Reportable:	YES / **NO**
Circulate to Judges:	YES / **NO**
Circulate to Magistrates:	YES / **NO**
Circulate to Regional Magistrates:	YES / **NO**

IN THE HIGH COURT OF SOUTH AFRICA

NORTH WEST DIVISION, MAHIKENG

CASE NUMBER:CA20/24

In the matter between:

MOHAMMED ALI MEHRAN **APPELLANT**

and

THE STATE **RESPONDENT**

Coram: REDDY ADJP *et* WESSELS AJ

Date: 7 May 2025

Delivered: This judgment is handed down electronically by circulation to the parties through their legal representatives' email addresses. The date for the hand-down is deemed to be 7 May 2025 at 14:00.

ORDER

i. The appeal is dismissed.

JUDGMENT

Introduction

[1] This is an opposed appeal against the order of the Magistrate Potchefstroom (the court *a quo*) made within the purview of section s 13 of the Extradition Act[1] (EA) emanating from a warrant of arrest issued in terms of s 5(1)(b) of the EA read with s 43 of the Criminal Procedure Act[2](CPA).

[2] The extradition proceedings served before the court *a quo* which court, on 6 April 2023, granted the following order, which reads:

> *'It is ordered that the respondent is committed to the Potchefstroom Correctional Facility to await the Minister of Justice and correctional services with regard to his surrender to the United States of America.'*

[3] The succinct history of this matter is that on 29 December 2021 the appellant was arrested on a charge of contravention of s 4(b) of the Drugs and Drug Trafficking Act[3] (DTA) (possession of and/or use of a dangerous dependence producing substance listed in Part 1 of Schedule 2 of the DTA) and s 5(b) (the unlawful dealing in a dangerous dependence producing substance listed in Part 2 of Schedule 2 of the DTA).

---

[1] Extradition Act 67 of 1962
[2] Criminal Procedure Act 51 of 1977
[3] Drugs and Drug Trafficking Act 140 of 1992

[4] The appellant was arrested in Lindequesdrif within the jurisdiction of the court *a quo* on 29 December 2021 on the aforementioned charges.

[5] The arrest was brought about as a result of an undercover investigation spanning over a period of time preceding the arrest relating to the smuggling of narcotics from South Africa to the United States of America. The investigation was the concerted effort of an undercover agent (the undercover agent) of the South African Police Service (SAPS) and an undercover agent of the Drug Enforcement Administration of the United States of America.

[6] In a parallel process in the Unites States of America, a warrant of arrest was issued in terms of s 5(1)(b) of the EA for the arrest of the appellant. The appellant is charged in the United States District Court for the Southern District of New York on two counts of distribution of narcotics and possession of a firearm in the furtherance of drug trafficking.

Evidence before the court *a quo*

[7] The evidence before the court *a quo* mainly centred around an affidavit deposed to by the undercover agent and a statement filed by the appellant in opposition thereto.

[8] The undercover agent paid the appellant 150 000 USD, purporting to be payment for dangerous dependence producing substances as referred to in the DTA. When the payment was made, the illegal

narcotics that formed the subject of the undercover operation were already en route to Johannesburg.

[9] At the time of the arrest, an employee of the appellant escaped with what is referred to as *'the remainder of the 150000 American dollar'* that was paid to the appellant by the undercover agent. Although this employee, identified by the undercover agent as an employee of the appellant by the name of Mehruwan, made a successful escape, the appellant was arrested in the undercover operation.

[10] The appellant advanced in his statement that he is a self-employed businessman and importer of machinery to South Africa, trading in vehicles and speculation in immovable property. On the day of his arrest, the appellant advanced that he was a participant in a meeting with a person named Mehruwan, who was introduced to him by a Greek national, to discuss the importation of generators and electrical equipment for resale in South Africa and Mozambique.

[11] The appellant denied that he was involved in the dealing of illegal narcotics, that he transacted with the undercover agent for, and that he was the person with whom the undercover agent had dealings in the undercover operation.

[12] The appellant admitted that he was in possession of cocaine, but that it was exclusively for personal use.

Grounds of appeal

[13] The appellant assails the order of the court *a quo* on the following grounds:

> *'1. The Honourable Court erred and misdirected itself in finding that the mere production of an affidavit relating to the identity of the Appellant is admissible as evidence.*
>
> *2. The Honourable Court misdirected itself and erred in finding that the identity of the Appellant has been proven by the requesting party.*
>
> *3. The above Honourable Court erred and misdirected itself in finding that the Section 10(2) certificate is properly before Court.*
>
> *4. The above Honourable Court misdirected itself and erred in not finding that the only inference to be drawn from the failure of the State to submit the passport of the Appellant, which is in possession of the investigating officer, is that the passport contradicts the allegation that the correct person is before Court.*
>
> *5. The above Honourable Court misdirected itself and erred in finding that the statement handed by the State constitutes a properly commissioned affidavit.*
>
> *6. The above Honourable Court misdirected itself and erred in finding that the viva voce evidence could be disposed of and substituted by an affidavit in the presentation of Applicant's case.*
>
> *7. The above Honourable Court misdirected itself and erred in finding that the appellant is to be extradited and to be committed to prison on the admissible evidence.'*

[14] It is conceded in the appellant's heads of argument that the production and acceptance of a certificate in terms of s 10(2) of the EA (the certificate) constitutes conclusive proof of sufficient evidence to warrant the prosecution of the appellant. The appellant reserved a residual incursion to the certificate in its heads of argument by advancing that the wording used in this certificate is not verbatim to what is required in terms of the EA. In what respect the wording used in the certificate falls short of compliance is not clear from the notice of appeal.

[15] The third ground of appeal, therefore, still stands and must be adjudicated. Although not dealt with in the appellant's heads of argument, the fifth ground of appeal also stands to be adjudicated as it has not been conceded.

[16] The appellant had distilled the content of the first, second, fourth and sixth grounds of appeal down to his main contention in the appeal by the inclusion of the following concession in his heads of argument:

> *'The main contention of the Appellant relates to identity, the procedure followed in order to establish the identity and the acceptance of the statement as conclusive evidence of the identity of the accused.'*

Extradition process

[17] In *Carolissen v Director of Public Prosecutions*[4], the Full Bench of the Western Cape High Court aptly summarised the extradition process as follows:

> *'Where a foreign state such as the USA requests extradition a three stage process is envisaged by the Act. In the first (administrative phase) the foreign state submits a request for extradition which the Minister considers before authorizing a magistrate to conduct an enquiry. In the second (judicial phase) the magistrate considers the factors set out in section 10 of the Act and either issues an order committing the person to await decision by the Minister or discharges the person. The appeal process to this court is part of that judicial phase. The third phase is an executive phase. In this phase the discretion, as to whether the appellant is, as a matter of fact, to be extradited to the USA, is exercised by the Minister: the exercise of that discretion is an executive act given that extradition is a matter of foreign policy, which falls within the exclusive competence of the executive state power.'*

[18] If an accused person is found liable to be extradited, s 10(1) of the EA prescribes the following mandatory order to be made:

> *'(1) If upon consideration of the evidence adduced at the enquiry referred to in section 9 (4) (a) and (b) (i) the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State concerned and, in the case where such person is accused of an offence, that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned, the magistrate shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender, at the same time informing such person*

[4] Carolissen v Director of Public Prosecutions (A 531/2015) [2016] ZAWCHC 50 par 69

that he or she may within 15 days appeal against such order to the Supreme Court.'

The Section 10(2) Certificate

[19] A determining factor in an extradition application is that a Magistrate must be satisfied that the foreign state possesses sufficient evidence to warrant a prosecution on the charges that the accused is facing in that state. This test is laid down by the provisions of Section 10(2) of the EA, which reads as follows:

'For purposes of satisfying himself or herself that there is sufficient evidence to warrant a prosecution in the foreign State the magistrate shall accept as conclusive proof a certificate which appears to him or her to be issued by an appropriate authority in charge of the prosecution in the foreign State concerned, stating that it has sufficient evidence at its disposal to warrant the prosecution of the person concerned.'

[20] The appellant contends that the wording of the certificate is not verbatim to what is required in terms of the EA. The relevant portion of the certificate reads as follows:

'The evidence summarized or contained in the extradition documents is available for trial and is sufficient under the laws of the United States to justify the prosecution of MUHAMMAD ALI MEHRAN'

(emphasis added)

[21] The objection raised in the court *a quo* to the wording of the certificate was correctly dismissed. To this end, much store was

predicated on the judgment of the Supreme Court of Appeal (SCA) in *Patel v National Director of Public Prosecutions, Johannesburg*[5]. The facts in *Patel*[6] are analogous to the matter before this Court. Resultantly, this Court can do no better than to refer to the following applicable portion of the judgment:

> '*[41] The applicant's counsel submitted that the section 10(2) certificate is fatally defective on two grounds. The first is that the certificate does not state that there is sufficient evidence to "warrant" the applicant's prosecution in the US. Instead, it states that there is sufficient evidence to "justify" his prosecution. The second is that the certificate does not adequately describe the offences for which the applicant is to be prosecuted: it is "ambiguous, ambivalent and unnecessarily vague". These submissions may be dealt with briefly. They have no merit.*
>
> *[42] As already stated, section 10(1) of the Act requires the magistrate at an extradition enquiry to be satisfied that there is sufficient evidence to warrant a prosecution for the offence in the foreign State concerned. Sufficient details of the offence must be placed before the magistrate to make that determination. According to section 9(3) of the Act, that evidence may take the form of a deposition or statement on oath or affirmation, whether or not it is taken in the presence of the person concerned, and must be duly authenticated in the manner provided in section 9(3)(a)(iii) of the Act.*
>
> *[43] Nothing turns on Mr Axelrod's statement in the section 10(2) certificate that the evidence is sufficient to "justify" the applicant's prosecution in the US. According to the Oxford English Dictionary the word "warrant" also means "to justify". And it is obviously used in that context in section 10(1) of the Act, which requires sufficient (not*

---

[5] Patel v National Director of Public Prosecutions, Johannesburg [2016] JOL 37004 (SCA) par 41-44
[6] Ibid, fn 5

conclusive) evidence to justify (not guarantee) the prosecution in the foreign State. It is thus not surprising that the Afrikaans text states that the magistrate must be satisfied, "dat daar voldoende getuienis is om 'n vervolging weens die misdryf in die betrokke vreemde Staat te regverdig".

[44] Moreover, the Constitutional Court has held that the section 10(2) certificate is consistent with the Constitution of the Republic of South Africa, 1996 ("the Constitution"). In this regard it found that once the double criminality rule has been satisfied, the magistrate must rely on the certificate as regards the narrow question whether the fugitive's conduct warrants prosecution in the foreign country, as that question would not normally be within the knowledge or expertise of South African lawyers or judicial officers. An extradition enquiry is not a trial. The process involves no adjudication of guilt or innocence.'

(emphasis added)

[22] What the certificate condenses down to is that the Magistrate must be satisfied that there is sufficient evidence to justify the appellant's prosecution in the United States of America. This position has been settled by the SCA in *Patel*[7] and the third ground of appeal stands to be dismissed.

Affidavit

[23] The fifth ground of appeal strikes at the heart of the provisions of the Regulations issued in terms of the Justices of Peace and Commissioners of Oaths Act[8]. Regulation 4 bears specific

[7] Ibid, fn 5
[8] Commissioners of Oaths Act, 16 of 1963

relevance to the prescripts of what information about the Commissioner of Oaths should be contained in an affidavit. It reads:

> *'4. (1) Below the deponent's signature or mark the commissioner of oaths shall certify that the deponent has acknowledged that he knows and understands the contents of the declaration and he shall state the manner, place and date of taking the declaration.*
>
> *(2) The commissioner of oaths shall*
>
> *(a) sign the declaration and print his full name and business address below his signature; and*
>
> *(b) state his designation and the area for which he holds his appointment or the office held by him if he holds his appointment ex officio.'*

[24] The Full Court of the Transvaal Provincial Division, as it then was, found the following in *Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk*[9] that:

> *'Even, however, if this approach be insufficiently formalistic, it nevertheless seems to me that the document in question is an affidavit. It is now settled (at least in the Transvaal) that the requirements as contained in regs 1, 2, 3 and 4 are not peremptory but merely directory; the court has a discretion to refuse to receive an affidavit attested otherwise than in accordance with the regulations depending upon whether substantial compliance with them has been proved or not (S vMsibi 1974 (4) SA 821 (T))'*

[9] Lohrman v Vaal Ontwikkelingsmaatskappy (Edms) Bpk 1979 (3) SA 391 (T) at 398 G-H

(emphasis added)

[25] In exercising its discretion, the court *a quo* correctly found that the commissioner of oaths is identifiable. In addition to this finding, the document is identifiable as an affidavit. It is abundantly clear that there had been substantial compliance with the regulations promulgated in terms of the Justices of the Peace and Commissioners of Oaths Act[10] and nothing further turns on this point.

[26] The fifth ground of appeal, therefore, also stands to be dismissed.

Procedure followed to establish the identity of the appellant

[27] The extradition enquiry is initiated and held in terms of s 9 of the EA which reads:

> *"9. Persons detained under warrant to be brought before magistrate for holding of an enquiry.—(1) Any person detained under a warrant of arrest or a warrant for his further detention, shall, as soon as possible be brought before a magistrate in whose area of jurisdiction he has been arrested, whereupon such magistrate shall hold an enquiry with a view to the surrender of such person to the foreign State concerned.*
>
> *(2) Subject to the provisions of this Act the magistrate holding the enquiry shall proceed in the manner in which a preparatory examination is to be held in the case of a person charged with having committed an offence in the Republic and shall, for the purposes of holding such enquiry, have the same powers, including the power of committing any person for*

[10] Ibid, fn 7

further examination and of admitting to bail any person detained, as he has at a preparatory examination so held.'

(emphasis added)

[28] The procedure to be followed in the enquiry is similar to that of a preparatory examination in terms of Chapter 20 of the CPA. The format of this procedure in extradition proceedings has been confirmed in *Geuking v President of the Republic of South Africa and Others*[11] wherein the following was posited:

'As mentioned earlier, the enquiry must be held in open court in the manner in which a preparatory examination is held. In particular, the person concerned is entitled to testify and adduce evidence. The identity of the person before the magistrate - as being the person named in the request - has to be established and can be challenged or contradicted by documentary or oral evidence. Likewise, consent of the President has to be proved and can be challenged or refuted. In the ordinary course, however, proper proof of the document evidencing the consent would suffice'

(emphasis added)

[29] In *Minister of Justice and another v Additional Magistrate and another*[12], it was held that extradition proceedings cannot be regarded as criminal proceedings in every respect. Neither is such

[11] Geuking v President of the Republic of South Africa and Others 2003 (3) SA 34 (CC) par 38
[12] Minister of Justice and another v Additional Magistrate and another [2001] JOL 8157 (C)

an enquiry similar to that of trial proceedings. The remarks in *Geuking*[13] in this respect are apposite:

> *'The appellant also relies on the fair trial provisions enshrined in s 35(3) of the Constitution. What must be stressed here is that the fact that the enquiry envisaged in s 9(2) must proceed in the manner in which a preparatory examination is held does not transform the enquiry into a trial. The person facing extradition is not an accused person for the purposes of the protection afforded by s 35(3) of the Constitution. As pointed out earlier, the enquiry does not result in a conviction or sentence. This does not mean, however, that the person concerned is not entitled to procedural fairness at all stages of the extradition proceedings. It follows that the provisions of s 35(3) of the Constitution are not relevant to it. The reliance on it by the appellant is therefore misplaced. The Magistrate's Court relied on the evidence of an undercover police officer brought before it by way of affidavit.'*

[30] The following remarks of the Full Bench in *Bell v S*[14] are illustrative of the *sui generis* nature and effect of the enquiry wherein it was held that:

> *'...in my opinion, is that we are dealing here with an enquiry and not a trial. The trial will come later, in Australia, and the appellant will no doubt at that stage be given the opportunity to adduce evidence and to challenge evidence. If section 10(2) is held to be unconstitutional it could mean that a person in the position of the appellant would in effect have to be tried twice, and that all of the witnesses in the foreign State would have to be brought to South Africa for the purposes of the extradition enquiry to substantiate and prove the allegations made against him.'*

---

[13] Geuking v President of the Republic of South Africa and Others 2003 (3) SA 34 (CC) par 47
[14] Bell v S [1997] 2 All SA 692 (E) at 698 E-G

[31] As already alluded to, the State adduced its evidence by means of an affidavit deposed to by the undercover agent. In this affidavit, the undercover agent confirmed the identity of the appellant. In the affidavit, the undercover agent mentions at least five sets of facts employed to confirm the identity of the appellant. These facts are:

31.1. The undercover agent met the appellant on previous occasions before the appellant's arrest. In more specificity, the undercover agent explains that he met the appellant in person on 18 September 2020. Before the in-person meeting with the appellant took place, the undercover agent had many video calls with the appellant.

31.2. Two photographs attached to the extradition request were both confirmed to be photographs of the appellant

31.3. The undercover deals that took place between the police officer and the appellant were captured on photographs, videos and closed-circuit video recordings. In all undercover deals that the police officer took part in, the appellant is identified as being present.

31.4. All these photographs and video footage were availed to the United States, which were used in addition to the evidence at their disposal to apply for the extradition of the appellant.

31.5. The undercover agent introduced the appellant to the undercover DEA agent of the United States of America. At the time of the arrest of the appellant, the undercover agent

distinguished the appellant from another person by the name of Mehruwan, who was with the appellant.

[32] In opposition to the affidavit presented by the State, the appellant filed a statement in which he assailed the State's evidence about his identity. No negative inference can be drawn from the fact that the appellant advanced his defence by way of a statement, as that right is afforded to him by the provisions of s 133 of the CPA. Apart from producing the signed statement, s 133 of the CPA afforded the appellant the right to testify under oath, and in terms of s 134 of the CPA the appellant was also afforded the right to call witnesses in the enquiry.

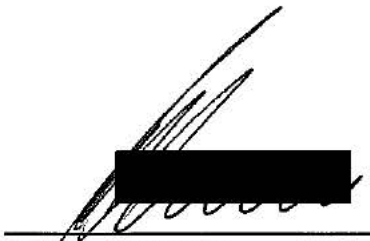
[33] Despite the aforementioned options being available to the appellant, he elected to present his defence by means of his statement alone. The appellant now bemoans the fact that the State had not conducted the enquiry in the manner and form of a trial.

[34] In the final analysis, this Court is not persuaded that the court *a quo* came to the wrong conclusion on the facts presented to it. On this basis, the appeal stands to be dismissed.

Order

[35] In the result, the following order is made:

i. The appeal is dismissed.



M WESSELS
ACTING JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

A REDDY
ACTING DEPUTY JUDGE PRESIDENT OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

Date of hearing	:	**18 October 2024**
Date of judgment	:	**7 May 2025**

APPEARANCES

Counsel for Appellant	:	**Mr SW van der Merwe**
Instructed by	:	**Van der Merwe Attorneys** **Johannesburg** **c/o Labuschagne Attorneys** **Mahikeng**
Counsel for Respondent	:	**Adv JJ van Niekerk** **Director of Public Prosecutions** **Mmabatho**