extradition hearing before the US District Court for the Middle District of Tennessee, the appellant waived his extradition rights and consented to be surrendered to South Africa by the USA in terms of Article 19 of the Extradition Treaty. He is in the country on the strength of that waiver and his trial has resumed in the regional court, Cape Town.

On 8 October 2021, Mr Spagni launched review proceedings in the high court. Therein he sought review of the extradition request on the basis of illegality. That application was premised on the contention that the extradition request was unlawfully submitted by the ADPP to the USA when the power to execute undertakings contained in the Extradition Treaty vested only in the executive authority of the country. That application was dismissed with costs on 6 April 2022. The present appeal is against the whole of that judgment.

In the SCA, the first and second respondents applied in terms of section 19(1)(b) of the Superior Courts Act 10 of 2013 (the Act) read with rule 11(1)(b) of the Supreme Court of Appeal Rules (the SCA rules) for leave to adduce, by way of

affidavit, further evidence of the intervening developments subsequent to the granting of the order sought to be impugned. The developments are not in dispute. To this extent, Mr Spagni did not oppose the application. He undertook to abide by the decision of this Court in respect thereof. Based on these developments, the respondents contended that the challenge to the extradition process was moot, as a decision thereon would be of no practical effect. Mr Spagni disputed this contention and insisted that there remains a live issue for this Court to decide. It was also submitted on his behalf that as a matter of principle he has a right to a decision on the lawfulness of the extradition request, and further, that it is in the interest of justice that the issue be determined by this Court.

The further evidence admitted on record was that Mr Spagni voluntarily and knowingly waived his extradition rights in terms of Article 19 of the treaty at the enquiry that was held on 25 May 2022 before the United States District Court for the Middle District of Tennessee, Nashville Division (the District Court). He is in South Africa on the strength of that waiver for the continuation of his trial, which was set to continue on 3 November 2022 in the regional court. It is against this background that the respondents argued that the order sought will have no practical effect or result as it has been overtaken by events.

On the contrary, counsel for the appellant argued that Spagni's waiver and return to this country is inconsequential to the determination of the lawfulness of the extradition request sent to the USA by the second respondent. Further, that if the request was unlawful and invalid, it means that Mr Spagni's waiver was made on the basis of an unlawful and invalid extradition request, which continues to determine the basis of his presence in South Africa and the jurisdiction that may be exercised over him. Thus, it will have legal implications for Mr Spagni's

ongoing criminal trial in that he may only be prosecuted only for the offences for which extradition had been successfully sought.

The SCA had to determine whether, despite there being no live controversy between the parties, it was still in the interests of justice to pronounce on the merits of the appeal. On the basis that the appellant was legally represented and fully cognisant of the implications of the unequivocal waiver of his rights under the extradition treaty, the SCA held that it is not open for him to now challenge the validity of the extradition request. It found that the appellant had failed to make out a case for this court to determine the validity of his extradition process as that would have no practical effect. The appeal was thus dismissed on mootness alone.

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