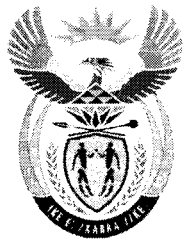
# REPORTABLE



## IN THE HIGH COURT OF SOUTH AFRICA

## [WESTERN CAPE HIGH COURT, CAPE TOWN]

Case No: 4731/2010

In the matter between:

**VITO ROBERTO PALAZZOLO** Applicant

and

**THE MINISTER OF JUSTICE AND**

**CONSTITUTIONAL DEVELOPMENT** First Respondent

**THE FORMER MINISTER OF JUSTICE**

**AND CONSTITUTIONAL DEVELOPMENT** Second Respondent

**THE DIRECTOR-GENERAL: JUSTICE AND**

**CONSTITUTIONAL DEVELOPMENT** Third Respondent

**THE NATIONAL DIRECTOR OF PUBLIC**

**PROSECUTIONS** Fourth Respondent

## JUDGMENT DELIVERED: 14 JUNE 2010

**FOURIE, J:**

**INTRODUCTION**

[1] The events preceding this review application span a period of more than 20 years. Ever since applicant's arrival in South Africa on 26 December 1986, his relationship with the South African authorities has been troubled. In fact, he maintains that, probably because of his undeserved reputation as an influential member of the Italian Mafia, the South African Government has for many years waged a vendetta against him.

[2] Notwithstanding this troubled relationship, applicant was granted South African citizenship by automatic naturalisation on 24 January 1995. His alleged membership of the Italian Mafia has, however, led to six requests by the Italian Government to the South African authorities, for the extradition of applicant. The first five requests, which were made during the period December 1992 to August 2003, were, for a variety of reasons, unsuccessful. The sixth request, dated 16 January 2007, was

received by the South African Government on 5 February 2007. It is this request which is the subject of the present application.

[3] The latest request for applicant's extradition is based on his conviction, in absentia, by the Criminal Court of Palermo on 5 July 2006. Applicant was convicted under section 416 *bis* of the Italian Criminal Code, of the offence of complicity of aggravated Mafia-type association. He was sentenced to 9 years imprisonment. The conviction and sentence were subsequently confirmed by the Appeal Court of Palermo and by the Supreme Court of Appeal in Rome.

**THE LEGISLATIVE SCHEME**

[4] As explained in **Harksen v President of the Republic of South Africa & Others** 2000 (2) SA 825 (CC) at para 4, an extradition procedure works both on an international and a domestic plane. 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, is governed by the rules of public international law. The general legal basis for extradition is treaty, reciprosity or comity. 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.

[5] In the instant matter a treaty, namely the European Convention on Extradition (1957) ("the Convention"), governs extradition between South Africa and Italy. On the domestic level, the Extradition Act No. 67 of 1962 ("the Act"), prescribes the manner in which the extradition request is to be acted upon by the South African Government and our courts. South Africa acceded to the Convention, and the two Additional Protocols thereto, on 13 May 2003. Article 1 of the Convention creates the fundamental international obligation, by which the contracting parties undertake to surrender to each other, subject to the provisions and conditions of the Convention, all persons against whom the competent authorities of the requesting party are proceeding for an offence or who are wanted by the said authorities for the carrying out of a sentence or detention order.

[6] Article 2.1 of the Convention provides as follows:

*"Extradition shall be granted in respect of offences punishable under the laws of the requesting party and of the requested party by deprivation of*

*liberty or under a detention order for a maximum period (sic) of at least one year or by more severe penalty..."*

This constitutes the Convention's double criminality requirement, namely that the relevant offence should be punishable under the laws of the requesting party and of the requested party.

[7] Article 12 of the Convention prescribes the following formalities:

> *"(1) The request shall be in writing and shall be communicated through the diplomatic channel. Other means of communication may be arranged by direct agreement between two or more Parties.*
>
> *(2) The request shall be supported by:*
>
> *(a) The original or an authenticated copy of the conviction and sentence or detention order immediately enforceable or of the warrant of arrest or other order having the same effect and issued in accordance with the procedure laid down in the law of the requesting Party;*
>
> *(b) A statement of the offences for which extradition is requested. The time and place of their commission, their legal descriptions and a reference to the relevant legal provisions shall be set out as accurately as possible; and*

*(c) A copy of the relevant enactments or, where this is not possible, a statement of the relevant law and as accurate a description as possible of the person claimed, together with any other information which will help to establish his identity and nationality."*

[8] The relevant provisions of the Act, creating the mechanism for the extradition of persons liable to be extradited, may be summarised as follows:

(a) Requests for the surrender of persons to a foreign State must be made to the Minister of Justice (presently the Minister of Justice and Constitutional Development) ("the Minister") (Section 4 (1)).

*(b)* Upon receipt of a notification from the Minister to the effect that a request for the surrender of a person to a foreign State has been received, a magistrate may issue a warrant for the arrest of such person (Section 5 (1)(a)).

*(c)* Any person detained under a warrant of arrest must be brought before a magistrate in whose area of jurisdiction such person has been arrested, whereupon the magistrate must hold an enquiry with a view to the surrender of such person to the foreign State concerned (Section 9 (1)).

*(d)* If upon consideration of the evidence adduced at the enquiry, the magistrate finds that the person brought before him or her is liable to be surrendered to the foreign State, he or she shall issue an order committing such person to prison to await the Minister's decision with regard to his or her surrender (Section 10 (1)).

*(e)* The magistrate issuing the order of committal must forthwith forward the copy of the record of the proceedings, together with such report as he or she may deem necessary, to the Minister. The Minister may order or refuse, with reference to certain criteria, surrender to the requesting foreign State (Sections 10 (4) and 11).

*(f)* Any person against whom an order under section 10 has been issued, has the right of appeal to the High Court and no order for the surrender of such person shall be executed before the right to an appeal has been exercised or waived (Sections 13 and 14).

**THE ISSUING OF THE SECTION 5 (1) (a) NOTICE**

[9] The instant request for applicant's extradition was held over by the South African Department of Justice and Constitutional Development ("the Department"), pending the outcome of the appeal process in Italy. When the Supreme Court of Appeal in Rome finally dismissed applicant's appeal on 13 March 2009, the Department set the process in motion for applicant's extradition. This resulted in second respondent (Minister Surty) issuing a written notification in terms of Section 5 (1) (a) of the Act, on 23 April 2009. It is, however, common cause that the notice has not yet been transmitted to a magistrate, as contemplated in Section 5 (1) (a) of the Act. Minister Surty was subsequently succeeded by the first respondent (Minister Radebe) who, on 16 July 2009, confirmed or endorsed in writing that he agreed with Minister Surty's decision to issue the Section 5 (1) (a) notice and that he had no reason to differ from it.

**RELIEF SOUGHT BY APPLICANT**

[10] The issuing of the notification by Minister Surty and the subsequent confirmation thereof by Minister Radebe, prompted applicant to institute these review proceedings. Wide-ranging relief is sought, including the reviewing and setting aside of the decisions of Ministers Surty and Radebe, to issue and confirm the notice in terms of section 5

(1) (a) of the Act. Ancillary and alternative relief is also sought, to which I will in due course refer.

**DISCUSSION**

[11] In determining whether the decision to issue a notice in terms of section 5 (1) (a) of the Act, is invalid and should be reviewed and set aside, it is necessary to decide what the content of the Minister's duty is in issuing such a notification.

[12] Applicant submits that the Minister, in issuing the notification, is required to reach a conclusion as to whether the person is liable to be extradited to the requesting State. Respondents, on the other hand, contend that all that is required of the Minister at the section 5 (1) (a) stage, is to satisfy himself or herself as to the formal validity of the extradition request. They submit that a conclusion as to whether such a person is liable to be extradited to the requesting State, can only be reached by a magistrate after an enquiry as contemplated in sections 9 and 10 of the Act.

[13] The adjudication of this issue calls for an interpretation of the relevant provisions of the Act and the Convention. When interpreting any legislation, section 39 (2) of the Constitution of the Republic of South

Africa, 1996, enjoins the courts to promote the spirit, purport and objects of the Bill of Rights. The Act is silent as to what is required of the Minister before issuing the notification in terms of section 5 (1) (a), while section 4 (2) merely provides that a request for the extradition of a person from the Republic, shall be handed to the Minister. Section 5 (1) (a) of the Act deals with the issuing of the notification by the Minister, which triggers the process at the domestic level, as the receipt thereof by the magistrate entitles him or her to issue a warrant for the arrest of the person to be extradited, which then leads to the enquiry envisaged in section 10.

[14] The Convention, which regulates the procedure on the international plane, confirms the obligation of the parties thereto to extradite and to surrender to each other, subject to the conditions laid down in the Convention, persons who have committed offences punishable under the laws of the requesting party and of the requested party. As indicated earlier, Article 12 of the Convention details the formalities with which the request and supporting documents have to comply. However, as the Convention only deals with the extradition process on an international plane, it does not prescribe the manner in which the requested party has to deal with the request at the domestic level.

[15] In construing the provisions of the Act it is evident that, upon receipt of a request for the extradition of a person, the Minister has to take a decision as to the fate of the request. It is obvious that the Minister has the option of either refusing the request or acceding thereto by issuing a notice in terms of section 5 (1) (a) of the Act. A third initial option also appears to be available, namely, to require an incomplete or formally defective request to be amended or supplemented.

[16] At the risk of stating the obvious, it has to be noted that the Act does not prescribe what decision the Minister has to take, nor does it state that the Minister is obliged to issue a notice in terms of section 5 (1) (a). Therefore, logic dictates that the Minister is required to form a view as to whether or not a section 5 (1) (a) notification should be issued, which, as already demonstrated, triggers the extradition process.

[17] The question which now presents itself, is what considerations are to be taken into account by the Minister, in deciding whether or not a section 5 (1) (a) notification should be issued. Once again, one has to turn to the Convention and the Act for an answer. It is, in my view, clear from the provisions of the Convention and the Act, that, in this instance, the rule of double criminality underlies the process of extradition. This much

appears from Article 2.1 of the Convention and sections 2 and 3 of the Act.

[18] The rule of double criminality requires that *"the conduct claimed to constitute an extraditable crime should constitute a crime in both the requesting and the requested state"*. See Dugard, **International Law: A South African Perspective** (3rd Edition) at p. 215.

[19] Section 2 (1) (a) of the Act, empowers the President to conclude extradition agreements with foreign States, providing for the surrender on a reciprocal basis of persons accused or convicted of the commission of extraditable offences specified in such agreement. Section 3 (1) of the Act, provides that a person accused or convicted of an offence included in an extradition treaty, may be extradited. As mentioned earlier, Article 2.1 of the Convention provides that extradition *"shall be granted in respect of offences punishable under the laws of the requesting party and of the requested party..."*. Therefore, in the instant matter, applicant may be liable to be extradited in circumstances where he has been convicted or is accused of an extraditable offence, i.e. an offence punishable under the laws of Italy and of the Republic of South Africa. See also the definition of *"extraditable offence"* in section 1 of the Act.

[20] I am in agreement with the submission made on behalf of applicant, that common sense dictates that, upon the receipt of a request which is formally in order, the Minister would need to consider whether, at least *prima facie*, a case has been made that applicant, as the target of the request, has been convicted or is accused of an extraditable offence. This view is underscored by a two judge decision of this court in **Abel v Minister of Justice and Constitutional Development & Others** 2001 (1) SA 1230 (C) at 1245A-C, where Traverso J (as she then was) held that, before the Minister can issue a notification for purposes of Section 5 (1) (a), he or she must have before him or her a request that states or shows that the person in question is accused or convicted of an extraditable offence, alternatively an offence included in an existing extradition treaty, committed within the jurisdiction of the requesting State.

[21] It should be borne in mind that, as was held in **Abel**, the Minister is not required, before issuing a notice in terms of section 5 (1) (a) of the Act, to be satisfied that the person concerned is indeed liable to be surrendered to the requesting State. Nor is the Minister required to conduct an investigation into the merits of the request for extradition. What was decided in **Abel**, is that before the Minister can issue the Section 5 (1) (a) notification, the request must state or show that the

person in question is accused or convicted of an extraditable offence, alternatively an offence included in an existing extradition treaty.

[22] I respectfully agree with the approach adopted in **Abel**. Put differently, I disagree with the submission on behalf of respondents, that, before issuing the section 5 (1) (a) notification, the Minister was not required to reach any conclusion or to form any view as to whether, *ex facie* the request, it has been stated or shown that applicant has been convicted or is accused of an extraditable offence. This approach of respondents reduces the function of the Minister to that of a gatekeeper who merely has to satisfy himself or herself as to the formal validity of the extradition request. As submitted on behalf of applicant, it is difficult to comprehend why, if indeed the Minister's scrutiny is only formal, the task would have been legislatively assigned to a Minister of the National Cabinet.

[23] One should also bear in mind that the Constitutional Court has held that, when in terms of section 3 (2) of the Act the President consents to the surrender of a person to a foreign State in circumstances where such foreign State is not party to an extradition agreement, he or she has to have regard to the fact that the person in question has been convicted or is accused of criminal conduct in the requesting State and that the offence is

an extraditable offence. See **Geuking v President of the RSA & Others** 2004 (9) BCLR 895 at para 26.

[24] The decision in **Geuking** lends support to the view that, when acting in terms of section 5 (1) (a) of the Act, the Minister is not merely a formal gatekeeper, but is required to form a view as to the extraditability of the relevant offence.

[25] It was argued on behalf of respondents, that, insofar as the court in **Abel** held that before the Minister can issue a section 5 (1) (a) notification, he or she must have before him or her a request that states or shows that the person in question is accused or has been convicted of an extraditable offence, the judgment is clearly wrong. I disagree. On the contrary, I am, for the reasons already furnished, of the view that, in so deciding, the court in **Abel** correctly required that the Minister should form a view as to the extraditability of the offence concerned. Hence the requirement that the request must state or show this.

[26] I am accordingly of the view that, although the Act is silent as to what is required of the Minister before issuing a section 5 (1) (a) notification, it must, by necessary implication, follow that the Minister is required to conclude, at least *prima facie*, that, *ex facie* the request, the

target of the request has been convicted or is accused of an extraditable offence. If this requirement is not implied, it would lead to an absurdity when the extradition of a person, who has clearly not committed an extraditable offence, is requested. It should be borne in mind that the issuing of a section 5 (1) (a) notice may lead to the arrest of the person concerned, which arrest is the precursor to an enquiry in terms of sections 9 and 10 of the Act. The constitutional rights of a South African citizen arrested in this manner could no doubt be violated. The rights to freedom and security of the person, freedom of movement and residence, freedom of assembly, freedom of association and freedom of trade, occupation and profession, come to mind. (See sections 12 (1) (a), 21, 17, 18 and 35 of the Constitution).

[28] Finally, on this issue, the proof of the pudding is in the eating. It is common cause that previous requests by the Italian Government for the extradition of applicant, were refused prior to the enquiry stage, also by reason of the fact that the alleged offence was not an extraditable offence.

[29] I now turn to consider whether, in issuing the section 5 (1) (a) notice in the instant case, the Minister formed a view that applicant has been convicted or is accused of an extraditable offence. It is common cause between the parties, that the operative decision is that of Minister

Surty. As mentioned earlier, Minister Radebe merely confirmed or endorsed the decision of his predecessor and stated that he had no reason to differ from it.

[30] It is also common cause that the only basis for the Italian request for the extradition of applicant, is his conviction of complicity of aggravated Mafia-type association under section 416 *bis* of the Italian Criminal Code. The recurring view expressed by the deponent to respondents' answering affidavit, is that it was not necessary for the Minister to determine whether this offence is one upon which applicant may be extradited in terms of South African Law. The deponent puts it as follows at paragraph 405 of the answering affidavit:

*"The Minister does not need to be satisfied, prior to the issue of a section 5 (1) notification, that the offence in question is indeed an extraditable offence. That is one of the jurisdictional facts of which the magistrate (and the Minister when considering the magistrate's findings) must be satisfied following an inquiry held as a result of the section 5 (1) notification".*

[31] It is evident from the respondents' papers, including the supporting affidavits of Ministers Surty and Radebe, that neither Minister Surty nor Minister Radebe applied his mind to the question whether the offence for

which applicant had been convicted in Italy, constitutes an extraditable offence. In particular, both of them failed to consider whether the request of the Italian Government showed, at least *prima facie*, that applicant has been convicted or is accused of an extraditable offence.

[32] In his supporting affidavit, Minister Surty states that he understood that he had a discretion as to whether or not he should issue a section 5 (1) (a) notification, but saw no reason to exercise that discretion against the requesting State. In his affidavit, Minister Radebe confirms that he also appreciated that he had a discretion in considering whether or not a section 5 (1) (a) notification should be issued. Minister Radebe, similarly, adds that he saw no reason to exercise that discretion against the requesting State. It appears from both the affidavits, that they exercised their discretion bearing in mind that applicant *"had been convicted of a serious crime in Italy and sentenced to a considerable period of imprisonment"*. What they do not say, is that, *ex facie* the request and the documents accompanying same, they formed the view, at least *prima facie*, that applicant has been convicted or is accused of an extraditable offence. To use the language of Traverso J in **Abel**, the Ministers do not allege that, before they issued or confirmed the notification for purposes of section 5 (1) (a), they had before them a request that stated or showed that applicant has been convicted or is accused of an extraditable offence.

[33] In argument an alternative submission was advanced on behalf of respondents, namely that if it is found that **Abel's** case is correct, then the Minister had only to be satisfied that the request on its face stated or showed the existence of an extraditable offence. It was argued that the Minister was quite correct in accepting that an extraditable offence has been stated or shown, especially if the factual basis for the court of Palermo's finding as set out in its judgment (which judgment served before the Ministers as part of the request), is read with the provisions of the Prevention of Organised Crime Act No. 121 of 1998 and the Prevention and Combating of Corrupt Activities Act No. 12 of 2004.

[34] The difficulty that I have with this submission, is that it is not the respondents' case that Minister Surty or Minister Radebe, was, in fact, satisfied that the request on its face stated or showed the existence of an extraditable offence. In any event, the request does not state or show that a conviction of this Mafia-type association under section 416 *bis* of the Italian Criminal Code, has a counterpart in South African criminal law, resulting in it being an extraditable offence. Respondents' reliance on Acts 121 of 1998 and 12 of 2004 is, in my opinion, misplaced. These Acts do not criminalise the joining of an association with Mafia-type characteristics (as section 416 *bis* of the Italian Criminal Code does) and had, in any event, not yet been promulgated at the time that applicant was

allegedly involved in Mafia-type activities in Italy, which led to his conviction by the court of Palermo. As held by the House of Lords in **R v Bow Street Metropolitan Stipendiary Magistrate: Ex Parte Pinochet Ugarte (No.3)** [1999] 2 ALL ER 97, the principle of double criminality requires that the conduct for which extradition is sought, is an offence in both the requesting and requested countries at the time of the commission of the offence.

[35] As indicated earlier, both Ministers allege that they exercised their discretion in favour of the requesting State on the basis that applicant had been convicted of a serious crime in Italy and sentenced to a considerable period of imprisonment. They did not, as appears from their affidavits, at any stage consider the existence or not of an extraditable offence. It follows that, even if this interpretation of the **Abel** judgment were to be accepted, respondents have not shown that the Ministers did, in fact, accept that an extraditable offence had been stated or shown to exist.

[36] I have to reiterate that, in my view, it is required of the Minister before issuing a section 5 (1) (a) notification in the present circumstances, to conclude, at least *prima facie*, that *ex facie* the request, applicant has been convicted or is accused of an extraditable offence. In my opinion, this requirement constitutes a jurisdictional prerequisite which has to be

present before the Minister can lawfully issue a notification in terms of section 5 (1) (a) of the Act. Put differently, the Minister must have before him or her an extradition request containing sufficient information to enable him or her to establish, at least *prima facie*, the objective fact that the person whose extradition is sought is a person liable to be extradited.

[37] I agree that the decisions of Ministers Surty and Radebe constituted *"administrative action"*, as defined in section 1 of the Promotion of Administrative Justice Act No. 3 of 2000 ("PAJA"). In addition, the decisions constituted the exercise of public power, which can only be legitimate when it is lawful. The failure of the Ministers to consider whether, *ex facie* the request, it was shown, at least *prima facie*, that applicant has been convicted or is accused of an extraditable offence, renders both decisions unlawful. I therefore conclude that the decisions of Ministers Surty and Radebe fall to be reviewed and set aside, due to the violation of the principle of legality and also in terms of section 6 (2) (b) and/or 6 (2) (d) and/or 6 (2) (e) (iii) of PAJA.

[38] I should add that, in my view, the decisions of the two Ministers may also be impugned on the ground that these decisions were based on material errors of fact, which resulted in them taking irrelevant considerations into account.

[39] In arriving at their respective decisions, Ministers Surty and Radebe had regard to memoranda prepared by the Department. They concede that in the memoranda they were misinformed by the Department as to the number and nature of the offences committed by applicant in Italy. Minister Surty concedes that the departmental memorandum addressed to him *"incorrectly referred to the applicant having also been convicted of international drug trafficking"*. Minister Radebe concedes that he was misinformed that applicant had also been convicted of international drug smuggling and money laundering. In exercising their discretion to issue and confirm the section 5 (1) (a) notice, they accordingly relied on incorrect information, as applicant had not been convicted in Italy of international drug trafficking and/or money laundering.

[40] Even before the inception of our new constitutional order, decisions of functionaries were reviewed and set aside in circumstances where the decision was taken on the strength of incorrect information. In **Swart v Minister of Law and Order & Others** 1987 (4) SA 452 (C), Rose-Innes J set aside a detention order authorised by the Minister in circumstances where the Minister's opinion had been formed with reference to a report placed before him which was false in an important and decisive respect. The learned Judge said the following at 480A - D:

*"One is not concerned with the merits of the opinion resulting from the exercise of discretion, but with whether the exercise of the discretion, whatever the outcome, was a due, proper and regular exercise of discretion. The effect of innocent misrepresentation misleading the Minister is the same as the effect of fraud....His discretion has been trammelled and misled... by false information and considerations which have impinged upon the due exercise of his discretion."*

[41] Ministers Surty and Radebe, however, maintain that they would not have exercised their discretion differently had they not been so misinformed. But, as pointed out by applicant, there is well-established authority that, where a decision may be said to have been influenced by material errors, the decision-maker cannot defend the decision by speculating what his decision would have been absent such error. De Smith, Woolf and Jowell, **Judicial Review of Administrative Action** (1995) put it as follows at paragraph 6-086:

*If the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial."*

[42] The errors contained in the memoranda prepared by the Department, are no doubt of a serious nature. They relate to the main purpose of the request, i.e. the extradition of applicant for offences

allegedly committed by him in Italy. International drug trafficking and money laundering are no doubt serious offences, which would impress upon any objective reader of the memoranda that the person whose extradition is sought, has been convicted of very serious crimes. In these circumstances the Ministers cannot, in my view, be allowed to defend the decision by speculating what their decision would have been had the memoranda not contained these errors of fact.

[43] I therefore find that the respective decisions of the Ministers are also liable to be set aside due to the fact that same were based on material errors of fact. In **Pepcor Retirement Fund and Another v Financial Services Board and Another** 2003 (6) SA 38 (SCA), it was held at para 47, that the doctrine of legality requires that the power conferred on a functionary to take decisions in the public interest, should be exercised properly, i.e. on the basis of the true facts. Similarly, section 6 (2) (e) (iii) of PAJA provides that a court has the power to review an administrative action if the action was taken because irrelevant considerations were taken into account.

**CONCLUSION**

[44] In view of the aforesaid findings, applicant is entitled to the relief sought in paragraphs 8.3 and 8.4 of the amended notice of motion, i.e. the

reviewing and setting aside of the respective decisions taken by Ministers Surty and Radebe. It is accordingly not necessary to consider the additional ground upon which the review application is based, namely the alleged existence of institutional bias on the part of the South African authorities.

[45] Returning to the amended notice of motion, it appears that the need for any interim relief as sought in paragraph 2 thereof, has fallen away. As far as paragraph 3 is concerned, applicant has not proceeded with the relief relating to Mr. E. Daniels. As regards the relief involving Mr. N. J. Makhubele, I do not believe that it would be appropriate for this court to prescribe to the Department which of its officials should be involved in the processing of any extradition requests. Similarly, I am of the view that the granting of an order in terms of paragraph 4 would be inappropriate, as it would be tantamount to the court meddling in the affairs of the Directorate of Public Prosecutions.

[46] There is no need for the relief sought in paragraph 5.1 of the amended notice of motion, as it is common cause that no warrant of arrest has been issued pursuant to any Italian request for applicant's extradition. It would also be premature for the court to pronounce upon the

extraditability of applicant, as is envisaged in the relief sought in paragraph 5.2.

[47] As I have already found, applicant is entitled to the relief sought in paragraphs 8.3 and 8.4 of the amended notice of motion. The granting thereof should suffice and there is no need for the wide-ranging relief sought in paragraphs 8.1, 8.2, 8.5 and 8.6. The relief sought in paragraph 8.7, is also not required, as no warrant has yet been issued. Similarly, the relief sought in paragraph 9, is not required, as the relevant notification has not yet been referred to any magistrate. By virtue of the finding that applicant is entitled to relief in terms of paragraphs 8.3 and 8.4 of the amended notice of motion, it is also unnecessary to consider the alternative relief sought in terms of paragraph 10.

[48] In the light of the finding that the relief to which applicant is entitled, is restricted to paragraphs 8.3 and 8.4 of the amended notice of motion, it is not necessary to adjudicate upon respondents' application to strike out matter from applicant's amended notice of motion and certain supplementary affidavits. Nor is it necessary to make any finding on respondents' application in terms of Rule 30.

[49] I should add that the setting aside of the decisions taken by Ministers Surty and Radebe, does not, in my opinion, require the matter to be remitted for reconsideration by the Minister, with or without directions, as envisaged by section 8 (1) (c) (i) of PAJA. The section 5 (1) (a) notice having been set aside, the request for the extradition of applicant, if proceeded with by the Italian Government, will necessarily require reconsideration in accordance with law and no directions are required by this court.

[50] As regards costs, applicant as the successful party is entitled to his costs. I agree that this is a matter which justified the employment of three counsel.

[51] In the result the following order is made:

1. The decision of second respondent taken on 23 April 2009, to issue a notification in terms of section 5 (1) (a) of the Extradition Act No. 67 of 1962, in relation to applicant's extradition to Italy, is reviewed and set aside.
2. The decision of first respondent taken on 16 July 2009, confirming or endorsing the second

respondent's decision to issue a notification in terms of section 5 (1) (a) of the Extradition Act No. 67 of 1962 in relation to applicant's extradition to Italy, is reviewed and set aside.

3. No order is made in regard to respondents' application to strike out, dated 23 April 2010, and the application pursuant to respondents' notice in terms of Rule 30 (2), dated 23 April 2010.

4. The first to fourth respondents are directed to pay the costs of this application, including the costs consequent upon the employment of three counsel, jointly and severally, the one paying the other to be absolved.

**P B Fourie, J**

I agree

**N J Yekiso, J**

# REPORTABLE

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**THE NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS** Fourth Respondent

| | |
|---|---|
| Advocate for Applicant | : Adv. J C Heunis SC |
| | : Adv. P F Cloete SC |
| | : Adv. M F Osborne |
| Advocate for Respondent | : Adv. I Jamie SC |
| | : Adv. S Van Zyl |
| | : Adv. N Mayosi |
| Attorney for Applicant | : N V Snitcher of Snitchers Attorneys |
| Attorney for Respondent | : A M Scott of the State Attorneys |
| Date of Hearing | : 18 – 20 May 2010 |
| Date of Judgment | : 14 June 2010 |